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PLYLER v. PACIFIC PORTLAND CEMENT CO. (Sac. 1,452.)

(Supreme Court of California. Oct. 2, 1907.)

1. Trial—Verdict—General Verdict—Special Verdict.

A general verdict implies a finding in favor of the prevailing party of every fact essential to his action or defense, while special findings test the general verdict as to whether it was the result of misapplication of the law to findings in material conflict with the findings implied from the general verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 809–812, 871–874.]

2. Same—Special Verdict—Requests—Sufficiency.

Code Civ. Proc. § 625, providing that the court on the request of any of the parties must direct the jury to find a special verdict, requires the court on proper request of either party to direct the jury, if they return a general verdict, to give answers to any material question, which will enable the court to apply the law to the facts actually found.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 836–839.]

3. Same.

A request for a special verdict, authorized by Code Civ. Proc. § 625, requiring the court on proper request to direct the jury to find a special verdict, cannot be refused on the ground that it does not include the words in the Code, "in case you find a general verdict," though the court in giving its direction of a special verdict should direct that the jury need not return findings on particular facts, unless they agree on a general verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 837.]

4. Same—Issues.

An issue of fact arises when an allegation of one party is actually or impliedly denied by the other, but the issue may sometimes relate to a fact capable of being resolved into two or more essential elements and a failure to prove either of which will leave the issue unproven, in which case a special finding on any single essential element inconsistent with a general verdict will be as fatal as a special verdict on the broader issue.

5. Pleading—Issues.

Under the rules of pleading, there is no replication to the answer, though it consists of a plea in avoidance, but every fact in support of the plea is deemed denied and constitutes an issue on the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 321–330, 1212–1216.]

6. Same.

A plaintiff may meet a defense consisting of a plea in avoidance not only by evidence in rebuttal to the evidence offered in its support, but by proof of some fact in avoidance which it has had no opportunity to plead and as to which there is no formal issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1237–1251.]

7. Trial—Special Verdict—Effect.

A finding in favor of plaintiff on a particular question of fact in avoidance is fatal to a general verdict for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 857–860.]

8. Same.

Under Code Civ. Proc. § 625, requiring the court on request to direct the jury to find a special verdict on any of the issues if they render a general verdict, etc., special verdicts and special findings are identical in everything except the name, and it is immaterial if the request of a party happens to speak of special findings when a special verdict is sought.

9. Same.

The court in determining whether a party has a right to special findings must determine whether a question will admit of a direct answer, or whether an answer favorable to the party preferring the request will be inconsistent with a general verdict for the adverse party, and, where these conditions are satisfied, the request should be granted, whether an issue is called a question of fact or a question of fact is called an issue, or whether the request relates to one or several questions.

10. Same.

The term "special verdict," in Code Civ. Proc. § 625, requiring the court on request to direct the jury to find a special verdict, does not mean a finding on every material issue, but the object of the statute is to determine whether a general verdict is or is not against the law.

11. Same.

Where, in an action for injuries to an employé while attempting to descend from a platform to an unguarded walk three feet wide, the issue was whether there was a sufficient threat of danger arising from smoke to justify the employé to descend while it was dark, special interrogatories whether the accident was caused by the failure of the employer to provide guards on the walk, whether the injury was caused by the quantity of smoke about the walk, whether the smoke was such as to threaten the employé with bodily injury, and whether the employé knew that there were no guards on the walk, were proper for they directed the jury to find the cause of the injury and determine the issue.

12. Same.

Under Code Civ. Proc. § 625, requiring the court on request to direct a special verdict, etc., a request for a special verdict embracing no questions that the counsel for the adverse party could have omitted to discuss in his argument, and which were submitted to counsel for the adverse party long enough before he commenced his argument to enable him to file his objections to the allowance of the request, was made in time.

13. Same.

Under Code Civ. Proc. § 625, requiring the court on request to direct the jury to find a special verdict, a request for a special verdict need not be submitted to the adverse party, though the court may do so.

14. Same.

Where, in an action for injuries to an employé, the complaint charged that the injury resulted from the concurrent operation of the act of the employer in maintaining an unguarded walk, and in permitting smoke to envelop the space about the walk, requested interrogatories whether the accident was caused by the failure of the employer to guard the walk, or whether the injury was caused by smoke enveloping the space, were proper, though the jury could not give a categorical answer; Code Civ. Proc. § 625, requiring the court on request to direct the jury to find a special verdict, not requiring the interrogatories to be susceptible of answer by yes or no.

Angellotti and Sloss, JJ., dissenting.

In Bank. Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Action by James Plyler against the Pacific Portland Cement Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

See 87 Pac. 395.

C. H. Wilson, Peter F. Dunne, and A. A. Moore (Stanley Moore, of counsel), for appellant. Frank R. Devlin, for respondent.

BEATTY, C. J. This is an action for damages for personal injuries, in which the plaintiff recovered a judgment for $2,500, from which the defendant appeals.

The only questions presented for decision arise out of the refusal of the trial judge to direct the jury to return a special verdict upon certain issues or particular questions of fact. A number of rather technical objections to the form and manner and time of presenting the request for this direction are urged by respondent in justification of its refusal, and, in order to a proper consideration of most of these objections, it will be necessary to state in some detail the circumstances of the case. The defendant owns and operates a quarry and plant for the manufacture of cement. The plaintiff was employed as a carpenter in and about the plant. In the most elevated portion of the works, known as the "Rock Crusher Building," was a large bin for the reception of rock from the quarry. Over the bin was a platform, to reach which it was necessary to pass along a plank walk, 15 feet in length and 3 feet wide, extending from the outer wall of the building to the side of the bin, and from that point to ascend a ladder about 9 feet in height. The walk was suspended 19 feet above the cement floor of the building, and was unprovided with rails or guards. In May, 1904, defendant's foreman called upon the plaintiff and two other carpenters to go with him to the platform over the bin, and to bring their tools for the purpose of doing some work there. The plaintiff, according to his own testimony, was 42 years of age, and, as a carpenter, was used to stagings and ladders. He had been upon the platform before for the purpose of repairing a beveled wheel, had passed over the same places, and knew the situation perfectly. On this occasion he went with the foreman and the other carpenters to the platform as directed, but, when there they found that the place was so obscured by smoke from the furnaces that they could not see to do the work, an attempt was made to turn on some incandescent lights, but there was no current, and the foreman descended for the purpose of turning on the current at the switch, but was unable to do so by reason of the fact that there was no current there. He then returned to the platform, but the plaintiff and his two companions on account of the increasing smoke had descended the ladder for the purpose of leaving the building. His companions passed the walk in safety, but plaintiff, who was the last to leave, lost his footing at the bottom of the ladder, and fell to the floor of the building, sustaining the injuries here complained of.

The grounds of the action, as stated in the complaint, were that the platform where plaintiff was directed to work was an unsafe, unsuitable, and dangerous place, and the means of ascending to, and descending from, the platform were dangerous, unsuitable, and unsafe, all of which was known to the defendant and unknown to plaintiff; that the plank walk was unsafe for want of rails and guards, which it was the duty of defendant to provide; that while the plaintiff was on the platform in obedience to the direction of the foreman, and exercising due care, defendant carelessly and negligently caused and suffered a great volume and quantity of dense smoke to arise and envelop the space in and about said plank walk, ladder, and platform, rendering it impenetrable to sight, and causing partial suffocation of plaintiff and endangering his life if he remained, thus rendering it necessary for him to descend the ladder in the dark by reason of which, in stepping from the ladder to the plank walk, he missed his footing and fell, thereby sustaining the injuries in question. The bill of exceptions contained in the record does not purport to embrace all the evidence introduced at the trial, but it shows that there was a conflict of evidence as to the issues above stated, and it clearly appears from the plaintiff's own testimony that there was nothing dangerous about the platform, plank walk, or ladder to a man of his calling and experience, or at least that he was perfectly aware of the situation and assumed the risk, such as it was, except that caused by the smoke escaping from the furnaces—a danger of which he was wholly unaware at the time of the accident. In short, it may be said that both by the pleadings and the evidence, so far as detailed in the record before us, the crucial question to be decided by the jury in arriving at a general verdict was this: Was there a sufficient appearance or threat of danger arising from the increasing density of the smoke to justify the plaintiff in attempting to descend from the platform while it was too dark for him to do so with safety? Upon this point the only evidence in the record is that of Cowles, one of the carpenters who was with plaintiff, and who was called as a witness by him, who testified that the smoke was disagreeable, but not dangerous. In this state of the case the defendant before the introduction of any testimony by it presented the following written request to the court: "(Title of Court and cause) Request for special findings by the jury upon particular questions of fact. The court is hereby respectfully requested to direct the jury to find a special verdict in writing upon the following issues in this case, to wit: First. Was the accident and injury complained of caused by the failure of defendant to provide rails or guards on the plank walk described in the pleadings and evidence? Second. Was the accident and injury complained of caused by a great volume and quantity of dense smoke arising and enveloping the space in and about the plank walk and ladder described in the pleadings and evidence? Third. If you answer the last interrogatory in the affirmative, was the smoke alone of such a character as to threaten plaintiff with great bodily injury, or justify him in really believing that he was threatened with such great bodily injury as to require prompt action on his part to escape such injury? Fourth. Did plaintiff see and know, when he first went upon the plank walk described in the pleadings and evidence, that there were no rails or guards on said plank walk?" When this request was presented to the court, no copy had been served on plaintiff, and it was understood that it was not to be submitted to him or his attorney. At the close of the morning session of the court plaintiff objected to the submission of any special issues. At the opening of the afternoon session, the request of defendant was submitted by the court to plaintiff's attorney, and he was furnished with a copy by defendant's attorney a few minutes before he commenced his argument to the jury, whereupon he filed his specific objections to their allowance, before commencing his argument. At the close of the argument, the court instructed the jury upon the matters of law involved in the case, and at the close of the instructions said: "To the attorneys I will say I shall take the chances myself and decline to direct the jury to find special verdicts as requested by the defendant, upon the ground that they are unnecessary for the final determination of the case and must necessarily be included in the general verdict, whichever way it is found." To which ruling the defendant excepted. Whereupon the jury retired, and returned a general verdict for $2,500.

The ground upon which the court refused to direct the jury to make the special findings requested by the defendant was not included among the objections specified by the plaintiff's attorney, and is not relied upon by respondent here. It is perhaps unnecessary under the circumstances to say that the ruling was based upon an evident misconception of the sole purpose of the then recent amendment to section 625 of the Code of Civil Procedure, making the submission of special issues and particular questions of fact, when properly requested, compulsory in all cases tried by jury. It is, of course true, but no truer to-day than it always has been, that a general verdict implies a finding in favor of the prevailing party of every fact essential to the support of his action or defense, and the very purpose of special findings is to test the validity of the general verdict by ascertaining whether or not it may have been the result of a misapplication of the law to actual findings in material conflict with the findings which in their absence would be implied from the general verdict. In other words, the response of the jury to the special issues or particular questions of fact may show that no judgment can properly be entered in favor of a plaintiff upon a general verdict because the jury has not found in his favor upon some material issue, or has found against him as to some fact fatal to his cause of action, and in case of a general verdict for a defendant the special findings, together with the facts admitted on the record, may show that the plaintiff is entitled to a judgment notwithstanding the general verdict against him. These are but illustrations of a great variety of cases, frequently occurring, in which special findings would show that a general verdict is a verdict against law, upon which it would be the duty of the court either to enter no judgment at all because the findings were insufficient to support a judgment for either party, or because the party against whom the general verdict was returned would be entitled to a judgment non obstante. The Legislature, recognizing these conditions, and in view of the great and growing difficulty which jurors encounter in the effort to apply to facts plain enough in themselves the law given to them in the form of voluminous instructions abounding in nice distinctions, often imperfectly stated, and of doubtful meaning even to those who have had the advantage of professional training, has wisely determined that upon the proper request of either party to an action the court must direct the jury, if they return a general verdict to give answers to any material question, or questions of fact, which will enable the court, in the exercise of its proper function, to apply the law to the real facts of the case as they have been actually found, instead of recording a judgment wholly unsupported by the facts. It is not a question with the courts whether this law should be enforced, but some question seems to be made whether it should be liberally construed and applied, or narrowly construed, and hampered in its application on account of the inconveniences which it is supposed to involve. The most serious fault imputed to it is that its enforcement will often result in mistrials on account of the inability of jurors to agree upon the facts necessary to support their general verdicts. This, so far from being a fault, is to my mind the crowning virtue of the amendment referred to, as it is its sole justification. Jurors are not supposed to be skilled in the interpretation of the law, and they may often make mistakes in applying it to a given state of facts, but the concurring judgment of 12 men as to the effect of conflicting evidence upon an issue of fact is accorded great weight, and is generally conclusive. If in any case a jury is unable to find that a material fact has been proved, no man should be allowed to profit or be condemned to suffer by the implied existence of such fact, resulting from the return of a general verdict; and, if a fact has been proved fatally at variance with their general verdict, no man should gain or lose by the necessity of inferring its nonexistence in the absence of a specific finding. In either case the worst effect of the due operation of the amended statute would be the immediate and just award of a new trial, while the result of its nonenactment, or the failure to apply it, would be, at best, an order for a new trial, after a long and troublesome proceeding, and at the worst a cruel and irremediable injustice to the losing party consequent upon the refusal of a new trial. Between these alternatives it is difficult to suppose that any tribunal—legislative or judicial—could hesitate which to choose. I, at least, speaking from long experience as a trial judge and member of courts of review, am firmly convinced that the amended law was wisely enacted, and that its operation, if liberally construed and freely applied, as all remedial statutes should be, especially in matters of procedure, will be to prevent many miscarriages of justice, at the same time that it will eliminate much of the trouble and delay hitherto experienced in disposing of motions for new trials based upon the ground that the verdict is against the evidence.

Coming, now, to the specific objections of the plaintiff to the defendant's request for special findings, the first to be considered is the failure of defendant to make his request conditional. The meaning of this objection is that, since the court can only require the jury to answer particular questions of fact in case they return a general verdict, the request in this instance was fatally defective because it did not include the words: "In case you find a general verdict," or some similar qualification. In Clementson on Special Verdicts, at page 63, decisions are cited from one or two states having statutes substantially the same as ours sustaining the denial of instructions to return special findings upon this narrow ground. It seems to me that this is not only carrying construction to the extreme verge of strictness in a spirit of hostility to the act, but that it imposes upon its language a meaning that it does not disclose. It is true that the court in giving its direction to the jury should make it plain that they are not required to return findings upon particular questions of fact unless they have agreed upon a general verdict; but, since the judge knows this as well as counsel, there seems to be no reason why he should be reminded of the necessity of so framing or qualifying his direction every time it is requested. The objection implies that it is the imperative duty of counsel to put in writing, not only the questions to which they require answers and their request for their submission, but also the language in which the direction of the court to the jury is to be couched, and that the minutest failure on their part to frame the direction properly will deprive them of any right to complain of a refusal to give it. There is no necessity for imposing upon the statute so narrow a construction. It may with much more reason be held that counsel have only to frame a proper request, and that it then becomes the duty of the court to give in its own language the short and simple direction prescribed by the statute. For a court to refuse to submit special questions of fact, wholly unobjectionable in themselves, for the sole reason that the party requesting their submission has omitted to write out a proper form for the direction to the jury, would be, to my mind, not merely an abuse of discretion, but a plain violation of the statute.

Respondent contends that the statute (Code Civ. Proc. § 625) makes a clear distinction between issues, and particular questions of fact, and complains that the defendant by entitling his request for special findings, "Request for special findings by the jury upon particular questions of fact," and by following this up by a request that the jury be directed to find a special verdict in writing upon "the following issues in the case," has rendered it uncertain whether it was a request for a special verdict or for findings upon particular questions of fact; and his argument seems to imply that such requests must be for one thing or the other exclusively, i. e., either a request for a special verdict upon some or all of the issues, or for findings upon particular questions of fact. There is undoubtedly a distinction between issues and particular questions of fact. An issue of fact arises whenever an allegation of one party is denied, or deemed denied by the other. The issue, however, may not always relate to a fact incapable of being resolved into two or more essential elements, a failure to prove either of which would leave the issue unproven. In such a case a special finding upon any single essential element of the issuable fact inconsistent with the general verdict would be as fatal as a special verdict upon the broader issue. Again, under our rules of pleading, there is no replication to the answer even when it consists of nothing but a plea in avoidance. Every material fact in support of the plea is, however, deemed denied, and therefore constitutes an issue on the record. But the plaintiff may at the trial meet such a defense not only by evidence in rebuttal of the evidence offered in its support, but by proof of some fact in avoidance which he has had no opportunity to plead, and as to which there is no formal issue. In such a case a finding in favor of the plaintiff on that particular question of fact would be as fatal to a general verdict for the defendant as a special verdict on any issue in the case. Other illustrations might be given of special questions arising in a case as important and as vital as the issues in which they are involved. It is because such questions frequently arise that the statute has given parties the same right to demand responses to them that they have to demand special verdicts as to any or all of the issues. So far, therefore, as section 625 of Code of Civil Procedure is concerned, special verdicts and special findings are identical in everything except the name, and it is wholly immaterial if the request of a party happens to have a wrong label. The court is not hampered and ought not to be confused by a request for a special verdict upon a particular question of fact, or a special finding upon a formal issue. What the judge has to determine from an examination of the questions themselves is whether the parties presenting them have a right to demand their submission to the jury in the form in which they are presented, and this depends, alike in the case of an issue and in the case of a special fact involved in the issues, upon two conditions: First, is the question so framed as to admit of a plain and direct answer? And, second, would an answer favorable to the party preferring the request be inconsistent with a general verdict for his adversary? If these conditions are satisfied, the request should be granted whether an issue is called a question of fact, or a question of fact is called an issue—whether the request relates to one question or issue or to several questions or issues, or to one or more of each kind. Of course, what is here said must be understood with the qualification that the court would not be compelled to repeat the same question in different forms.

Another objection of the respondent to defendant's request is that his interrogatories were not addressed to any issue in the case, and therefore no special verdict could be rendered thereon. The argument on this point seems to be that no possible answer to the four interrogatories would have been sufficient to sustain a judgment for either party, and the assumption is that the term "special verdict" as used in the statute means what it originally meant in the common-law practice, viz., a finding upon every material issue in the case. But the term is not used in that sense in the statute, which authorizes the demand for special verdicts on any one or more of the issues or particular questions of fact, not for the purpose of determining what judgment shall be entered, but primarily and principally for the purpose of determining whether the general verdict is or is not against law. In this case the third and fourth interrogatories were directed to issues plainly made by the pleadings, the first and second to questions involved in an issue, viz., the cause of the injury. Altogether they covered two distinct issues, and the essential facts involved in another issue, and it is not a valid ground of objection that they did not cover all the issues.

Again, it is objected by respondent that the interrogatories were not submitted to him in seasonable time. The statutes in some of our sister states require a request for special findings to be submitted to the opposing party before the argument. Our statute omits this requirement. Nevertheless, the interrogatories in this case were submitted to counsel for the plaintiff long enough before he commenced his argument to enable him to frame and file his objections to their allowance. Considering that they embraced no questions that he could have omitted to discuss in his argument, even if the special findings had not been requested, it could not be held that they were submitted too late even if we were to import into the statute a provision which the Legislature has chosen to omit. There is no requirement, express or implied, in our law that the interrogatories shall be submitted to opposing counsel, any more than that a request for a special instruction shall be so submitted. Each party has the right to ask his questions and to propose his instructions in his own terms and without interference of the opposing party. The court, however, is free to do what was done in this case; that is, to submit the interrogatories to the opposite party if he thinks it desirable to do so before ruling on the request.

It is further objected that the proposed interrogatories were confusing, and for that reason properly refused. This objection is more particularly directed to the first and second questions. It is said, and it is true, that the complaint does not charge that either the absence of rails to guard the walk or the smoke filling the space about the platform was the sole cause of the injury, but, on the contrary, that it resulted from the combined and concurrent operation of both causes; and it is argued that it was therefore impossible for the jury to have truthfully answered either question by a simple yes or no. The argument assumes that an interrogatory must always be so framed that it can be answered in this simple and categorical form, and also assumes that a case necessarily retains the same aspect after the evidence has been heard that is presented by the complaint. But our statute, unlike the statutes in some of the other states, does not require the interrogatories to be so framed that the jury may answer by a simple yes or no, and the omission of this requirement evinces an intention to leave something more to the discretion of the court. It is no doubt true that a court should refuse to allow an unmeaning or confusing question, just as it should refuse an unmeaning or confusing instruction upon a question of law. But it would be absurd for a court which daily assumes that jurors are perfectly capable of understanding the instructions commonly given for the purpose of enabling them to apply the law to the facts in framing a general verdict to hold at the same time that their capacity in dealing with questions of fact is so limited that they cannot, when the occasion arises, say yes or no with the necessary qualification. Take this case as an illustration. If the evidence was sufficient to prove the facts exactly as they were alleged in the complaint, the first and second questions could each have been answered by so short and simple a formula as, "Yes, but not solely," or by "partly but not wholly." Are we going to base a construction of the law upon the supposition that among 12 men, each assumed to be capable of applying the law of negligence to the facts in issue here, involving the nature of the action, the rules as to assumed risks and contributory negligence, not one could be found capable of answering these questions as counsel say they could only have been truthfully answered? I do not rate the intelligence of jurors so low. But, in view of the evidence contained in the record (and it is assumed to contain so much of the evidence as is necessary for a proper review of the exceptions), the jury might truthfully have answered the first interrogatory in the negative because the plaintiff himself testified that he knew that the walk was unguarded, he assumed the risk of passing over it, and would have done so in safety except for the smoke, which was therefore in a just sense the sole cause of the injury. Suppose then the jury had said "Yes" to the first question and "No" to the second, they could only have said "Yes" to the fourth and everything would have depended on their answer to the third: Was the danger of remaining on the platform sufficient in fact to justify the plaintiff in encountering the known danger of the unguarded walk? Since all the evidence in the record is to the effect that there was no danger in the smoke, the jury certainly might have said "No" to the third question, an answer which would have invalidated their general verdict.

It is contended that, if even one of the four questions proposed was improper, it was right to refuse them all. Being of the opinion that none of these interrogatories was improper, I do not think it necessary to consider this question.

The judgment of the superior court is reversed, and cause remanded.

We concur: LORIGAN, J.; McFARLAND, J.; SHAW, J.; HENSHAW, J.

ANGELLOTTI, J. I dissent. Conceding that the amendment of section 625, Code of Civil Procedure, whether it is in our judgment a wise provision or not, should be liberally construed with a view to accomplishing the object of its enactment, I am satisfied that it should not be construed in such a manner as to deprive a trial court of the power to refuse to submit to the jury interrogatories which, under the circumstances of the case, may be misleading and confusing. To my mind, this was clearly the situation in the case at bar as to questions Nos. 1 and 2. Question No. 3 was so framed as to be entirely dependent on the answer to question No. 2, and was properly refused for that reason. An answer to question 4 favorable to defendant would not have been inconsistent with the general verdict in favor of plaintiff, and defendant cannot be held to have been prejudiced by the refusal of the court to submit the same, even if it be conceded that it should have been submitted under a proper construction of the law.

I concur: SLOSS, J.

152 Cal. 10

SHADE et al. v. BAY COUNTIES POWER CO. (Sac. 1,490.)

(Supreme Court of California. Sept. 18, 1907. On Rehearing, Oct. 19, 1907.)

ELECTRICITY—INJURY FROM ELECTRIC WIRE—CONTRIBUTORY NEGLIGENCE.

One of the wires of an electric power company extending along a highway being down, so as to more or less obstruct the road, deceased, one of a pleasure party driving along the road, got a rope, threw it over and fastened it to a broken insulator on the wire, and while reaching for a pole, on which to tie the rope, got so near the wire as to receive a fatal shock. *Held*, he was guilty of contributory negligence as matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 10.]

Department 2. Appeal from Superior Court, Solano County; Henry C. Gesford, Judge.

Action by Elma Hodges Shade and others against the Bay Counties Power Company. Judgment for plaintiffs. Defendant appeals. Reversed.

G. A. Lamont, Myrick & Deering, Myrick, Deering & Gibbons (Garret W. McEnerney and William B. Bosley, of counsel), for appellant. Frank R. Devlin, for respondents.

McFARLAND, J. This action was brought jointly by the parents and widow of John Chester Shade, deceased, to recover damages for the death of said deceased, alleged to have been caused by the negligence of the defendant. The plaintiffs are the only heirs of the deceased. The jury returned a verdict for plaintiff, fixing the damages at $8,000, for which amount judgment was rendered. From the judgment and from an order denying defendant's motion for a new trial, the defendant appeals.

Defendant makes a number of contentions for a reversal, but, under our view of the case, only one of these contentions need be specially considered, namely, that the facts show as a matter of law that the deceased was guilty of contributory negligence, which was the approximate cause of his death, and therefore defendant's motion for a new trial should have been granted, etc. We think that this contention must be sustained. With respect to the principle of contributory negligence, it is well established "that where the facts are clear and undisputed, and where no other inference than that of negligence can be drawn from them, the court is not required to submit the question to the jury, but may itself make the inference." Studer v. Southern Pacific Co., 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39. In 1 Thompson on Negligence, § 1249, the rule, supported by ample authority, is stated to be that "the traveler cannot recover if he could have avoided the accident by the exercise of reasonable care on his part." See, also, Flemming v. W. P. R. R. Co., 49 Cal. 253.

In the case at bar the facts were these: At the time of the occurrences out of which this litigation arose the defendant was the owner of an electric power system, and carried electricity by means of poles and wires along and over the side of the American Cañon public road in Solano county. On the morning of July 4, 1904, the deceased, Chester Shade, and seven other persons, were traveling in a three-seated two-horse wagon along said road, and when approaching a certain bridge they saw that a few yards on the other side of the bridge one of the electric wires of defendant's system had become detached from a pole and was hanging down over the side of the road a few feet from the ground. The wagon was stopped on or about the middle of the bridge, which was about 41 feet long, so that when the wagon was stopped it and its occupants were about 30 feet away from the hanging wire. The deceased and one of the parties named Hodges got out of the wagon, and went a short distance towards the hanging wire. The deceased then returned to the wagon and took from it a small rope or cord about a quarter of an inch thick, and about four feet long, and started with it towards the wire. Another party, Forbes Brown, said to him "Don't touch the wire, Chester, whatever you do," and the deceased replied: "There is no danger of my doing that. I would not think of doing that." The deceased and Hodges then went near to the wire, which had attached to it an instrument in the form of an insulator. It does not appear to what extent this insulator was intended to be a protection to appellant's employés even when the wires were in proper position on the poles. It appears that it was not a protection against a large voltage, which sometimes passed through the wires. It appears to have been fastened to the wire on one side only, so that it was more dangerous to touch it at some points than at others. Moreover, it had been broken by the fall, and pieces of it were lying on the ground near the pole. The deceased approached the hanging wire quite closely, for he threw the end of the short cord over the insulator and fastened it there by a knot. He then reached towards Hodges for a flagpole, which the latter had, and to which he intended to tie the cord, when he received a charge of electricity, which caused his death a day or two afterwards.

The deceased was not a backwoodsman who had never heard of electrical plants and the danger which lurks in live wires—if, indeed, such a person could be found in California. He had been born and had always lived in the city of Vallejo, where, as in nearly every American city, electricity is used, was a business man, 28 years old, and of good intelligence. He knew the danger of live wires, but was not an expert electrician. He had not been placed by the negligence of the appellant in a position of peril from which he must by some means extricate himself, so that he might have been excused if he had not used the best judgment in trying to avoid danger. He was in no danger whatever. It appears probable from the evidence that he and his party could have driven past without any risk, as the distance from the hanging wire to the edge of the road was, at the narrowest point, nine feet and nine inches. However, it was not necessary for them to drive past. They could have turned back, and, if they could not have reached their original destination by some other road, they could have had their picnic at some other place; and, if they had suffered any serious wrong by the obstruction, they could have recovered damages. They were not even tempted by any business interests to incur the danger of trying to remove the wire, nor were they impelled by any sense of duty to do so. They were traveling merely for the purpose of pleasure. Exactly how near the deceased went to the wire does not appear from the testimony of the witnesses who were present at the time. One of them testified that he could not have been closer to the wire than 14 inches. It appears quite probable from the testimony of the expert electricians that the deceased did not receive the shock which killed him through the cord which he held in his hand; but that some part of his person, or clothing, came in contact with the wire, or was so close to the wire that the electricity "sparked" or "jumped" from the wire to his person. While standing so near the wire and being employed in trying to adjust the cord and pole he might readily have inadvertently moved nearer to the wire. At all events, it is clear that he unnecessarily, heedlessly, and recklessly placed himself in a most dangerous position which resulted in his receiving the deadly shock. "No other inference than that of negligence can be drawn from" his conduct. It was careless and negligent in the extreme sense, and is fitly characterized by the old phrase "foolhardy." Our opinion is that he was guilty as a matter of law of contributory negligence, and that, therefore, the nonsuit should have been granted, and the verdict was unwarranted.

The judgment and order appealed from are reversed.

We concur: LORIGAN, J.; HENSHAW, J.

On Rehearing.

In Bank.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. The opinion of the court omits some facts which I deem highly material to the question of contributory negligence. Shade and his companions, traveling on a public road, on a descending grade, at a brisk pace, suddenly became aware of the suspended wire, barely in time to stop their carriage on the bridge. They were not at that point 30 feet distant from the wire. The insulator attached to the wire was 30 feet distant, but the wire itself extended alongside of the carriage over one side of the bridge, and they were in a position where it was impossible to turn back except by doing what they finally did; that is, by unhitching the horses and backing the carriage by hand to a point on the road where there was a sufficient space to enable them to turn it. In this way, and in this way only, can it be said that they could have turned back. And the evidence does not, in my opinion, make it appear probable that they could have driven past the obstruction without risk. The only evidence on this point was the testimony of one of defendant's witnesses—an expert electrician—who, on his cross-examination, admitted that he would not himself have taken the risk of driving between the fence and the wire when the current was on. The case, then, as it appears to me, is that Shade and his party, without any fault of their own, found themselves in a position where it was difficult to turn back and perilous to go forward. They were on a public road in the exercise of their undoubted right. Was it then such contributory negligence on the part of Shade as necessarily precludes a recovery to attempt in a cautious and prudent manner to remove the obstruction?

It is true, as stated in the opinion of the court, that he was not a backwoodsman, who knew nothing of electric plants and the danger which lurks in live wires. On the contrary, he was perfectly aware of the danger of coming in contact with the wire, and he was assisted in all that he did by his father-in-law, Mr. Hodges, who was an engineer in the supply department at Mare Island, and in actual charge of an electric generating plant there. They both knew of the danger of touching the wire, or coming in close proximity to it, and according to all the evidence they carefully avoided those dangers.

Shade took a cord 53 inches long, and, holding it by the two ends, threw the loop over the skirt of the insulator. Then, with both hands held about two feet from the wire, he tied a knot in one end, so as to form a slip noose inclosing the other end, and then, by drawing out the free end, he slipped the noose down upon the insulator without getting any nearer to the wire. At this moment, while he was holding the cord with one hand, and reaching with the other for the stick, which he intended to tie to the cord, the explosion occurred, fatally injuring him and knocking Hodges down and rolling him over and over. The evidence is clear that the current did not pass through the cord, and the circumstance that the insulator was slightly broken is of no possible significance. It was one of those large porcelain affairs 14 inches high, used on the poles of high transmission lines. It had been tested for 120,000 volts, and the line was carrying only 50,000. It does not appear what the break in the insulator was, but it does appear that it was fastened to the wire by the upper portion, and hung down under the wire in its proper position, so that a cord thrown over the skirt would be at more than sparking or arcking distance from the wire. In short, the testimony of all the witnesses—defendant's as well as plaintiffs'—shows conclusively that the current did not reach Shade through the cord or insulator. But defendant's expert witnesses testify that he must have come in actual contact with the wire, or within less than two inches of it. The eyewitnesses of the accident testify that he was never within less than 14 inches of the wire, and there is no doubt that he was consciously and carefully avoiding a near approach to it. In deciding that he must have touched the wire, the court is obliged to disregard the testimony of the eyewitnesses in favor of the theory that he could not otherwise have been injured. Can we lay this down as a proposition of law? Is it competent for this court to say that a sudden and fatal explosion may not have occurred in consequence of some unusual condition, or combination of causes which no one could reasonably have anticipated? If not, and if Shade was using all due precaution for the safe removal of a dangerous obstruction to a highway along which he desired to pass for a lawful purpose, I do not think he is chargeable with contributory negligence. For myself, I do not profess to know enough about the possible eccentricities of electric force to deny the possibility of the accident having been due to a cause which no one could have reasonably anticipated, and the evidence on the part of plaintiffs shows that Shade, in attempting to remove the obstruction, took every precaution to avoid the only danger that is ordinarily involved in such operations.

It is to be observed that, according to the authorities cited in the opinion of the court (Studer v. So. Pac. Co., 121 Cal. 400, and Flemming v. W. P. R. R. Co., 49 Cal. 253), it is only when the evidence introduced by the plaintiff in chief shows clearly and without conflict that the person injured has been guilty of culpable negligence directly contributing to the injury complained of that this court can set aside the verdict of a jury upon that ground. Here, several of the matters stated in the opinion of the court rest wholly and entirely upon evidence introduced by the defense. There was nothing in the evidence introduced by the plaintiff tending to show that the insulator was broken, that plaintiffs' party had room to pass the obstruction without risk, or that Shade could not have received the injury without coming in contact with the wire (unless that is a datum of science of which courts must take judicial knowledge). On the contrary, the evidence for the plaintiffs is clear that he was never within arcking distance of the wire.

I can conceive of no principle upon which the decision of the court can be sustained, except this: That, where a person lawfully passing along a public road encounters an obstacle which may possibly injure him if he attempts to pass it or remove it, the mere fact that he is injured in the attempt to do one or the other is proof conclusive that he has been guilty of culpable negligence. This was in effect the sort of argument urged upon this court in Robinson v. W. P. R. R. Co., 48 Cal. 409. There a woman passing a street of Stockton attempted to cross a railroad track behind a train of cars, which suddenly started back and injured her. In substance the argument was, if she had kept off of the track, she would never have been injured. Here the argument seems to be that if Shade had not attempted to remove the obstruction he never would have been injured, and no allowance is made for the ample precautions he took (according to the evidence in chief) to avoid the only danger ordinarily involved in the attempt. I cannot concur in a view which limits so strictly the rights of persons lawfully using the public roads.

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152 Cal. 167

TEHAMA COUNTY v. SISSON, Treasurer, et al. (Sac. 1,455.)

(Supreme Court of California. Oct. 3, 1907. Rehearing Denied Oct. 31, 1907.)

1. Counties—Limitations on Use of Funds and Credit—Constitutional Provisions.

Under Const. art. 11, § 18, providing that no county shall in any year incur an indebtedness in excess of the revenue for the year without the assent of two-thirds of the electors voting at an election for that purpose, each year's revenue must pay each year's indebtedness, and no indebtedness incurred in any one year can be paid out of the revenue of any future year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, §§ 215, 216.]

2. Same.

The board of supervisors of a county allowed in a year claims against a fund in excess of the revenues. Members in their individual capacity borrowed money from a bank to pay the claims. The board purported to sell county property to a buyer for the amount borrowed, and purported to repurchase the same for the amount and issued a warrant therefor to the buyer, who transferred it to the bank, which, if permitted to collect it, would obtain revenues for a subsequent year. *Held*, that the transaction was in violation of Const. art. 11, § 18, providing that no county shall in any year incur an indebtedness in excess of the revenue for the year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, §§ 215, 216.]

3. SAME.

A finding, in an action to enjoin payment of a county warrant, that at the end of a fiscal year there was a surplus in the general fund of a county to pay claims chargeable against the indigent fund and allowed during the year, is not a finding that there is a surplus in the general fund existing after all claims which may be presented against the general fund have been paid, since under County Government Act (St. 1897, p. 470, c. 277) § 40, claims may be presented after the end of the fiscal year, so that the result may be that no surplus will be left.

4. SAME.

The act of the board of supervisors of a county in directing the issuance of a warrant payable out of the indigent fund for a year in the payment of a claim against the fund for a preceding year is in violation of Const. art. 11, § 18, providing that no county shall in any year incur an indebtedness in excess of the revenue for the year, and the act cannot be sustained on the ground that the warrant may be paid out of any surplus in the general fund of the preceding year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, §§ 215, 216.]

5. SAME—ALLOWANCE OF CLAIMS—JUDICIAL REVIEW.

The propriety of a claim allowed by the board of supervisors of a county cannot be questioned collaterally.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 322.]

6. SAME.

Where the board of supervisors of a county did not sell or buy property, but, to evade a constitutional restriction, entered on its records orders purporting to authorize a pretended sale and purchase, the orders were not conclusive, but were subject to judicial review in a collateral action.

7. DISTRICT AND PROSECUTING ATTORNEYS—POWERS—ACTIONS.

Under County Government Act (St. 1897, p. 452, c. 277) § 8, requiring the district attorney to sue where the board of supervisors shall without authority of law order any money paid, etc., the district attorney may, without authority from the board, sue to restrain the payment of a warrant issued in violation of Const. art. 11, § 18, providing that no county shall in any year incur an indebtedness in excess of the revenues for the year.

8. COUNTIES—PROPERTY PURCHASED—CLAIM FOR PRICE—ESTOPPEL.

A county receiving property or services beyond its ability to pay out of the revenues of the current year is not estopped from defending against a claim therefor, since Const. art. 11, § 18, prohibits a county from incurring any liability in any year in excess of the revenues provided for such year.

9. EQUITY—PRELIMINARY INJUNCTION—BILL—AMENDMENT—ALLOWANCE.

It is within the discretion of the court to permit the filing of an amended bill to support a preliminary injunction previously issued.

10. INJUNCTION—PRELIMINARY INJUNCTION—DISSOLUTION.

Where an amended bill shows good ground for a preliminary injunction, it is not error to refuse to dissolve it because the original bill on which it was issued was defective.

11. APPEAL—ORDERS—APPEALABILITY.

An order refusing to dissolve a preliminary injunction is appealable under Code Civ. Proc. § 939, and is not reviewable on appeal from a final judgment properly perpetuating the injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 394, 395.]

12. COUNTIES—ACTIONS—PARTIES.

The board of supervisors of a county allowed in a year claims against a fund in excess of the revenues. Members in their individual capacity borrowed money from a bank to pay the claims. The board purported to sell county property to a buyer for the amount borrowed, and to repurchase the same for such amount, and issued a warrant to the buyer, who transferred it to the bank. *Held*, in a suit to restrain the payment of the warrant, that the treasurer of the county, the board of supervisors, and the individual members thereof, and the buyer and the bank were proper parties defendant.

In Bank. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by the county of Tehama against E. L. Sisson, treasurer thereof, and others. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

P. H. Coffman and H. P. Andrews, for appellants. U. S. Webb, Atty. Gen., and M. G. Gill, Dist. Atty. (Charles A. Garter, of counsel), for respondent.

SLOSS, J. This action, instituted by the district attorney of Tehama county to restrain the payment of a warrant for $950 drawn by the auditor of said county on the treasurer thereof, resulted in a judgment in favor of the plaintiff. The defendants appeal from the judgment and from an order denying their motion for a new trial.

Findings amply sustained by the evidence, taken together with uncontroverted averments of the complaint, disclose this state of facts: For the fiscal year commencing July 1, 1902, and ending June 30, 1903, the board of supervisors of Tehama county had raised by taxation a fund known as the "indigent fund," to be applied to the care and maintenance of the indigent sick and dependent poor of the county, and the support of the county hospital. During said year the board of supervisors had incurred indebtedness in behalf of the county and allowed claims for the same against the indigent fund to such an extent that on June 20, 1903, a few days before the expiration of the fiscal year 1902-03, all of the revenues provided for that fund for the then fiscal year had been exhausted, and claims had been allowed and debts and liabilities incurred by the said board of supervisors, chargeable against the indigent fund to such an extent that in the estimation of the board an additional sum of $950 would be required in said fund for that year to meet the payment of such claims and liabilities. On June 20, 1903, G. W. Vestal, H. C. Kauffman, W. H. Samson, and Perry E. Lee, four of the members of the board of supervisors, acting in their individual capacities, borrowed $950 from the Bank of Tehama County, and executed a joint and several promissory note to the bank for said sum. The money so borrowed was paid by the bank to A. L. Conard, who at once delivered it to E. L. Sisson, the county treasurer. Sisson credited it to the indigent fund of the county, and out of it claims accruing during the fiscal year 1902–03 were subsequently allowed and paid. This addition of $950 to the indigent fund for the year 1902–03 was represented, in the records of the board of supervisors, as having been realized in the following manner: At a meeting held on the 20th day of June, 1903, the board of supervisors caused to be entered in their minutes an order reading in part as follows: "It appearing to the board that it is necessary to sell and dispose of some of the property at the County Hospital, in order to raise additional funds to pay the outstanding indebtedness of the amount charged and registered against the indigent fund for the fiscal year ending July 1, 1903, therefore it is hereby ordered that the crop of fruit now growing on the trees and vines in the orchard at the County Hospital be sold, and it is further ordered that the said crop of fruit be sold by the board as a whole, and that said crop of fruit be and the same is hereby offered for sale to the highest bidder at this time (the said fruit being the product of the County Farm). The said crop of fruit was then offered for sale, and A. L. Conard bid the sum of $950 for the said crop of fruit. There being no further bids, it is hereby ordered that the said crop of fruit now growing on the trees and vines in the orchard of the County Hospital be and the same is hereby sold to A. L. Conard for the sum of $950, and he is hereby directed to pay the said amount into the county treasury to the credit of the indigent fund. It appearing that the proceeds of the sale of the crop of fruit would be sufficient to pay the outstanding indebtedness of the amount chargeable against the indigent fund to July 1, 1903, it is ordered that no other property be offered for sale." No delivery of the said fruit, which, as the court finds, was worth not exceeding $100, was ever made to Conard, and he never took possession of any of it. On the 14th day of July, 1903, after the commencement of the next fiscal year, said board of supervisors met and entered an order reading as follows: "It is ordered that the crop of fruit growing on the trees and vines at the County Hospital, be purchased from A. L. Conard for the sum of $950, and the county auditor is hereby ordered to draw a warrant in favor of said A. L. Conard for the sum of $950 in full payment of the said crop of fruit, said warrant to be drawn on the indigent fund." Pursuant to this order, the auditor drew his warrant, number 214, in favor of A. L. Conard or order. This warrant was delivered by Conard to the Bank of Tehama County, and while it was still unpaid this action was instituted by the district attorney to prevent its payment. The bank will, if it collects the warrant, apply the proceeds to the satisfaction of the promissory note executed to it by the members of the board of supervisors. Conard had no interest in the transactions above set out except to aid in carrying out the plans of the defendant members of the board of supervisors.

The court finds—and in view of the facts above stated it is difficult to see how any other inference is possible—that the sale to Conard and the purchase from him were not made in good faith, but were a merely ostensible and colorable sale and purchase, and that the transactions and orders of the board of supervisors constituted a plan or device by which the indebtedness of Tehama county, incurred during the fiscal year commencing July 1, 1902, and allowable against the indigent fund for that year, might be paid from the revenues provided for said fund for the fiscal year commencing July 1, 1903, without the assent of two-thirds of the qualified electors of said county. It is further found that, while the indigent fund was exhausted as above stated, there was at the expiration of the fiscal year 1902–03 a surplus of moneys in the general fund provided for said fiscal year sufficient to pay all claims and indebtedness chargeable against the indigent fund. The board of supervisors never authorized or directed the district attorney to prosecute this action. The court made conclusions of law to the effect that the payment of the warrant No. 214 would have the effect of paying the indebtedness of the county incurred during the fiscal year 1902–03 from the revenues provided for the indigent fund of the county for the next fiscal year; further, that the defendants, members of the board of supervisors, were interested in the so-called contracts for the sale and purchase of the crop of fruit and in the payment of said warrant, and such interest was such as to make illegal and void all of the said contracts and proceedings and the warrant itself; further, that the action is properly brought and prosecuted by the district attorney. Accordingly a decree was entered enjoining the treasurer of the county from paying the said warrant from the funds or money of said county, enjoining the Bank of Tehama County from presenting the said warrant to the treasurer for payment, and enjoining the board of supervisors from "making any order or allowance for the payment of any debt, indebtedness or liability incurred by the said board of supervisors during the fiscal year commencing July 1, 1902, from the moneys or revenues provided for such fund for any subsequent fiscal year." Article 11, § 18, of the Constitution of California provides: "No county, city, town, township, board of education or school district shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose," etc. In San Francisco Gas Co. v. Brickwedel, 62 Cal. 641, this court said: "We think it clear that when the framers of the present Constitution said, as they did by section 18 of article 11 of that instrument, that 'no county, city, town, township, board of education or school district shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue previded for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose,' etc., they meant that no such indebtedness or liability should be incurred (except in the manner stated) exceeding in any year the income and revenue actually received by such county, city, town, township, board of education or school district. In other words, that each year's income and revenue must pay each year's indebtedness or liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year." This construction of the constitutional provision has repeatedly been affirmed in later cases. Shaw v. Statler, 74 Cal. 258, 15 Pac. 833; Schwartz v. Wilson, 75 Cal. 502, 17 Pac. 449; McGowan v. Ford, 107 Cal. 177, 40 Pac. 231; Weaver v. San Francisco, 111 Cal. 319, 43 Pac. 972; Bradford v. San Francisco, 112 Cal. 537, 44 Pac. 912; Buck v. Eureka, 119 Cal. 44, 50 Pac. 1065. That the effect of the transactions had and the orders made by the board of supervisors in the case at bar will be, if such transactions are carried to their conclusion, to pay the indebtedness incurred in the year 1902–03 out of the revenues provided for the year 1903–04, is too plain for argument. The result of paying the warrant in question will be to refund to the Bank of Tehama County the sum of $950 which it advanced, and which was used for the purpose of paying indebtedness of the county incurred prior to June 30, 1903, and this repayment is to be made out of the indigent fund provided for the year 1903–04. This would be a palpable violation of the letter and the spirit of section 18, art. 11, of the Constitution.

It is argued by the appellants that the "indigent fund" is not a fund created by law, and that the liabilities incurred and allowed against said fund during the year 1902–03 might with propriety have been allowed and paid out of the general fund for that year, in which, as the court has found, there was at the end of the year a surplus sufficient to meet all of these demands. This we may assume to be so. But if it be granted that the liabilities incurred on account of the care of the poor of the county for the year 1902–03 might, in case of a deficiency in the indigent fund provided for that purpose, have been chargeable against any surplus in the general fund, the effect of the payment of the warrant here in question would not be to pay such claims out of any surplus in the general fund. The finding is merely that at the end of the year there was a surplus in the general fund sufficient to pay all claims chargeable against the indigent fund, not that there was sufficient to pay all claims chargeable against the general fund, nor that such surplus existed at the time the warrant in question was drawn. Further claims might be presented after the end of the fiscal year (County Government Act [St. 1897, p. 470, c. 277] § 40), with the result that no surplus would be left in the general fund to be carried over into the fund of a succeeding year. No such surplus could be carried over until all claims of the preceding year had been paid (Bilby v. McKenzie, 112 Cal. 143, 44 Pac. 341), and the allowance of the warrant in question, payable out of the indigent fund for 1903–04, was therefore not a direction that the same be paid out of any surplus of the funds of the preceding year, but was an order that it be paid out of the funds of the succeeding year. This is prohibited by the Constitution. Admitting that the board of supervisors may take steps to pay the expenses incurred during the year 1902–03 out of any surplus left in the general fund for that year, they have not the right to pay such liabilities out of the funds and revenues provided for the ensuing year.

It is strongly urged by the appellants that, since the board of supervisors of the county had the power to purchase for the county any personal property necessary for the use of the county (County Government Act [St. 1897, p. 459, c. 277] § 25, subd. 7), and to sell at public auction any property belonging to the county not required of public use (Id. § 25, subd. 9), the determination by the board of supervisors that the fruit in question should be sold, and the subsequent determination that it should be bought, were acts within the authority and jurisdiction of the board, and cannot be questioned collaterally. The principle relied upon has been frequently applied to cases where the board of supervisors had allowed claims or demands against the county, and it was held that the justice and propriety of the claims were concluded by the allowance of the board and could not be inquired into by the courts. Robinson v. Supervisors, 16 Cal. 209; El Dorado Co. v. Elstner, 18 Cal. 145. So in Lamberson v. Jefferds, 118 Cal. 363, 50 Pac. 403, the court, in speaking of an order by the board of supervisors, allowing a claim for legal services rendered to the county, said: "The allowance and settlement of the claim by the board of supervisors is an adjudication by a tribunal having jurisdiction of the matter that the services have been rendered and of the correctness of their value, and is conclusive." See, also, Colusa Co. v. De Jarnett, 55 Cal.

373; Kenna v. Bd. of Sup., 89 Cal. 11, 26 Pac. 615. It is sought by the appellants to apply the doctrine of these cases to the case at bar; it being argued that the order of the board of supervisors that the county pay for the fruit crop alleged to have been purchased of A. L. Conard constituted a conclusive determination that the fruit crop was the property of Conard; that it was worth $950; that it was to the interest of the county to purchase and pay for it; and that there was due Conard from the county $950. But the rule invoked should not be carried to the extent claimed. Here, as is found by the court upon evidence which is not open to question, the board of supervisors did not in fact sell or buy any property, but, for the purpose of evading a constitutional restriction, adopted and entered upon its records resolutions purporting to authorize and show a pretended sale and purchase which never took place. To allow to such orders the conclusive effect claimed by appellants would be to abrogate the constitutional restriction in question and make it possible for boards of supervisors to act in defiance of the Constitution, provided that they merely cast their illegal action in the form of a fictitious transaction, which, if actually consummated, they had the power to conclude. While, where property has actually been bought by a county, the determination by the supervisors that such purchase is necessary, that the property is of a certain value and that such value should be paid therefor, may be conclusive, the board cannot, by a mere entry upon their minutes that they have purchased property for a certain price, preclude an inquiry into the facts, when in reality there has not been any purchase of property at all. In McGowan v. Ford, 107 Cal. 177, 40 Pac. 231, the county of Mendocino had incurred an indebtedness for work done in repairing county buildings. The work was completed in one fiscal year, but the board of supervisors attempted to make payment out of the revenues of the succeeding year, and to that end made an order reciting that the work had not been completed, and extending the time for its completion to a date in the ensuing fiscal year. No effect was allowed to this device; the court saying: "It is also obvious that the orders of the board made for the purpose of carrying the indebtedness over and making it payable out of the revenue of the next fiscal year were unauthorized and without effect. See Schwartz v. Wilson, 75 Cal. 502, 17 Pac. 449, where a similar question was considered." If the board of supervisors could not bind the county by a recital that a debt incurred in one year had been incurred in the next, an order reciting a purchase of fruit, when none had in fact been purchased, is no more conclusive.

The appellants rely with great confidence upon the position that the district attorney had no authority to bring this action in the name of the county without an order of the board of supervisors authorizing him to bring it. Section 8 (page 452) of the county government act provides that "whenever any board of supervisors shall without authority of law, order any money paid as a salary, fees, or for any other purpose, and such money shall have been actually paid, or whenever any county officer has drawn any warrant or warrants in his own favor, or in favor of any other person, without being authorized by the board of supervisors or by the law, and the same shall have been paid, the district attorney of such county is hereby empowered, and it is made his imperative duty to institute suit in the name of the county against such person or persons to recover the money so paid, and 20 per centum damages for the use thereof, and no order of the board of supervisors therefor shall be necessary to maintain such suit. When the money has not been paid on such order or warrants it is hereby made the imperative duty of the district attorney of such county, upon receiving notice thereof, to commence suit in the name of the county to restrain the payment of the same, and no order of the board of supervisors shall be necessary in order to maintain such suit." It is argued that, since the power of a district attorney to commence a suit is limited to cases where the board of supervisors has "without authority of law" ordered moneys paid, such suit cannot be instituted where the board has acted, or assumed to act, under an authority vested in it by law; that the board of supervisors, as above stated, has authority to purchase personal property for the county and to order payment for the same; and that here the order in question was an order for the payment of money found to be due as the purchase price of the fruit bought by the county. This argument is, in a measure, similar to that just considered with relation to the conclusiveness of the orders of the board of supervisors. It is true that an order for the payment of property purchased by the county is not an order made by the supervisors without authority of law, but it is equally true that an order by the board of supervisors for the payment of indebtedness incurred in one year out of the revenue of the succeeding year is an order made without authority of law, and that it is none the less without authority of law because it is given the guise and form of a purchase of property where no property was in fact purchased. As was said by the learned judge of the trial court in an opinion filed by him: "The question then turns upon the meaning of the words 'without authority of law.' Section 1667 of the Civil Code reads: 'That is not lawful which is: (1) Contrary to an express provision of law; (2) contrary to the policy of express law; or (3) otherwise contrary to good morals. * * *' The ordering of the warrant drawn in July in consummation of a plan to pay the debts contracted in one fiscal year out of the funds of the next fiscal year was 'contrary to an express provision of the law,' to wit, of section 18, art. 11, of the Constitution." We are satisfied that, on the facts found, the district attorney was authorized by section 8 of the county government act to institute the action without having received from the board of supervisors an order to institute it. County of Santa Cruz v. McPherson, 133 Cal. 282, 65 Pac. 574, Sacramento Co. v. Southern Pacific Co., 127 Cal. 217, 59 Pac. 568, 825, and similar cases cited, do not conflict with this view. In those cases the board of supervisors had made a contract within the scope of its powers, and ordered money paid thereunder. But in each case the contract had a real existence, and was not a mere cloak for a plan to expend money in defiance of the law.

The appellants contend that it would be inequitable to restrain the payment of the warrant in question, because the county would thereby be permitted to retain both the crop of fruit and the $950 paid in exchange for the same, and that the county should be held estopped to restrain the payment of the warrant until it has restored to the owner (the Bank of Tehama County) the $950 which it received without consideration. Whatever scope may be given to the doctrine of equitable estoppel as against municipal corporations, it is clear that that doctrine can have no application here. The Constitution expressly forbids the payment of the indebtedness of one year out of the revenues of the next year. This prohibition is a limitation upon the powers of the officers of the county, and prevents them from creating a liability against the county contrary to the terms of the Constitution. To hold that the county by receiving property or services beyond its ability to pay out of the revenues of the current year could be estopped from defending against a claim that they be paid out of the revenues of a succeeding year would nullify the constitutional restriction. In many of the cases above cited—for example, San Francisco Gas Co. v. Brickwedel, Shaw v. Statler, Schwartz v. Wilson, McGowan v. Ford, Smith v. Broderick, Weaver v. San Francisco—the municipal corporation had received something of value, for which, by force of the constitutional provision, it was not able to pay. But this was not regarded as furnishing a reason for paying the indebtedness out of funds which the Constitution declared were not to be applied to such purpose.

The foregoing disposes of the substantial points made on the merits, with the exception of respondent's contention that the order for the issuance of the warrant was void on the ground that four of the supervisors were interested in the alleged contract of purchase. In view of the conclusion reached on the matters already discussed, it is unnecessary to consider this point.

The original complaint made the county treasurer the sole party defendant. The Bank of Tehama County intervened, and moved to dissolve a preliminary injunction issued at the time of the filing of the complaint. This motion was met on the part of the plaintiff by a motion for leave to file an amended and supplemental complaint, which joined as parties defendant the board of supervisors and four members thereof who had taken part in the transaction with the bank, Conard, the alleged purchaser and seller of the fruit, and the Bank of Tehama County. The case made by the amended pleading was in no wise inconsistent with the cause of action originally attempted to be set forth. The court permitted this amended and supplemental complaint to be filed before taking up the motion to dissolve the preliminary injunction, and thereupon denied the motion to dissolve. These rulings are assigned as error. We think, however, that it is within the discretion of the court to permit the filing of an amended bill to support a preliminary injunction already issued, and that, if the amended bill shows good ground for the injunction, it is not error to refuse to dissolve such writ for the mere reason that the original bill may have been defective. Barber v. Reynolds, 33 Cal. 497. In any event, if the order refusing to dissolve the injunction can be reviewed on this appeal from the judgment (said order being itself appealable, Code Civ. Proc. 939), the injunction has now become merged in the final judgment, and, if such final judgment properly restrains the payment of the warrant in question, it would not avail the appellants to have this court rule that the preliminary injunction should not have been originally granted, or that the motion to dissolve it should have been granted. See Sheward v. Citizens' Water Co., 90 Cal. 635, 27 Pac. 439.

There was no impropriety in joining the other defendants with the county treasurer. Section 8 (page 452) of the county government act above referred to provides that, where the money has not been paid, the district attorney shall "commence suit in the name of the county to restrain the payment of the same." Such suit, being a proceeding in equity, may properly join as defendants all who have an interest in the subject-matter of the litigation. All of the defendants here joined were so closely connected with the subject of the action that they were certainly proper if not indispensable parties. At any rate, no injury could have resulted from the joinder.

The judgment and order denying a new trial are affirmed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; SHAW, J.; McFARLAND, J.; HENSHAW, J.

(152 Cal. 118)

CUSHING-WETMORE CO. v. GRAY et al.

(S. F. 2,965, 3,833.)

(Supreme Court of California. Oct. 2, 1907.)

1. NUISANCE — PUBLIC NUISANCES — ACTIONS FOR DAMAGES—RIGHT TO MAINTAIN.

One may maintain an action at law for damages for a nuisance without seeking an abatement thereof.

2. TRIAL—VERDICT—JUDGMENT.

Where an action was tried on the theory that it was one at law for damages for a nuisance, and abatement thereof was not decreed, the objection that the judgment was based wholly on the verdict and that no findings of fact were made by the court was unavailable.

3. APPEAL—FINDINGS—PRESUMPTIONS.

Where findings by the court are essential, and the record does not affirmatively show that the findings are not waived, the presumption is that findings are made so far as required.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3762-3771.]

4. MUNICIPAL CORPORATIONS — OBSTRUCTION OF STREET — PUBLIC NUISANCE—COMPLAINT —SUFFICIENCY.

A complaint which alleges that plaintiff engaged in the business of quarrying rock on property on streets; that defendant obstructed the streets, though not immediately in front of plaintiff's property; that the obstructions impeded plaintiff in the right to go on the streets from his property, and prevented all access to his property, etc.—states a cause of action, for it shows a special injury to plaintiff, essential under Civ. Code, § 3493, to enable a private person to sue for a public nuisance.

5. SAME.

The owner of a lot abutting on a street has a special easement in the street for the purpose of ingress and egress, which right is invaded by obstructions which have the effect of absolutely preventing access to the premises along the street, though such obstructions are not immediately in front of the premises.

[Ed Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1445.]

6. SAME.

Where, in an action for a nuisance resulting from the obstruction of a street, it appeared that a sufficient width along the street was open for use as a roadway, and was capable of being used as such, and was used by the public as such, the fact that the portion so open for use was in what would be the sidewalk portion of the street, if sidewalks were ultimately constructed, was immaterial.

7. SAME—DAMAGES—MEASURE OF DAMAGES.

A corporation entitled to recover for a nuisance consisting of the obstruction of a street cannot recover for the value of the time of its officers, based on the theory that their time was occupied in defending the corporation against the attacks of defendant, in consultation with the attorneys of the corporation, and in making preparations for the trial, but the recovery is limited to the loss of profits, expenses incurred, and injury to the corporation resulting from the obstruction.

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Cushing-Wetmore Company against George F. Gray and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed and remanded.

Fisher Ames and J. E. Manning, for appellants. Wright & Lukens, for respondent.

ANGELLOTTI, J. These are appeals from a judgment in favor of plaintiff for $5,000 damages and from an order denying defendants' motion for a new trial.

1. Counsel for the respective parties differ as to the character of the case made by the complaint; counsel for plaintiff claiming that the action is one at law for damages for injury to plaintiff's business, caused by malicious and oppressive conduct of defendants deliberately intended to injure such plaintiff and "drive plaintiff out of the field as a competitor with the defendants," while counsel for defendants claim that the action is one in equity for the abatement of an alleged nuisance, and incidentally for the damage caused thereby. We regard this question as immaterial on these appeals, even if it be conceded that an action for the abatement of a nuisance is under our present Constitution an action within the equitable jurisdiction of the court, and to be governed by the principles prevailing in that jurisdiction. See McCarthy v. Gaston, etc., Co., 144 Cal. 542, 547, 78 Pac. 7. The case was tried upon the theory that it was solely an action at law for damages, and the judgment given was one for damages only; no abatement of any nuisance being decreed. It is, of course, not disputed that one may maintain an action at law for damage caused by a nuisance, without seeking an abatement of the nuisance. We are satisfied from the record before us that this must be treated as such an action. Under these circumstances, the objection that no findings of fact were made and filed by the judge, and that the judgment was wholly based on the verdict of the jury, is without force. In this connection, however, it is proper to say that, if findings by the court were essential, the record does not affirmatively show that such findings were not waived, and under such circumstances the presumption is that findings were made so far as required. See Richardson v. City of Eureka, 110 Cal. 441, 446, 42 Pac. 965; Baker v. Baker, 139 Cal. 626, 73 Pac. 469; Tomlinson v. Ayres, 117 Cal. 568, 49 Pac. 717.

2. It is contended that the complaint failed to state a cause of action. This contention is based on the fact that the alleged acts causing the injury to plaintiff were the placing obstructions in certain public streets of the city and county of San Francisco. The obstruction of a public street or highway constituting a public nuisance, and the law authorizing a private person to maintain an action for a public nuisance only where it is specially injurious to himself (section 3493, Civ. Code), it is urged that the complainant fails to show any cause of action in favor of plaintiff.

The complaint shows plaintiff to be the owner of certain real property on Lombard and Winthrop streets (the obstructed streets), on which it was engaged in the business of quarrying, crushing, and selling rock, and that the obstructions alleged, while not immediately in front of plaintiff's property, and therefore not impeding plaintiff in the right to go upon the obstructed streets from its property, or upon its property from the obstructed streets, were so placed upon said streets at other points as to prevent all ingress to and egress from plaintiff's quarries by plaintiff's wagons, teams, carts, and appliances of its business. It is alleged that plaintiff had for several years been engaged in its business on this property, operating a rock crusher and reduction works with a capacity of 180 tons of rock per day, and delivering therefrom to customers an average quantity of 75 tons each day, that defendants on May 3 and 5, 1899, wantonly and maliciously, and for the purpose of injuring plaintiff's business, obstructed said Lombard street in such a way as to totally obstruct all passage and access of plaintiff's wagons, etc., to and from its quarry, and, that plaintiff having thereupon procured a private right of way leading from Winthrop street, defendants for the same purpose, on May 20, 1899, and again on July 30, 1899, obstructed said Winthrop street, with the same result, thus totally stopping the business of plaintiff. It is further alleged that, by reason of such obstruction, plaintiff has been compelled to repair and reopen the roadways, and to purchase rights of way over private lands, and purchase rock and material, to its damage in the sum of $5,000, has been prevented from fulfilling contracts, lost custom and trade, and been deprived of profits in the further sum of $10,000, and that the credit and business of the plaintiff has been injured in the further sum of $10,000.

We are of the opinion that this shows such special injury to plaintiff as authorized the maintenance of the action by it. The case is practically the same as that made by the complaint in the case of Gardner v. Stroever, 89 Cal. 26, 26 Pac. 618, where the injury complained of was an obstruction in a public highway between the plaintiff's slaughterhouse and a connecting highway, which completely prevented plaintiff, maintaining a meat market in the town of Oroville, from bringing his meat to town to supply his customers, to the injury and destruction of his business. It is said that this decision is in conflict with the doctrine of the earlier cases of Aram v. Schallenberger, 41 Cal. 449, and San Jose Ranch Co. v. Brooks, 74 Cal. 463, 16 Pac. 250, wherein it was held that allegations simply to the effect that the plaintiff had no means of access to his land except over and along the obstructed road did not show such special injury, in addition to that suffered by the public, as would authorize the maintenance of the action. The former of these cases was an action for an injunction to prevent a proposed obstruction of a highway affording the only means of access to the plaintiff's property. The only allegation of damage was that plaintiffs had no other means of access, neither injury to the property nor interference with any use plaintiffs were making or desired to make of the land being averred. In San Jose Ranch Co. v. Brooks, supra, the allegation was simply that the obstruction prevented the plaintiff "having ingress or egress to and from a tract of land which it owned situated at a point in a canyon above the place where the obstruction is placed, and which prevents it from making any use of its land which it desires." It did not affirmatively appear that any use was then being made of the property, or that any particular use was then contemplated. The theory upon which these decisions is based is that the only injury done in such a case is the obstruction of the party in his right of passage over the highway, and that this injury is the same in kind as that suffered by all of the general public who may have occasion to travel over the road, although the inconvenience may be greater in degree in the one case than in the other. Neither of these cases goes to the extent of holding that an obstruction in a public highway absolutely preventing all access to and egress from one's land may not cause such an interference with the use of the land for the purposes to which it is devoted, and the injury to and suspension of a business there established and carried on, as will constitute special injury to the owner of the property different in kind from that suffered by the public at large, authorizing a private action, although some expressions in the opinion in the later case may tend to support such a view. So far as they do this, they are opposed to the general current of authority. The injury to the general public is simply the deprivation of the right of passage over the streets. The additional injury to the owner of the property is the interference with the use of his land for the purpose to which it is adapted, and the suspension of his business there carried on. It cannot reasonably be said that these results are not caused by the obstructions alleged. For all practical purposes, they are directly caused by the obstructions.

It has several times been declared by this court that the owner of a lot abutting upon a public street has by reason of such ownership a special easement in such street for the purpose of ingress and egress, which is property as fully as the lot itself. See Eachus v. L. A., etc., Ry. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307; Geurkink v. Petaluma, 112 Cal. 306, 44 Pac. 570; Symons v. San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453; Williams v. Los Angeles R. Co., (Cal. Sup.) 89 Pac. 330. See, also, McLean v. Llewellyn Iron Works, 2 Cal. App. 346, 83 Pac. 1082, 1085. This right of property is as much invaded by obstructions which have the effect of absolutely preventing access to the premises along the street as it is by obstructions preventing access from the premises to the street immediately in front of the land. As to the latter, it is thoroughly established that the obstruction constitutes a private, as well as a public, nuisance. The attempted distinction between the two cases appears to us to be too technical to afford a sufficient basis for a rule granting the relief in the one case, and denying it in the other. So far as the comfortable enjoyment and use of the land itself are concerned, the owner is not perceptibly advantaged by being allowed to get to the portion of the street immediately in front of his property if he can go no further. In each case, there appears to us to be an invasion of his rights as a property owner and an interference with his use and enjoyment of his property differing in kind from the injury common to the general public occasioned by the obstruction. This view may be conceded to be in conflict with the doctrine of the two cases heretofore referred to. But it is in accord with the later expressed views of this court as to the rights of an owner of property abutting on a street, and also with the overwhelming weight of authorities elsewhere. See note to Stetson v. Faxon (Mass.) 31 Am. Dec. 132; Fossion v. Landry, 123 Ind. 136, 24 N. E. 96; Indiana, etc., v. Eberly, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225; Venard v. Cross, 8 Kan. 248; Jackson v. Kiel, 13 Colo. 378, 22 Pac. 504, 6 L. R. A. 254, 16 Am. St. Rep. 207; Bannon v. Murphy (Ky.) 38 S. W. 889; Brakken v. Minn., etc., 29 Minn. 41, 11 N. W. 124; Wood on Nuisances, §§ 648, 657, 680. See, also, Blanc v. Klumpke, 29 Cal. 156, 159; Buchholz v. N. Y., etc., R. R. Co., 148 N. Y. 640, 43 N. E. 76.

3. The contention that the evidence was insufficient to justify the verdict is principally based upon the objection to the complaint already discussed. It is further claimed that the evidence shows that the streets had not been so improved as to be capable of use by the public. It was shown that a sufficient width along the streets was open for use as a roadway and was capable of being used as such and was in fact being used by the public. The case of George v. N. P. T. Co., 50 Cal. 589, is therefore not in point. The fact that the portion so open for use was in what would be the sidewalk portion of the streets, if, ultimately, sidewalks were constructed, is immaterial.

4. Under the circumstances appearing in the record, the claim that the platform construction placed on Winthrop street by defendants, covering the whole space which was open for travel or passage, was a sidewalk, and not a construction designed solely to obstruct travel by wagons and other vehicles, was, upon the record before us, so obviously a mere pretense, that the trial court was perfectly justified in disregarding it altogether.

5. We have discussed the foregoing matters solely for the purposes of a new trial, as the judgment and order must be reversed because of improper evidence admitted on the question of damages. In the face of proper objection, an officer of plaintiff corporation was allowed to testify that the value of the time of himself and another officer, from the time of the first obstruction, May 3, 1899, to the date of the commencement of the trial, March 26, 1900, was $6,560, the theory advanced by the witness being practically that the whole of the time of himself and fellow officer between those dates was occupied in defending the plaintiff corporation against the attacks of defendants, in consultation with plaintiff's attorney, and preparations for the trial of this action. We know of no theory upon which plaintiff could be held entitled to a recovery for such loss of time of its officers, in addition to the whole loss suffered by it by reason of loss of profits, expenses incurred, and injury to plaintiff resulting from the obstructions, as to all of which it introduced evidence and claimed the right to recover, a claim sanctioned by the court in its rulings both in the matter of evidence and instructions. Counsel for respondent have not attempted to justify this ruling of the trial court.

6. The court erred in refusing to strike out the portion of an answer given by Mr. Phelan as to his opinion of the nature of the structure placed by defendants on Winthrop street, and also in overruling an objection to a question asked him as to what instructions he had given to subordinates after examining the structure, but it is doubtful if these errors should be held to have been prejudicial.

We find no other matter requiring notice. The judgment and order are reversed, and the cause remanded.

We concur: SLOSS, J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.

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152 Cal. 138

SILVA et al. v. HAWKINS et al. (Sac. 1,399.)

(Supreme Court of California. Oct. 3, 1907.)

JUDGMENT—RES JUDICATA—IDENTITY OF PARTIES.

A judgment roll in a former suit is not admissible in bar of an action where there is no privity between defendants and either of the parties to the former action, although plaintiffs may have acquired their interests from parties to the former suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1148.]

In Bank. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by Frank Silva and others against Austin Hawkins and others. From a judgment for defendants, and an order denying plaintiffs a new trial, the latter appeal. Reversed.

James F. Farraher, for appellants. R. S. Taylor, for respondents.

McFARLAND, J. This is an action to quiet plaintiffs' title to certain waters of the main fork of Greenhorn creek in Siskiyou county, and of certain tributaries of said creek called "Heybrook Gulch" and "Barker Gulch," and to have the relative and proportionate rights of the plaintiffs and defendants to such waters judicially determined and declared. The case was tried without a jury, and judgment was rendered in favor of defendants. Plaintiffs appealed from the judgment and from an order denying their motion for a new trial.

The plaintiffs are the owners of a water ditch called the "Cornish & Company ditch," which has its head in the main Greenhorn creek, and runs on the northerly side of the creek down and across to the north fork of said creek, where the water that is carried by the ditch to said north fork is used by plaintiffs for mining purposes. Defendants are the owners of a placer mining claim called the "Clark & Company claim," which is situated in the bed of the main fork of Greenhorn creek, and over this mining claim passes the said Cornish & Company ditch. This ditch, before reaching defendants' mining claims, passes across the said two tributaries of Greenhorn creek, and carries their waters, as well as the water of the main creek, to defendants' mining claim. Defendants concede that plaintiffs have the right to carry over and across their mining claim all the waters flowing in this ditch during the nighttime (that is, from 6 o'clock p. m. to 6 o'clock a. m. of the next day), but they aver that defendants have the right to use upon their mining claim all the water flowing in said ditch during the daytime (that is, from 6 o'clock a. m. to 6 o'clock p. m. of each day), and deny that plaintiffs have any right to the use of any of such water during the hours last above mentioned. The plaintiffs in their amended complaint admit that they have no right to the water of the main Greenhorn creek during the daytime, but they aver that during all of the time, both night and day, they have the right to carry away in the ditch across and over defendants' mining claim all the water which flows in the ditch from the said two gulches. And so the real controversy between the parties concerns only the waters of said Heybrook and Barker gulches.

The defendants in their answer pleaded as an estoppel against plaintiffs a certain prior judgment rendered in the superior court in a case entitled "Maurice Renner, as Trustee, v. Joseph Azevedo et al.," contending that the judgment in that case determines the rights of plaintiffs in the case at bar to the water in contest to be only those here admitted by defendants, and that plaintiffs are estopped by said judgment from contending otherwise. When, at the trial, defendants offered in evidence the judgment roll in the Renner Case, its introduction was objected to by plaintiffs and the objection was overruled, and the judgment roll admitted; and to the ruling plaintiffs excepted. Whether or not that judgment roll was properly admitted is the main question on this appeal and the only one calling for special notice, and it seems to be quite clear that its admission in evidence was an error. A judgment cannot operate as an estoppel except where it is given in a cause between the same parties or their privies. See Boggs v. Clark, 37 Cal. 236. In the case at bar there is some evidence tending to show that the plaintiffs, or at least some of them, acquired their interests in the ditch and water from the plaintiff in the Renner v. Azevedo matter, and it may be conceded for present purposes that plaintiffs are the successors in interest of said Renner; but there is no relation or connection whatever, with respect to the property rights here involved, between the defendants in the case at bar and the defendants in the former case. The defendants here are in no position to assert or invoke any right which might have been declared in the former action as between the parties hereto. They are neither the parties nor privies of parties to that action. That the error in admitting the judgment roll was prejudicial is clear; for there was some testimony tending to establish plaintiffs' contention that they are entitled to the use of the water in contest to the extent asserted by them, and we cannot say how the court would have found as to that contention if it had not admitted the judgment roll in the Renner Case and given it the significance of an estoppel. For this error the case must be reversed.

Plaintiffs offered in evidence the judgment roll in another case entitled "Cardoza v. Hawkins," but defendants' objection to it was sustained. That ruling was right. There was the same lacking here of the relation of parties and privies that appeared in Renner v. Azevedo.

We see no other points calling for discussion.

The judgment and order appealed from are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

BEATTY, C. J. (concurring). I concur in the judgment and in the opinion of Justice McFARLAND, which is fully supported by the ground upon which he holds that the superior court erred in overruling the objection to the admission in evidence of the judgment roll in the case of Renner v. Azevedo et al. There was, as the main opinion shows, no privity between the defendants and either of the parties in Renner v. Azevedo, but there is even a stronger and more conclusive reason for holding that the judgment in that case can never operate as an estoppel in this case. The right in litigation there had no sort of connection with the right in controversy here. There Renner, as trustee of the Bohnerts, was suing Azevedo and others (whose rights, such as they may have been, have never vested in these defendants) for a diversion of the waters of the main Greenhorn creek above the head of the Cornish ditch, a diversion by which the owners of that ditch were deprived of their right to all the waters of the main branch naturally flowing to the head of their ditch between 6 o'clock p. m. and 6 o'clock a. m. A litigation of that controversy could by no possibility involve the rights of the owners of the Cornish ditch to the entire flow of the Heybrook and Barker gulches during the whole 24 hours, for the waters of those gulches naturally flowed into Greenhorn creek below the head of the ditch, and were intercepted by the ditch below its head. The only shadow of a reason for the claim that any right to the waters of those gulches was involved in Renner v. Azevedo is that the plaintiff in that action by way of description of his ditch used the language: "Was the owner and in possession of that certain water ditch known as the 'Cornish Ditch' which takes the waters of main Greenhorn creek and gulches adjacent thereto, and conveys the same to the North Fork of said Greenhorn creek." This was a perfectly correct and proper description of the ditch for the purpose of the complaint and the judgment, but it did not tender any issue as to the rights of the plaintiff to the waters of the adjacent gulches, and, when the complaint which follows this description is examined, it appears that the only injury alleged is the diversion of the waters of Greenhorn creek at a point to which the waters of the gulches never flowed and never will flow while the law of gravitation continues in force.

I concur: HENSHAW, J.

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152 Cal. 90

NILES v. GONZALEZ et al. (L. A. 2,043.)

(Supreme Court of California. Oct. 1, 1907.)

1. Appeal—Notice—Necessity—Waiver.

If notice of appeal has not been served within the time required by law, the appellate court has no jurisdiction, and jurisdiction cannot be conferred by a waiver made after the time for appeal has expired.

[Ed Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 92, 1923, 1924.]

2. Same—Adverse Party.

A codefendant was an adverse party who should have been served with notice of appeal from a judgment for plaintiff in an action to specifically enforce a contract to sell land, where the court found that a defendant purchased from the codefendant who had agreed to convey the land to plaintiff and decreed the codefendant to be the owner and holder of a note and mortgage given by defendants to the codefendant for part of price of the purchase, and that plaintiff pay a certain sum to codefendant, as a condition for the specific performance and satisfaction of the mortgage.

[Ed Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2139.]

3. Same—Appeal from Order Denying New Trial.

Notice of appeal from an order denying a new trial need be served only on parties who were adverse to the motion in the lower court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2137, 2138.]

4. Same—Burden of Proof.

The burden is upon a respondent moving to dismiss an appeal for want of service of notice upon an adverse party to show from the record that the party not served was adverse in interest.

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by William Niles against Lillian L. Gonzalez, M. G. Gonzalez, and another. From the judgment and an order denying a new trial, defendants Gonzalez appeal, and plaintiff as respondent moves to dismiss the appeals. Appeal from judgment dismissed. Motion to dismiss appeal from order denied.

J. Wiseman Macdonald and J. A. Donnell, for appellants. Ward Chapman, for respondent.

SLOSS, J. The respondent moves to dismiss appeals taken by the defendants Lillian L. and M. G. Gonzalez from the judgment, and from an order denying a motion for a new trial.

The principal ground for the motion is that the defendant Jennie R. Tarr is an adverse party on both of said appeals, and that no notice of either of the appeals by the defendants Gonzalez was served on said Jennie R. Tarr. On the appeal from the order denying the motion for a new trial, the further point is made that no undertaking on appeal has been filed, and that, while the filing of such undertaking has been waived by the plaintiff, it has not been waived by the defendant Jennie R. Tarr. This point, like the one made with reference to the failure to serve notices of appeal, is necessarily based upon the premise that Jennie R. Tarr was an adverse party to the appeal in question. The Judgment was entered on the 18th day of September, 1906, and the notice of appeal therefrom was served on the plaintiff and filed on the 27th day of September, 1906. The order denying the motion for a new trial was made and entered on the 28th day of December, 1906, and the notice of appeal therefrom served on the plaintiff and filed on the 14th day of January, 1907. The notice of the present motion to dismiss these appeals was served on the 4th day of April, 1907. On April 9, 1907, after the service of notice of motion, and prior to the hearing of the motion, the appellants obtained from the defendant Jennie R. Tarr a written stipulation waiving the service of any papers in connection with either of said appeals, waiving the giving of undertakings to perfect said appeals and appearing in the matter of said appeals as fully as if all necessary papers had been duly and properly served upon her. It is apparent that this purported appearance and waiver can have no effect to cure the failure to serve the notices of appeal upon the codefendant, if she was, in fact, an adverse party and service upon her was necessary to vest this court with jurisdiction of the appeals. The stipulation waiving the service of notices and entering an appearance on behalf of Jennie R. Tarr was made more than 6 months after the entry of the judgment, and more than 60 days after the making and entry of the order denying a new trial. At the time such stipulation was made, the time for taking an appeal from either the judgment or the order had expired. In order to vest jurisdiction in the appellate court, the notice of appeal must be both served and filed within the time allowed for the taking of the appeal. San Francisco, etc., Co. v. State of California, 141 Cal. 354, 74 Pac. 1047. If the notice of appeal has not been served within the time required by law, the appellate court has no jurisdiction of the case. Dalzell v. Superior Court, 67 Cal. 453, 7 Pac. 910. Jurisdiction of the appeal cannot be conferred by a waiver made after the time for taking an appeal has expired. Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411. And similarly, if Mrs. Tarr was an adverse party to the appeal from the order denying a new trial, the failure to file an undertaking on that appeal could not be cured by the waiver of such undertaking given by Mrs. Tarr after the time for appeal had expired. Perkins v. Cooper, supra. Indeed, the appellants do not in their brief place any reliance upon the alleged waiver of service and of the undertaking, but take the position that it was unnecessary to serve notice of appeal upon Mrs. Tarr, or to procure her waiver of an undertaking, for the reason that she was not an adverse party to either appeal.

1. The appeal from the judgment. It appears from the record that the plaintiff had entered into a contract with the defendant Jennie R. Tarr by which said Jennie R. Tarr agreed to convey to plaintiff, upon the making of certain payments by him, a lot of land situate in the county of Los Angeles. The complaint alleges the due performance by plaintiff of all of the conditions of the contract; that the defendant Tarr had, before the final payment became due, conveyed the property to Lillian L. Gonzalez, who took with notice of plaintiff's rights. The complaint alleges a tender to said Lillian L. Gonzalez of the balance due under the contract and a demand for a conveyance, which tender and demand were refused. The defendant M. G. Gonzalez is the husband of Lillian L. Gonzalez, and as to him it is alleged that he was in possession of the property, claiming an interest therein. The defendants Gonzalez answered, alleging that the defendant Lillian had purchased the property from Mrs. Tarr for its full value, giving in part consideration a note for $600 secured by a mortgage of the property, and that such purchase had been made without notice of any rights claimed by any other person. The defendant Tarr answered separately, alleging that the plaintiff had failed to comply with the contract on his part, and that he had forfeited his rights thereunder. The court found in favor of the plaintiff upon the issue raised as to the performance on his part of the conditions of the contract, and found that the defendant Lillian L. Gonzalez had taken with notice of his rights. The decree declared that the plaintiff was entitled to the specific enforcement of his contract against Lillian L. Gonzalez, and was entitled to receive from her a good and sufficient deed of conveyance of the property upon payment to her of the sum of $107.38. It further declared that the defendant Jennie R. Tarr is the owner and holder of the Gonzalez note and mortgage above referred to, and that said Jennie R. Tarr is entitled to receive from the plaintiff, and the plaintiff is required to pay to her as a condition to the specific performance of said contract and as a condition to having said mortgage satisfied of record, the sum of $578.30. The decree orders the plaintiff to pay to the clerk of the court within 10 days the sum of $107.38 for the defendant Lillian L. Gonzalez, and the sum of $578.30 for the defendant Jennie R. Tarr. Within 10 days after the payment of said sums, the said Lillian L. Gonzalez is ordered to execute and deliver to plaintiff a deed of the property, and said Jennie R. Tarr is ordered to enter a satisfaction of her mortgage. We think it is clear that this decree grants Mrs. Tarr certain substantial rights of which she might be deprived upon a reversal, or upon any conceivable modification of the judgment, and that she is therefore an adverse party who should have been served with the notice of appeal.

The case is not distinguishable in principle from Johnson v. Phenix Insurance Co., 146 Cal. 571, 80 Pac. 719. That was an action upon a policy of fire insurance. Part of the insurance money was payable to the mortgagee, who was made a codefendant. The judgment was in favor of plaintiff against the insurance company, with a provision that the amount of the mortgage was to be discharged out of the judgment. The mortgagee was not served with notice of appeal, and the appeal was dismissed, it being held that such mortgagee was an adverse party who should have been served. The court said: "The effect of the judgment was to provide for the payment of a debt due to it (the mortgagee) from money recovered by plaintiff from the insurance company, and the reversal of the judgment would be to deprive it of such fund. It is no answer to this to say that the insurance company has, in fact, no defense against the bank (mortgagee), and that the bank may ultimately recover the money due it by another judgment in this action directly against the insurance company, or that it may collect its debt from the mortgagor. The question is whether the judgment gives it something which will be taken away by a reversal. The judgment which it is here sought to reverse provides for the immediate payment of the money due the bank from the fund to be collected from the insurance company, and this gives the bank an apparent legal advantage." By the judgment in the case at bar the sum of $578.30 required to be paid by plaintiff as a condition for his obtaining the conveyance sought is ordered to be paid directly to the defendant Jennie R. Tarr. Here, as in the case just cited, it is no answer to the motion to say that the defendant Tarr held a mortgage upon the property. Nor is it material that this mortgage was for an amount larger than the sum here directed to be paid. Such mortgage was enforceable only by a suit for foreclosure, to which the mortgagor might have a good defense. Or, if there were no defense, it is impossible to say that the property after foreclosure would bring to Mrs. Tarr the amount due her, or that she could recover any deficiency from the mortgagor. A cause of action for the foreclosure of a mortgage is not the equivalent of a judgment for the direct payment of money. And, as one of the beneficiaries of this judgment, she was entitled, if she desired, to urge that this judgment should stand and that she should receive the money directed to be paid to her, rather than be relegated to her action of foreclosure.

2. The appeal from the order denying a new trial stands upon a different ground. It is well settled that the notice of appeal from an order denying a motion for a new trial need be served only on the parties who were adverse to the motion in the court below. Watson v. Sutro, 77 Cal. 609, 20 Pac. 88; In re Ryer, 110 Cal. 556, 42 Pac. 1082; Johnson v. Phenix Ins. Co., supra. If Mrs. Tarr was not a party to the motion in the superior court, she was not an adverse party upon whom notice of appeal from the order had to be served. The record before us fails to show that she was such adverse party. The notice of intention to move for a new trial is not incorporated in the transcript. The statement on motion for new trial is entitled, "Statement of defendant Lillian L. Gonzalez on motion for new trial," and states that it is proposed by said defendant as a statement to be used "on motion for new trial." Whether or not the defendant Tarr participated in the proceedings leading up to the settlement of the statement, or gave or received notice of intention to move for a new trial, or, upon the hearing, appeared either in favor of or in opposition to the granting of the motion, is not shown.

All that is contained in the record in addition to the statement is the copy of a minute entry showing the action of the court on the motion. This entry reads: "On this cause defendants' motion for a new trial is denied." In view of the fact that the notice of appeal purports to be given by the defendants Gonzalez, this entry might well be taken to indicate that the motion was made by these defendants. But, if we give it the construction suggested by the respondent, namely, that Mrs. Tarr, who was one of the defendants, is included among those whose motion for a new trial is denied, it would appear that she joined with her codefendants in asking for a new trial, and in that view the record would not show that her interests upon that motion were adverse to those of the other defendants. Barnhart v. Edwards, 111 Cal. 431, 44 Pac. 160.

We think the burden is upon a respondent moving to dismiss an appeal for want of service upon an adverse party to show from the record that the party not served was adverse in interest. "Only parties who appear from the record to be adverse need be served." Estate of Ryer, 110 Cal. 556, 42 Pac. 1082; In re Bullard's Estate, 114 Cal. 462, 46 Pac. 297. Here the record does not show affirmatively that Mrs. Tarr was an adverse party to the action in the court below. We are not here called upon to decide whether a failure to serve Mrs. Tarr with notice of intention to move for a new trial in the court below (assuming that she did not join in the motion) would furnish good ground for affirming the order denying a new trial, nor is it necessary here to decide whether in considering such appeal on its merits this court would presume that notice of intention to move for a new trial had or had not been given to the codefendant.

The appeal from the judgment is dismissed. The motion to dismiss the appeal from the order denying a new trial is denied.

We concur: SHAW, J.; McFARLAND, J.; ANGELLOTTI, J.; LORIGAN, J.

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152 Cal. 97

DAVIS v. LE MESNAGER et al. (L. A. Nos. 1,727, 1,728.)

(Supreme Court of California. Oct. 1, 1907. Rehearing Denied Oct. 31, 1907.)

TAXATION — TAX DEEDS—DESCRIPTION—EVIDENCE—ADMISSIBILITY.

Maps of the subdivisions and surveys of lots and tracts referred to in tax deeds are admissible to supplement the description in the assessments and tax deeds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1543.]

In Bank. Appeal from the Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by W. J. Davis against Mrs. George Le Mesnager and others. From a judgment for plaintiff, certain of the defendants appeal. Reversed.

H. H. Appel and Charles Lantz, for appellants. Denis, Loewenthal & Wellborn and Howard J. Fish, for respondent.

HENSHAW, J. These actions were brought to obtain decrees quieting plaintiff's title to certain lots located in the city of Los Angeles. That title rested upon certain deeds from the state of California executed by authority of the revenue laws of the state after nonpayment of taxes and sale to the state. Plaintiff deraigned title from one W. H. Wheeler to whom the state made the deeds.

The defendants made proof of their titles. The trial court held the deeds from the state of California to Wheeler to be void for certain irregularities in the proceedings leading up to them and decreed title in the defendants. Upon an appeal to the district court of appeal the same view of the state's deeds was taken, and the discussion was confined to conflicting claims of some of the parties defendant. These rulings as to the invalidity of the deeds from the state, both in the trial court and in the court of appeal, were prior to the decision of this court in Baird v. Monroe (Cal. Sup.) 89 Pac. 352, Fox v. Wright, 91 Pac. 1005, Carter v. Osborn (Cal. Sup.) 89 Pac. 608, and San Diego Realty Co. v. Cornell (Cal. Sup.) 90 Pac. 1130. The propositions advanced against the validity of the state's deeds in this case are all covered by the cases above enumerated. Maps of the subdivisions and surveys of the several lots and tracts referred to in the various deeds contained in the record were introduced in evidence, supplementing the description in the assessments and the deeds and making a case strictly within the ruling in Baird v. Monroe. It was error, therefore, for the court to have held that the deeds from the state were invalid, and the judgments must be reversed for this reason.

This conclusion renders unnecessary any expression upon the conflicting claims of title advanced by appellant against certain of the respondents.

The judgments and orders appealed from are, therefore, reversed.

We concur: SHAW, J.; SLOSS, J.; McFARLAND, J.; ANGELLOTTI, J.; LORIGAN, J.

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152 Cal. 87

PEOPLE'S DITCH CO. et al. v. FRESNO CANAL & IRRIGATION CO. et al.

(Sac. 1,473.)

(Supreme Court of California. Sept. 26, 1907.)

1. JUDGMENT—ON CONSENT.

Where, in a suit to settle conflicting claims to the use of the waters of a stream, the parties enter into an agreement fixing their water rights to obtain a decree pursuant thereto, the court is not empowered to do more than frame a decree in accordance therewith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 144.]

2. WATERS AND WATER COURSES — RIPARIAN RIGHTS.

In a suit to settle conflicting claims to the use of the waters of a stream, the parties entered into an agreement which fixed their water rights, and provided that nothing therein should be taken to waive the right of a riparian owner to a designated quantity of water. *Held*, that a lower riparian proprietor could not urge that the agreement positively gave to such riparian owner the right, and could not require the court to enter a decree giving such right.

3. JUDGMENT — ON CONSENT — MISTAKE IN AGREEMENT.

Where the agreement of the parties in a suit to settle conflicting claims to the use of the waters of a stream entered into to obtain a judgment settling their rights does not express the intention of the parties, the remedy is by an action to correct the agreement, and not by praying for the entering of a decree in the suit in accordance with such intention.

Department 2. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Suit by the People's Ditch Company and others against the Fresno Canal & Irrigation Company and others. From a decree settling the conflicting claims of the parties, plaintiffs appeal. Affirmed.

Bradley & Farnsworth, for appellants. Frank H. Short and F. E. Cook, for respondents.

HENSHAW, J. This was an action to quiet title and settle conflicting claims to the use of the waters of Kings river. The Laguna de Tache Rancho is riparian to this stream. The ownership of the lands of the rancho was at the time of the agreement between the parties hereinafter to be considered in the defendant Fresno Canal & Irrigation Company. Another of the defendants, the Laguna Lands, Limited, is the successor in interest of the Fresno Canal & Irrigation Company in and to these lands. At the time of the trial the parties to the litigation presented and filed their stipulation and agreement wherein they undertook to settle and adjust their differences and respective claims to the use of the waters of the river. Plaintiffs are users of water in location lower upon the stream than defendants. They are referred to and for convenience may be referred to as the "lower ditch companies." The defendants are upper appropriators. One of the defendants, it is to be borne in mind, is also the owner of the Laguna de Tache lands. The agreement between the parties recited that the intention of the parties was to obtain a judgment pursuant to the agreement, fixing and determining the right of all the parties in reference to the right to the flow, use, and diversion of the waters of Kings river. With numerous other provisions relative to the accomplishment of this object, it provided that the Fresno Canal & Irrigation Company could divert the first 100 cubic feet of water per second; that the lower ditch companies might then divert 339 cubic feet per second; thereafter, the Fresno Canal Company could divert the next 100 cubic feet per second; then the lower ditch companies might divert certain additional water, after which the Fresno Canal Company had the right to divert the remainder of the water without limitation. As to the rights of the riparian lands of the Laguna de Tache grant, which lands at the time of this agreement, it will be remembered, were owned by the Fresno Canal & Irrigation Company, the clause of the agreement applicable to it is as follows: "It is understood and agreed that nothing in this agreement shall be taken to waive the right of the Laguna de Tache Rancho to the first 30 cubic feet of water flowing per second in said river for use upon said grant." The court was asked to enter a decree in accordance with this agreement. It did so, and the decree is unassailed, saving in one particular. Plaintiffs proposed, as a form of decree embodying their construction of the language of the agreement last above quoted, a declaration in the precise form of the agreement, to the effect that "nothing in this decree shall be taken to waive the right of the Laguna de Tache Rancho to the first 30 cubic feet of water flowing per second in said river for use upon said Laguna de Tache Rancho," and adding thereto the following: "Which said 30 cubic feet of water per second shall at all times be allowed to flow down for said Laguna de Tache Rancho in addition to the water which is to be allowed to flow down said river for said plaintiffs as aforesaid." The defendants objected to the insertion of this added clause in the decree. The trial court ruled with them, and embodied in its decree the exact language of the agreement, and nothing more. From the court's refusal to enter the decree as they desired plaintiffs appeal.

The point of the controversy is, of course, apparent. The Laguna de Tache Rancho is situated below the points of diversion of the defendants, one of whom owns the rancho and, of course, its appurtenant water rights. The plaintiffs, who are lower users and appropriators, desire to have the first 30 cubic feet of water allowed to flow down the river, presumptively for use upon the rancho, but, in case it be not so used, to become subject to their use at their lower points of diversion. It is, upon the other hand, insisted that the clause which plaintiffs sought to have inserted as a construction of the agreement is not within its terms and meaning, and therefore was properly rejected by the trial court. In this we think respondents are correct. The court was empowered to do nothing more than to frame a decree in accordance with the agreement. If the agreement was not full enough to dispose of all conflicting claims and rights, it was not proper for the court, under the circumstances, and when called upon merely to enter a decree in accordance with the agreement, to have supplemented that decree by the insertion of extraneous matters—matters which were not covered by agreement of the parties. It is apparent that the attempt of plaintiffs is to convert a declaration in the negative into a positive order. The agreement goes no further than to say that nothing in its language shall be taken as a waiver of the right of the rancho to the first 30 cubic feet of water. It is sought to transform this negative declaration into a positive order that this water be allowed to flow down to the rancho. The owner of the rancho is not asking this, and, indeed, upon this appeal is opposing it. So far as the owner of the rancho is concerned, its riparian rights are fully protected when the first 30 cubic feet of water for use upon said grant is permitted to flow when and as the use of the rancho requires it. No other person, and certainly no one wholly disconnected and not at all in privity with the rancho, has any cause of complaint. And finally, if the agreement presented to the court, and upon which the decree was entered, does not fully express the intention of the parties, that is a matter for correction by appropriate action, and not, as is here sought to be done, by having the decree say something other and more than the agreement pronounces.

The decree appealed from is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

(152 Cal. 148)

FLOOD v. TEMPLETON et al. (Sac. 1,557.)

(Supreme Court of California. Oct. 3, 1907.)

1. Specific Performance — Contracts Enforceable.

Specific performance of a contract to leave property by will may be decreed where no other adequate relief is available, as where personal services fully performed under the contract are incapable of compensation in money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 223–224.]

2. Judgment—Equitable Relief — Grounds —Fraud in Obtaining Judgment.

Equity will not relieve a party from a judgment on the ground of fraud, where the fraud relates to matters on which the judgment was regularly obtained, and where an opportunity was given to contest the matters in issue or present any available defense, but will grant relief where the party complaining has been prevented from exhibiting his case by fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 784.]

3. Same.

Where a mortgagor failed to interpose a setoff in foreclosure and to avail herself of the plea of limitations, because of a promise made by the mortgagee to prevent the interposing of such defenses, and without intending to keep it, it was actual fraud within Civ. Code, § 1572, subd. 4, defining fraud as consisting of the making of a promise without any intention of performing it, which entitled the mortgagor to have the judgment of foreclosure set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 838.]

4. Appeal—Law of the Case.

The rule of the law of the case is applicable only where the same matters determined in a previous appeal are involved in a subsequent appeal, and a judgment on appeal sustaining a demurrer to a complaint is not conclusive on a subsequent appeal, where the facts alleged are different and present different questions of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4370.]

5. Judgment—Equitable Relief—Pleading —Sufficiency.

A pleading in a suit to set aside a judgment foreclosing a mortgage on the ground of fraud of the mortgagee, which alleges as a fact the rendition of the judgment, is not bad as against a general demurrer for failing to state the date of the judgment or the court in which it was rendered; the defect being available only by special demurrer.

6. Equity—Jurisdiction—Retention of Jurisdiction Acquired.

Where equity acquires jurisdiction of the subject-matter of the controversy, it will retain jurisdiction and do entire justice between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 104.]

7. JUDGMENT—EQUITABLE RELIEF—COMPLETE JUSTICE.

Where a mortgagor seeks to set aside a foreclosure judgment because of the fraud of the mortgagee in inducing her not to avail herself of a set-off, the court, on finding that she is entitled to the relief prayed for, should equitably adjust the claims of the parties, not only as of the time of the rendition of the judgment, but also as to matters down to the entry of the decree granting relief, by allowing to the mortgagee the taxes paid on the lands, less what would have been the mortgage tax, together with interest on the amount which would have been due him under the mortgage had the set-off of plaintiff been deducted when its amount was agreed on, and by allowing the mortgagor a credit to the extent of her payments.

8. QUIETING TITLE—RIGHT OF ACTION—TITLE—SUFFICIENCY.

Where, in a suit to quiet title, it was admitted that the legal title vested in plaintiff's intestate under a commissioner's deed in proceedings to foreclose a mortgage, and the deed was put in evidence, plaintiff was entitled to judgment as against the objection that there was no showing that he had a right to possession; there being a presumption of right to possession from proof of title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 89.]

In Bank. Appeal from Superior Court, Glenn County; Oval Pirkey, Judge.

Action by Mary Flood against Charles Templeton, executor of James Sullivan, deceased, and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

See 83 Pac. 148.

Frank Freeman, for appellant. R. L. Clifton and McCoy & Gans, for respondents.

LORIGAN, J. This is an appeal by the plaintiff from a judgment in favor of defendants. The principal question involved on the appeal from the judgment itself is as to the correctness of the ruling of the lower court in sustaining a demurrer to a portion of the amended answer of plaintiff to the cross-complaint of defendants. A bill of exceptions accompanies the appeal from the judgment upon which appellant presents other questions for consideration. This case was here before; the defendant therein being then the appellant, and is reported in 148 Cal. 374, 83 Pac. 148. This court on that appeal, which was from a judgment in favor of plaintiff, held that the trial court erred in not sustaining a demurrer to the complaint, and the cause was reversed.

In order to properly understand the point relative to the ruling on the demurrer now under consideration, it will be necessary to refer to the complaint involved on the former appeal. It alleged facts under which plaintiff sought the specific performance of a contract claimed to have been made between James Sullivan in his lifetime and herself, wherein he agreed to devise to her by will the real property described in the complaint. The facts alleged were that on February 4, 1899, she was the owner and in possession of the lands and owed Sullivan upon her promissory notes secured by a mortgage on the land $9,696 principal, and $5,226 interest; that upon the 1st day of January, 1899, Sullivan had become indebted to her in the sum of $5,875.50 and interest thereon for board, lodging, washing, nursing, etc., and for the pasture of his stock upon the said premises; that in February, 1899, Sullivan made demand on plaintiff for the payment of her indebtedness; that the first installment of the promissory note, amounting to the sum of $969.67, was barred by the statute of limitations; that in the month of February, 1899, immediately after the demand for the payment of said note by Sullivan, she and Sullivan entered into an agreement that Sullivan should proceed to foreclose the note and mortgage and obtain a deed to the lands through such proceedings; that plaintiff should refrain in such foreclosure suit from pleading the statute of limitations against the first installment due on the note, or setting up as a set-off the amount of $5,875.50 which was due from Sullivan to her, in consideration of which Sullivan agreed that after he had obtained title to the property through the foreclosure proceedings he would rent to plaintiff the premises as long as he, the said Sullivan, lived, for the sum of $400 a year, and would leave a will devising to her said property, so that upon his death she would become the owner in fee of the whole of it clear of incumbrance; that pursuant to the agreement Sullivan commenced foreclosure proceedings; that she refrained from pleading the statute of limitations or setting up as an offset the amount due her from Sullivan, and permitted Sullivan to take judgment in the foreclosure suit for the whole amount of said note, to wit, the sum of $14,922.87. The complaint then alleged the sale under foreclosure proceedings, and the vesting of the title in Sullivan by commissioner's deed. It then averred that plaintiff performed all the terms and conditions of her agreement with Sullivan; that she took possession of the land under the terms of the agreement, had ever since occupied it, and during his lifetime paid to Sullivan the rent, as agreed, of $400 per annum. The complaint then avers that Sullivan died on the 22d day of September, 1903; that he failed and neglected to make the will devising the property to plaintiff, but left a will devising it to others.

Upon these facts the plaintiff based her claim for a specific performance of the contract, and the complaint reciting them was demurred to in the lower court on the ground that it stated no cause of action for such relief. The demurrer was overruled, and on the appeal referred to it was held that the demurrer should have been sustained; that the facts did not bring the case within the line of authorities holding that specific performance of a contract to leave property by will may be decreed when no other adequate relief is available; where there is present the element of peculiar personal services fully performed under the contract which are incapable of compensation in money (Owens v. McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; McCabe v. Healey, 138 Cal. 81, 70 Pac. 1008); that the complaint in question showed that no services whatever were performed, but at most, plaintiff forebore to press a fixed money demand; that for this alleged breach of his promise by deceased she could be compensated in money in an action at law, and hence was not in a position to apply to a court of equity. The judgment was accordingly reversed, with directions to the lower court to enter an order sustaining the demurrer to the complaint. As the pleadings then stood, the complaint being eliminated therefrom by said order of this court, there was left only a cross-complaint which the defendants had originally filed praying for a judgment quieting title against plaintiff and which she had answered, denying its allegations and setting up a claim to the ownership of the property in herself based upon the same averments as were contained in her complaint.

When the case went back to the trial court for further proceedings, the plaintiff, by leave of the court, filed an amended answer to the said cross-complaint of defendants, in which, besides denying its allegations, she set up an affirmative defense and prayed for affirmative relief. This amended answer set forth affirmatively, as in the original complaint and answer to the cross-complaint of which it was amendatory, the execution of the note and mortgage of the premises in question by herself and her husband (who thereafter and in 1898 had died) in favor of Sullivan, and that on February 22, 1899, there was due the latter on said note the sum of $14,922.87, payment of which he had demanded. It was then alleged that on said February 22, 1899, the said real property covered by the mortgage was, and is now, of the value of $20,000; that prior to said date there were mutual accounts between Sullivan and herself unsettled and undetermined, but which were on said date determined, settled and agreed on between them; that in said settlement it was agreed that she was entitled to a credit and set-off against the amount due on the said promissory note of $10,922.87, and it was then determined and agreed between them that there was only due Sullivan on said note the sum of $4,000, and that such balance became and was an account stated as between Sullivan and herself; that for more than 20 years prior to the death of her husband said Sullivan had made his home with her husband and herself on the said premises, and, during that time plaintiff had washed for, nursed, and cared for said Sullivan in sickness and health and treated him as one of the family, and a feeling and relation of the greatest confidence and friendship had existed between them during that period and continued to exist between Sullivan and plaintiff until long after the 22d of February, 1899; that at the time it was agreed and determined between them that only the sum of $4,000 was due Sullivan plaintiff was able to, could have, and offered to borrow said sum, pay it to Sullivan, and thus secure a release from his indebtedness, but that Sullivan protested against and objected to plaintiff borrowing the sum of $4.000 to pay him off, and stated that his property and all included in the mortgage would belong to her any way at his death; that all he wanted was enough for a living while he lived; that he did not expect to live many years; that said plaintiff had always been like a sister to him and he intended that she should have all his property when he died; that there was no necessity for her borrowing the money to pay off the $4,000; that said Sullivan there and then promised and agreed with plaintiff that if she would permit him to foreclose the mortgage for the sum of $14,922.87, and would refrain from setting up as a counterclaim or set-off the amount due to her from Sullivan, namely, the sum of $10,922.87, that he would buy in the property at foreclosure sale, would rent the same to plaintiff as long as she lived for $400 a year; that at his death he would leave a will bequeathing all of the said property to her clear of incumbrance, and represented to her that he would only be holding the property in trust for her until his death, and at his death she would have all of it; that, confiding in the promises of Sullivan and believing that he would do as he agreed, she consented and agreed that she would permit him to foreclose said mortgage as he desired, would not set up her counterclaim, and would permit him to buy the same in at foreclosure sale and take a deed thereto; that, pursuant to said agreement, Sullivan foreclosed the mortgage, plaintiff refrained from setting up her counterclaim for $10,922.87, and permitted Sullivan to take judgment against her for the whole amount of his note, to wit, the sum of $14,922.87, and likewise permitted him to cause the premises to be sold at foreclosure sale, refrained from bidding on said property, and allowed Sullivan to buy the same in his own name and take a deed therefor; that after said foreclosure sale plaintiff continued to reside upon and remain in possession of said premises and in accordance with the terms of their agreement Sullivan leased her the premises for $400 a year, which amount she paid him up to the time of his death. It is then further averred that, had it not been for the promises and agreements of Sullivan that, in the event of plaintiff not pleading her set-off of $10,922.87 against his note of $14,922.87 in said foreclosure proceedings, he would devise and bequeath said property to her, plaintiff would have pleaded the said set-off and would and could have secured the $4,000 necessary to pay off the indebtedness due Sullivan, and thereby retain the whole title of the property in herself; that said promises, statements, and agreements made by Sullivan to and with plaintiff were fraudulently and deceitfully made by him and were made for the purpose of wronging, cheating, and defrauding plaintiff, and were made without any intention of performing them; that by reason thereof said judgment of foreclosure was wrongfully and fraudulently obtained and legal title to the property acquired by Sullivan; that plaintiff did not discover the fraud and deceit practiced upon her by Sullivan until after his death on the 22d of September, 1903; that plaintiff is willing and now offers to defendants the sum of $4,000, the amount due to said Sullivan at the time of the settlement between them on the 22d of February, 1899, and to do all other things that a court of equity may require in said matter. The prayer of the complaint was for an order of court bringing in as parties defendant, the devisees under the will of Sullivan, whose names are set forth in the complaint and for a decree of court annulling and vacating the judgment and decree obtained by Sullivan in said foreclosure suit, annulling and vacating the foreclosure sale and deed obtained thereunder by Sullivan; that it be adjudged defendants hold said property in trust for plaintiff; that they be required to convey the same to her and that her title to said property be quieted. This amended answer was filed on the 15th day of March, 1906, within three years after the death of Sullivan and the alleged discovery of the fraud claimed to have been practiced on plaintiff by him in the matter of the foreclosure proceedings. Defendants demurred to this portion of the amended answer on the ground that it did not state facts sufficient to warrant the relief prayed for, and, the court having sustained the demurrer, the main question on this appeal is as to the correctness of that ruling.

The views taken by the trial court, as appears from its written opinion on the subject, were, first, that the judgment sought to be set aside was conclusive on the parties, that the facts recited in the amended answer did not show that any fraud or imposition was practiced on the court in the foreclosure suit, that the judgment entered was satisfactory to the defendant, and if she saw fit to rely upon the verbal promises of the plaintiff in that action, and which were subsequently broken, this would not constitute fraud on the court such as would justify a court of equity in a separate action in setting aside the decree of foreclosure; second, that the facts set forth in the amended answer did not change the case in any material aspect from that passed on by this court on the former appeal referred to, that the issues now presented in the amended answer were practically the same as presented in the original complaint, and that the rule of "the law of the case" should be applied. None of these views are tenable. The view that the judgment sought to be set aside was conclusive on the parties, or could not be set aside because of any of the reasons assigned by the trial court in its opinion, is based on the theory that the fraud charged in procuring it was fraud entering into the obtaining of the decree itself, which, under the authorities, could not be asserted to annul it, and was not what is denominated extrinsic or collateral fraud, which will always warrant a court of equity in relieving from a judgment procured through it. But we think that under the authorities there can be no doubt that the fraud alleged was of an extrinsic character. The rule is well settled in this state as to when equity will or will not relieve a party from the effect of a judgment claimed to have been obtained by fraud. The rule is that it will not relieve when the fraud charged relates to matters upon which the judgment was regularly obtained and where an opportunity was given to the party against whom it was entered to contest the matters in issue, or present any defense which was available, fraud which was directed to or bore upon the claim or issue which was before the court for determination, as when a judgment is entered upon a fraudulent claim, or is procured by false testimony, where the party had an opportunity to be heard as to these matters. This is the rule laid down in United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, denying the right to relief when the fraud is of that character, and is the rule followed and applied in this state in the cases of In re Griffith, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381, and Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159. This rule, however, has no application to extrinsic or collateral fraud, which is defined to be "actual fraud, such that there is on the part of the person chargeable with it the malus animus, the mala mens putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him." Patch v. Ward, L. R., 3 Ch. App. 207. And in the Throckmorton Case the Supreme Court of the United States, after laying down this general rule to which we have referred, declares what constitutes collateral fraud and the right of a party to be relieved from a judgment obtained through it. It is there said: "There is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side, these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See Well's Res Adjudicata, § 499; Pearce v. Olney, 20 Conn. 544; Wierich v. De Zoya, 7 Ill. 385; Kent v. Ricards, 3 Md. Ch. 392; Smith v. Lowry, 1 Johns. Ch. (N. Y.) 320; De Louis v. Meek, 2 G. Greene, 55, 50 Am. Dec. 491; Bacon v. Bacon (Cal.) 89 Pac. 317–322. In all these cases, and many others which have been examined, relief has been granted on the ground that by some fraud practiced directly upon the party seeking relief against the judgment or decree that party has been prevented from presenting all of his case to the court."

All the matters stated in the exceptions referred to in that case constitute extrinsic or collateral fraud for which equity will relieve from a judgment obtained thereby. Such fraud operates not upon matters pertaining to the judgment itself, but to the manner in which it is procured. It will be observed that the principal ground upon which equity affords relief, as announced in the Throckmorton Case, is that by reason of the fraud practiced on the plaintiff against whom the judgment was obtained there was no adversary trial of the issues in the action; that he was prevented through such fraudulent act of his adversary, and without any fault on his own part, from presenting a meritorious defense to the action brought against him.

Now, taking the affirmative allegations of the amended answer as true (which, of course, the demurrer admits them to be), they present a clear case of fraud practiced by Sullivan on plaintiff, calling for the interposition of equity to relieve her from the judgment thereby obtained by him against her. In fact, when we bear in mind the rule in the Throckmorton Case as to what character of fraud constitutes extrinsic fraud, it is really a waste of time to endeavor to show that the fraud alleged by plaintiff in her pleading is of the character of extrinsic fraud that warrants relief. Plaintiff had a meritorious defense in the nature of a conceded set-off against the greater part of the indebtedness due from her to Sullivan under the note and mortgage, which she could and would have interposed in any action brought by him to foreclose it. Having this set-off, admitted by him to be valid, she was in a position, by payment to him of the balance due him, to relieve her property from his entire mortgage claim, and alleged that, in the event she did none of these things, but would let him foreclose for the entire amount due on the promissory note, he would later make a testamentary disposition of the property in her favor. It is alleged that her failure to interpose the set-off against his claim in the foreclosure suit, and to avail herself of the plea of the statute of limitations against a portion of his claim, was solely due to reliance on his promises and agreements; and it is further alleged that he made these promises and agreements with intent to prevent her from interposing those defenses to it, or to discharge it by payment of the balance due him; that he made them without any intention of keeping them when they were made; that he did not keep them; and that they were made solely to secure the legal title through foreclosure proceedings of the mortgaged premises. The actual fraud practiced on the plaintiff by Sullivan consisted in obtaining her consent to refrain from interposing defenses to his claim, upon a promise and agreement made by him without any intention on his part of performing it. Civ. Code, § 1572, subdiv. 4. These allegations which we have recited show a clear case of fraud in the procurement of the judgment, extrinsic fraud practiced upon her by Sullivan whereby she was, without any fault on her part, prevented from interposing a valid defense to the greater portion of his claim. They present a case where a party, having a good defense to an action, has been prevented by the fraud of her adversary from asserting it, and a judgment obtained against her, which in good conscience should not be permitted to stand—a case within the rule announced in the Throckmorton decision and in the cases of Kelley v. Kriess, 68 Cal. 210, 9 Pac. 129, and Cal. Beet Sugar Co. v. Porter, 68 Cal. 369, 9 Pac. 313, respectively, where the doctrine of the Throckmorton Case is approved and applied to sustain complaints to set aside judgments obtained under circumstances showing extrinsic fraud in their procurement, in no respect different in principle from the showing made by the amended answer of the plaintiff in the matter at bar.

Neither is there any merit in the proposition that the rule of the "law of the case" governs. While some of the facts alleged in the original complaint on review before this court in the former appeal are alleged in the amended answer, additional facts are alleged in the latter which were not set forth in the complaint and which materially changed the aspect of the two pleadings. The complaint involved in the former appeal contained no allegations of fraud. It set forth facts by which it was claimed that an agreement was made between plaintiff and Sullivan that he should devise the property to her by will and sought the specific performance of the contract. The present answer charges actual fraud in the procurement of the judgment against plaintiff and seeks relief from it. While some allegations of fact are common to both pleadings, additional allegations are contained in the amended answer, presenting a different cause of action from that set forth in the complaint involved on the former appeal and calling for entirely different relief. The rule of the "law of the case" is only applicable where the same matters which were determined in the previous appeal are involved in the second appeal. While a judgment rendered upon the sustaining of a demurrer to a former complaint will be a bar to another action based upon the same allegations of fact, yet where the facts are different and present different questions of law, as they do here, no such bar can be asserted. Newhall v. Hatch, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673.

In addition to the above points, it is insisted by counsel for respondent that the amended answer contains no statement of the date of the judgment sought to be set aside and annulled, or of the court in which it was rendered. This is true, but it cannot be said that failure to definitely allege these matters rendered the complaint insufficient. The complaint alleged as a fact that the judgment attacked was rendered. Presumably it was rendered in the superior court of Glenn county, where the mortgaged property affected by it is situated and where this action is brought. In any event, absence of such particular averments are not sufficient to warrant sustaining a general demurrer. Such defects could readily have been supplied by amendment, and want of them should have been taken advantage of by special demurrer. However, it is quite apparent that they were not taken into consideration at all by the trial court in disposing of this demurrer. It was evidently disposed of on broader and more vital grounds; those which were stated in the opinion of the trial court and which we have heretofore discussed.

We have discussed all the points urged in support of the ruling upon the demurrer, and do not think any of them are tenable or that the action of the trial court in sustaining it was correct. On the contrary, we think that, within the authorities and principles to which we have referred, the matters set up make a showing of fraud perpetrated by Sullivan sufficient to invoke the interposition of a court of equity to relieve plaintiff from the judgment thereby obtained against her.

Much discussion is had in the briefs as to constructive trusts; that Sullivan occupied the relation of a trustee for plaintiff as to this property under his acquirement of the legal title through the alleged fraudulent judgment and proceedings under the foreclosure sale. We perceive no reason for entering into a discussion of that subject here. The trial court as a court of equity having control of the entire subject-matter of the controversy between the parties can do entire justice between them and to the fullest extent. All that the plaintiff asks is that she be permitted now to assert against this fraudulent judgment the set-off which she was originally precluded from interposing against the claim of Sullivan in the foreclosure proceeding upon which it was based, and that she be permitted to pay any balance which Sullivan was entitled to at the date when she offered to procure and pay such balance, and, upon doing so, that she be restored to her legal title in the property. If the court should find that the fraud as alleged was practiced upon her in procuring the judgment and that she had a meritorious defense of set-off against the mortgage claim at that time, the matter would be of ready solution. But, in order to do complete justice, there should be an equitable adjustment between the parties, not only as of that time, but also of all matters from that period down to the entry of a decree in favor of the plaintiff in this case, if one should be awarded in her favor. If such a decree were awarded, it would be necessary to make a complete adjustment of all matters between the parties so that the dispute between them would be finally ended. In the event of such a decree, we think an equitable adjustment would be to allow the estate of Sullivan for whatever taxes Sullivan, or his legal representatives, have paid on the lands involved, less what would have been the mortgage tax, together with interest on the amount which would have been due him under the terms of the promissory note and mortgage had the set-off of the plaintiff been deducted when its amount was agreed on between them. As to plaintiff, she should be allowed a credit to the extent of her payments to Sullivan under her alleged lease from him. If it should develop that an equitable adjustment of any other matters between the parties should be had, they can readily be made on the theory upon which we have suggested the above adjustment, namely, that the mortgage held by Sullivan be treated as still a valid lien for the balance due him, and the plaintiff considered as the mortgagor properly retaining possession of the mortgaged premises.

If the court should find in favor of the plaintiff, all matters involved being adjusted on the basis above indicated, the decree should provide for the payment into court for the estate of Sullivan, within a reasonable time to be designated in the decree, of the amount found due from plaintiff; that, upon such payment, the judgment of foreclosure against her be vacated and set aside, and the commissioner's deed conveying the legal title in the property to Sullivan be annulled; that the title of plaintiff to said property be quieted and requiring the defendants to convey said premises to plaintiff, or, in default thereof, that a commissioner be appointed by the court to do so; that in the event of a failure on the part of plaintiff to make such payment into court within the time designated, that her bill to set aside the judgment be dismissed and her prayer thereof for relief against the judgment be denied.

Now, as to the points made in the bill of exceptions accompanying the appeal from the judgment. There is only one which requires consideration, and it arises under the following circumstances: After the trial court had sustained the demurrer of defendants to that portion of the amended answer under which her claim for affirmative relief for judgment was based, the cause went to trial upon the cross-complaint of defendants and the answer of plaintiff thereto. The cross-complaint was to quiet title against plaintiff, and contained the usual allegations, among others, that plaintiff claimed an interest adverse to defendants in it and was in possession, and that her claim and possession were wrongful and without right. The answer of plaintiff denied the ownership of defendants or their right to possession and asserted ownership of the property in plaintiff, and that she was in possession by virtue of such ownership. Upon the trial it was admitted by counsel for plaintiff that the legal title to the property involved in the action vested in John Sullivan under the commissioner's deed in the foreclosure proceedings against plaintiff, and the deed being put in evidence, defendants rested their case. Plaintiff moved for a nonsuit on the ground that, while defendants had shown the legal title to the property to be in themselves, they had not shown they were entitled to possession. The motion was denied, and it is urged that this ruling was erroneous. There is nothing in the point. It was not necessary for the defendants to prove any right of possession independent of the right thereto which the law presumed from their showing that the legal title to the property vested in them. The principal and controlling issue in an action to quiet title is as to the ownership of the property, who has the paramount title. When this was shown to be in the defendants through the conveyance to Sullivan, the law raised a presumption of the right to the possession being in them as holders of the legal title, and hence, at least, a prima facie case in their favor was made out against the plaintiff. Los Angeles County Bank v. Raynor, 61 Cal. 145; Reilly v. Wright, 117 Cal. 77, 48 Pac. 970.

In presenting her case, plaintiff endeavored to prove a lease of the premises in controversy made by Sullivan in his lifetime to her. An objection to the introduction of the evidence, on the ground that no lease was pleaded, was sustained. Immediately the plaintiff moved to be permitted to amend by setting up the lease which was denied. Both rulings are assigned as error. As this case is to be remanded and a new trial will have to be had, the court will doubtless permit the amendment, so there is no necessity for prolonging this opinion by a consideration of these assignments of error.

This disposes of all the matters presented on this appeal. As the court erred in sustaining the demurrer to that portion of the amended answer under which plaintiff sought affirmative relief from the judgment entered against her in the foreclosure suit, the judgment herein appealed from is reversed, the cause remanded and the lower court directed to set aside the order sustaining such demurrer, and to enter an order overruling the same.

We concur: McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

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152 Cal. 180

KIRK v. J. S. KIMBALL CO. (S. F. 3,828.)

(Supreme Court of California. Oct. 3, 1907.)

Carriers—Connecting Carriers — Liability of Initial Carrier—Contract.

Freedom from liabilty of C., the initial carrier, for noncarriage by Y., the connecting carrier, the ticket sold by C., on behalf of itself and Y., consisting of two coupons, and providing that the passage from F. to M. shall be over the line of C., and that from M. to D. over the line of Y., and that in selling tickets or coupons over other lines this company acts as agent, and shall not be responsible beyond its line, is not affected by testimony that the contract between the carriers was modified by parol, whereby the two carriers became "jointly" interested in the transportation, witness' testimony as a whole showing that by "jointly" he meant "equally," and that there was no other change in their contract other than that it was agreed each should receive 50 per cent. of the freight and passage money, where as it had before been agreed C. should receive 45 per cent. thereof, and T. the rest.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Christopher H. Kirk against the J. S. Kimball Company. Judgment for plaintiff. Defendant appeals. Reversed.

Page, McCutchen & Knight and C. E. Wilson, for appellant. Sullivan & Sullivan and Theo. J. Roche, for respondent.

HENSHAW, J. This action was instituted by plaintiff to recover the sum of $10,000 for damages alleged to have been sustained by him through the failure of the defendant, a common carrier of passengers, to transport him from San Francisco to the city of Dawson, Alaska. The case was tried before a jury, which rendered a verdict in favor of the plaintiff for the sum of $6,000. Upon motion for a new trial the amount of the verdict was reduced by the court to $2,730, which reduction was accepted by the plaintiff and a new trial denied. Judgment was entered in favor of the plaintiff accordingly, and defendant appeals.

The facts necessary to an understanding of the legal propositions presented are the following: In 1898 there was a corporation organized for the purpose of carrying freight and passengers between San Francisco and St. Michael, Alaska, which corporation may, for convenience, be designated the "California Corporation." There was likewise a corporation engaged in the business of a common carrier of freight and passengers on the Yukon river between St. Michael and Dawson City, which for convenience may be called the "Yukon Company." An agreement was entered into between these two corporations, by virtue of which the California Company agreed to transport passengers and freight from San Francisco to St. Michael, from which place the Yukon company was to carry them to Dawson City. The California Corporation, having no seagoing steamer of its own, chartered from the defendant J. S. Kimball Company the steamer Dirigo, by which the passengers were to be carried to St. Michael. The Yukon Company was having built for it in San Francisco a river boat, called the "City of Dawson," which boat was to be towed to St. Michael by the steamer Dirigo. After reaching this place, it was to take on board the passengers and freight for Dawson City, and proceed on the river journey. Tickets were sold by the California Corporation on behalf of itself and the Yukon Corporation for passage from San Francisco to Dawson City. These tickets contained two coupons, and provided that the passage from San Francisco to St. Michael should be made over the line of the California Company, while the passage from St. Michael to Dawson City should be made over the line of the Yukon Company. These tickets, which evidenced the contract between those companies and the purchasers, contained, amongst others, the following provisions: "In selling tickets, coupons or orders over other lines in connecting with this ticket and checking baggage thereon, this company acts as agent and shall not be responsible beyond its own line. * * * Neither shall said vessel, her owners or charterers be under any obligation to forward passengers to their destination by any other conveyance or line nor refund the amount of passage. * * * No agent or employé has any power to modify or waive in any manner any of the conditions named in this contract." The California Company experienced financial difficulties, was unable, in short, to pay the charter money for the Dirigo, and dropped out of business, the J. S. Kimball Company, owner of the Dirigo, assenting to a substitution of itself in place of the California Company. By this arrangement the Kimball Company was to tow the City of Dawson, belonging to the Yukon Company, for an agreed price, and was to receive, under their traffic agreement, 45 per cent. of freight and passage money for carrying them to St. Michael, while the Yukon Company was to receive 55 per cent. for its part, which was the river transportation. This agreement was in writing, and subsequently, according to the testimony of Zadig, manager of the Yukon Company, was modified by parol agreement, according to which, he testifies, the two companies became "jointly" interested in the transportation of freight and passengers. The idea here sought to be conveyed, and which the respondent insists was conveyed with legal sufficiency, is that the Kimball Company thus entered into a partnership with the Yukon Company, obtained a control over the Yukon Company's means of transportation and conduct of business, and became directly responsible to the passengers, not merely for their transportation to St. Michael—the end of the Kimball Company's run—but also for the river run to Dawson City as well. When analyzed, however, Zadig's testimony does not show that the "joint" interest of the two companies was any different from what it always had been, saving that the Kimball Company was to receive 50 per cent. of the passenger and freight rate instead of 45 per cent., as before agreed upon. The tickets issued to the passengers, it is to be noted, were identical with those first issued, with the substitution of the name of the Kimball Company for the California Company, and the plaintiff testifies that at the time this second ticket was issued to him Mr. Lauden (appellant's manager) said "they would assume or were assuming the contracts just as we had made them with the transportation companies." The Yukon Company, in turn, became financially involved, and was unable to proceed with its part of the contract. Its steamer City of Dawson was libeled, and the company was without financial ability to release the attachment. Delays in prosecuting the voyage followed, much feeling was aroused amongst the passengers because of this delay, and, in the end, against the protest of Zadig, manager of the Yukon Company, an arrangement was effected by the Kimball Company, or by the passengers of the Dirigo, or by both, with still another company, the Alaska-Yukon Company. The Alaska-Yukon Company had a river steamer known as "James Eva." This agreement, as testified to by Mr. Lauden, manager of the Kimball Company, was in effect a substitution of the Alaska-Yukon Company for the incapable Yukon Company of Zadig. The Alaska-Yukon Company agreed to transport the Dirigo passengers and freight from St. Michael to Dawson City upon the first of their boats to arrive after the arrival of the Dirigo. It was expected that this transportation would be made by the James Eva, one of the river boats, which was then on its way from San Francisco to St. Michael. But in the not unlikely event that the James Eva was lost at sea (a fact which actually occurred), or had departed from Dawson City before the arrival of the Dirigo, the Alaska-Yukon Company would receive the passengers and freight on another steamer called the "Rufus E. Wood," and, in the event that the Rufus E. Wood was not available, the Kimball Company was to deliver the freight and passengers upon the beach, when the Alaska-Yukon Company would become responsible for their further transportation. In brief, as has been said, the Alaska-Yukon Company took over the rights and duties of transportation from St. Michael which formerly had belonged to the Yukon Company. The contract was, of course, entered into between the two transportation companies. There is no doubt as to the nature of that contract. It was as above set forth. There is no doubt, also, that it was entered into by the Kimball Company because of the clamorous desire of the passengers on the Dirigo to proceed with their journey, on the one hand, and the reluctance of the Kimball Company, on the other, to forfeit its share of the business of this transportation because of the failure of the Yukon Company. Under this arrangement, the Dirigo proceeded on its voyage and arrived safely at St. Michael. There the Alaska-Yukon Company made default. The James Eva had been lost at sea. No other steamer was provided for the river voyage. The passengers made demand that the Kimball Company transport them or secure transportation for them. The Kimball Company refused to do this, but offered to repay the one-half fare forfeited by the Alaska-Yukon Company. Plaintiff refused to accept this, and was brought back to San Francisco, where, in time, this action was commenced. The complaint in this action, though based on a contract, sounded in tort (Jones v. S. S. Cortes, 17 Cal. 487, 79 Am. Dec. 142; Warner and Wife v. S. S. Uncle Sam, 9 Cal. 697; Sloane v. Southern California Ry. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193), and the demurrer to it was therefore properly overruled.

As to the liability of a connecting carrier for transportation beyond its own line or route, the law is so well settled that there can be no controversy over the matter, and, indeed, there is none here. The court instructed the jury that "a common carrier may so issue tickets beyond its own lines and so control the transportation of its passengers as to be held to have contracted for the entire distance, and in consequence be answerable in damages for any breach of its obligations occurring on any one of the connecting lines. But, where there are several connecting lines and plaintiff seeks to recover for an injury resulting from the act of a connecting company, plaintiff must establish a contract with the company he seeks to hold, or prove that it had some interest in or control over the transportation of passengers by the line in default." This instruction correctly enough enunciates the law, saving in two particulars. It should have been more explicit as to the nature of the contract which plaintiff must establish. The contract which plaintiff must show is the contract whereby the defendant carrier agrees to transport or warrants his transportation over the connecting lines. Of course, it would not be sufficient for the plaintiff in such a case to show merely that he had a contract with the company that he sought to hold, unless he further showed that the contract which he established bound the company to the performance of the particular obligation which was violated. Again, it is not sufficient, in order to hold a company, to prove that it had "some interest in or control over the transportation of passengers by the line in default." Some interest would be evidenced by the fact that the defendant company was a creditor of the other or owned some of its stock, and "some control" over the transportation of passengers is exercised by every transportation company over connecting lines. Thus, one connecting transportation company cannot convey passengers unless they are delivered to it by the other line, and always to the extent of the delivery the one line controls the transportation of the passengers of the other. Of course, what was meant is such control over or controlling interest in the connecting company as to vest the defendant company with power to secure transportation over the connecting line and to make it its duty to see that such transportation is effectuated.

But this, however, is merely in passing, for respondent makes full concession that the law is as above stated, but insists that the evidence, though in conflict, establishes such an interest and control by the Kimball Company in the Yukon Company by the agreement heretofore commented on as made it its duty to see to and secure the transportation of the passengers from St. Michael to Dawson. Upon this turns the whole case, and we are of the opinion that to establish this proposition there is a signal failure of evidence. Indisputably the ticket issued by the Kimball Company to plaintiff and accepted by him established the contract between the parties. Civ. Code, § 2176; Boglan v. Hot Springs R. R. Co., 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290. At the time of the issuance of this ticket, the Kimball Company had merely been substituted for the California Company, and its duty to the plaintiff was limited by the termination of its voyage to St. Michael. As before pointed out, plaintiff himself testifies that the Kimball Company informed him that it was assuming the contracts just as they had been made with the California Company. He testified, further, that, when he received the ticket, he knew exactly what arrangement had been made for his river transportation. Respondent not only admits, but insists, that the measure of the defendant's liability is fixed by the terms of the last contract made by Zadig for the Yukon Company with the Kimball Company. The whole weight of respondent's argument is brought to bear upon the proposition that, under this oral agreement as testified to by Zadig, the Kimball Company became "jointly" interested with the Yukon Company in the enterprise of carrying passengers and freight from San Francisco to Dawson, and therefore became liable to this plaintiff so to do. Great reliance is here placed on the testimony of Zadig, and italicized extracts are made therefrom. We will quote from Zadig's testimony the statements upon which respondent relies: "The verbal agreement we had with J. S. Kimball was *we were jointly going together.* He was going to take us to St. Michael, the Dawson City, I mean, and whatever passengers and freight money was received between Dawson and San Francisco *we were to divide jointly, and the returns from going up and coming down to San Francisco, both ways, were to be divided among ourselves, share and share alike.* The Dirigo was substituted under the arrangement that we should go in jointly. We entered into these arrangements after these original people, the Troy people [California Company], had failed to perform their conditions contained in the charter party, and then, *when Mr. Kimball saw that we could not carry that out, he made a new proposition to us to go in jointly, he take half and we half. The agreement was made with Kimball, fully two weeks or a little more before the Dirigo sailed. We made an entirely new deal, if you want to call it that way, with Kimball, and it was considered the joint account that he takes half and we take half,* which really was more advantage to him than to us, because it cost more from St. Michael to Dawson. He had the best of the bargain, if he would have had the boat gone up there, because the Dawson trip was the most expensive one. The facts are that we made a new arrangement. I must have found out that there was not enough money to go away, otherwise I needn't to make any different arrangements. Why should I make an arrangement which is poorer than—make an arrangement not as good—a new one not as good as the old one? There must have been some reason for it. A man never switches from a good thing to a bad thing unless there is some reason. The arrangement must have been made because we could not help ourselves. I understood that we were to divide equally the passage and freight money, after the payment of the towage and demurrage bill. We were to get 50 per cent. instead of 55." When all of Zadig's testimony is read, it is made apparent beyond peradventure that the only difference between the written contract and the amended oral contract was that the Kimball people were to receive 50 per cent., instead of 45, and the reason for this is fully explained as occurring because of the delays which the Yukon people had occasioned in the sailing of the Dirigo and because of the additional fact that they had not produced for that vessel the number of passengers and the amount of freight which they had promised. Such being the case, it is manifest that there was no more of a "joint" enterprise in a legal sense under the division of 50 and 50 per cent., than there was under the earlier agreement when the division was 45 and 55 per cent. It is as plainly apparent that throughout his testimony, where Zadig uses the word "jointly" he means "equally."

It follows, therefore, that, treating the ticket as the measure of defendant's obligation, it bound itself nothing more than the transportation of plaintiff to St. Michael, which duty it fully performed, under conditions all known to plaintiff at the time he accepted the ticket. If, however, reliance be placed by respondent upon the proposition that defendant, by contract with the Yukon Company, obtained a control over its lines and thus imposed upon itself a duty to its passengers to see that they were transported to Dawson, then it must be said that the evidence totally fails to establish such an agreement and control. Without Zadig's testimony the case of plaintiff in this respect fails utterly, and Zadig's testimony, as has been shown, is entirely inadequate to support this contention.

This conclusion renders unnecessary any consideration of the other propositions advanced by appellant, and, for the reasons given, the judgment and order appealed from are reversed.

We concur: McFARLAND, J.; ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.; SHAW, J.

152 Cal. 162

STEWART v. STEWART. (S. F. 4,620.)

(Supreme Court of California. Oct. 3, 1907.)

1. APPEAL—REVIEW—APPEAL ON PLEADINGS, JUDGMENT AND FINDINGS.

Where an appeal is presented upon the pleadings, findings, and judgment, the only question for decision is whether the findings of law can be sustained upon the facts as found.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2867.]

2. LIMITATION OF ACTIONS—COMPUTATION OF PERIOD—ABSENCE FROM STATE.

Under Code Civ. Proc. § 351, providing that if, after a cause of action accrues against a person, he departs from the state, the time of his absence is not a part of the time limited for the commencement of the action, a person so leaving the state cannot have reckoned in his favor the time of any secret or fraudulently contrived visit to his former residence; but, where he returns openly, the statute runs against the claim during his stay, although the creditor does not know of his presence before his departure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 465.]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Charles E. Stewart against Tassey Stewart. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

M. E. Sanborn and E. D. Edwards, for appellant. W. J. Tinnin and M. K. Harris, for respondent.

BEATTY, C. J. This is an action commenced August 2, 1905, upon a promissory note of the defendant for $400, bearing interest at the rate of 1½ per cent. per month, dated June 1, 1874, and by its terms due and payable 90 days after date. Plaintiff recovered a judgment for $2,680, from which the defendant appeals.

One of the defenses to the action was the limitation prescribed by section 337 of the Code of Civil Procedure, with respect to which the superior court made the following findings: "(4) The court further finds that from the date of the making and delivery of said note on the 1st day of June, 1874, continuously to the 26th day of April, 1878, defendant was in, and remained in, and was a resident of, the state of California; that on said 26th day of April, 1878, defendant for the first time left said state of California, and on said last-named date defendant, for the first time, went to the state of Oregon, and has ever since been, and now is, a resident of the state of Oregon; that on several occasions since the 26th day of April, 1878, defendant left his home in the state of Oregon and visited the state of California, and remained in the state of California for varying periods, as follows, to wit: Defendant came to California on the 13th day of December, 1887, and remained until the 3d day of February, 1888; defendant came to California December 20, 1891, and remained until January 28, 1892; came to said state on the 28th of November, 1895, and remained until January 2, 1896; came to said state January 1, 1897, and remained until January 21, 1897; came to said state December 8, 1900, and remained until December 29, 1900; came to said state January 21, 1901, and remained until January 28, 1901; came to said state February 21, 1901, and remained until February 27, 1901; came to said state June 24, 1904, and remained until July 12, 1904; that the foregoing are all the visits that said defendant ever made to California after his departure therefrom in 1878. Said visits were not surreptitious or secret, and were all, except the visit of February, 1901, made to the home of defendant's mother (who was also plaintiff's mother), about three miles from Yuba City, and during all of the time, up to the ——— day of December, 1890, plaintiff resided in Colusa county, about 35 miles from Yuba City, and from said last-named date, up to the present time, plaintiff resided in Fresno county, some 200 miles from Yuba City, and there was no communication by rail, or water, or telegraph between Yuba City and the place of plaintiff's residence in Colusa county while plaintiff resided in Colusa county. None of said visits of defendant to the state of California were known to plaintiff at the time such visits occurred, and plaintiff only learned of such visits after they had been concluded, and it is not true that all or any of said visits might have been known to plaintiff with the exercise of ordinary diligence on plaintiff's part. Said note sued on herein was made near Yuba City, in Sutter county, Cal., and there were, during all of said time, friends, acquaintances, and relatives of plaintiff and defendant residing there. (5) Said cause of action is not barred by the provisions of section 337 of the Code of Civil Procedure."

As the appeal is presented upon the pleadings, findings, and judgment alone, the sole question to be decided in the absence of the evidence adduced at the trial is this: Can the general conclusion stated in the fifth finding be sustained in the face of the specific facts established by finding 4? This depends altogether upon the proper construction of section 351 of the Code of Civil Procedure, which provides: "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not a part of the time limited for the commencement of the action." It will be seen that, if the defendant is allowed a deduction of the aggregate time of his various visits to his mother in Sutter county, the difference between the time of his actual absence from the state and the period elapsing between the maturity of his note and the commencement of the action exceeds by more than two months the four years required to bar a recovery, and his defense is complete unless section 351 is to be qualified by construction as plaintiff contends it must be qualified. His contention is that, when a person against whom a cause of action has accrued departs from the state and takes up his residence beyond its boundaries, he is, within the meaning of said section, continuously absent from the state, notwithstanding occasional visits to his former place of residence, unless his creditor knows of his return, or by the exercise of ordinary diligence could discover it, in time to commence an action and secure service of summons. If this is the true meaning of the statute, the conclusion and judgment of the superior court are free from error; otherwise not. Appellant contends that the cases of Rogers v. Hatch, 44 Cal. 280, and Watts v. Wright, 66 Cal. 202, 5 Pac. 91, are directly in point against this construction of section 351, but we think this is hardly true. The only question necessarily involved in either of those cases was whether the actual absences of a defendant from the state were to be aggregated against him notwithstanding his occasional presence here for temporary purposes, and the decision that the time of his absence was correctly computed by that method is not necessarily inconsistent with a denial of his right to the aggregate time of his occasional visits to his former residence for the purpose of barring the action. All that can be said of those decisions is that they gave the plaintiff the full benefit of the terms of the statute. It does not necessarily follow that he may not have the benefit of a construction which amplifies the express terms of the statute if there are considerations upon which it may be fairly inferred that such was the intention of the Legislature. The respondent insists that there are such considerations, and cites us to a number of decisions which he contends support his views. The only decision of this court to which he refers is Palmer v. Shaw, 16 Cal. 98. But that was a case arising under the first clause of the section in which the only question was: When did the defendant, who was absent from the state when the cause of action accrued, return to the state? It was held that he returned when he came here openly and to the actual knowledge of the plaintiff. It does not follow that it would not have been held that he had returned within the meaning of the statute, although the plaintiff had not known it. Neither do any of the cases cited in the opinion of the court go to the extent of holding that the return must be actually known to the plaintiff, or, if not actually known, that he could have known by the exercise of reasonable diligence. The extent to which they go is that the return must not be secret or clandestine, or fraudulently contrived for the purpose of setting the statute in motion, and the visit must be sufficiently prolonged to enable the plaintiff by the exercise of reasonable diligence and proper means, not to discover the presence of the defendant when he had returned openly and without any fraudulent intent, but to commence his action and secure the service of process. Several of these cases, it is proper to observe, were decided partly upon the consideration that, when the statute was once set in motion by the "return" of the defendant, it continued to run notwithstanding his subsequent departure from the state, a consideration weighing very strongly in favor of the requirement that the return of the defendant should be actually known to the plaintiff in time to enable him to secure service of process. Our statute is in this respect far more favorable to the creditor, and warrants a correspondingly liberal construction in favor of the defendant as to what constitutes absence from the state. In view of the fact that we are now called upon for the first time to construe section 351 with reference to this point, we are unwilling to go further than to say that a person departing from the state after a cause of action has accrued against him cannot have reckoned in his favor the time of any secret, clandestine, or fraudulently contrived visit to his former residence for the purpose of ascertaining the time of his absence from the state. But if he returns openly, long after the action would be barred but for his absence, and especially if, as in this case, his return is not only open and unconcealed, but his visits repeated and prolonged, the fact that the plaintiff has not learned of his presence here before his departure is immaterial.

It follows that the conclusion of the superior court that the action was not barred was erroneous.

The judgment is reversed, and the cause remanded with directions to enter judgment for defendant on the facts established by finding 4.

We concur: HENSHAW, J.; McFARLAND, J.; SLOSS, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.

(152 Cal. 99)

REEVE v. COLUSA GAS & ELECTRIC CO.

(Sac. 1,128.)

(Supreme Court of California. Oct. 1, 1907.)

1. Appeal—Review of Evidence.

Where a question of fact is determined on conflicting evidence in plaintiff's favor, and a new trial is refused, the Supreme Court on appeal is bound to consider as true all the evidence in favor of plaintiff, as well as all reasonable inferences that may be deduced therefrom, and, if two or more inferences may reasonably arise, to take that most favorable to plaintiff.

2. Master and Servant—Injuries to Servant—Knowledge of Danger—Question for Jury.

Evidence considered, and *held*, that plaintiff, an electric lineman, who was injured by contact with live wires, was not charged with knowledge as a matter of law, nor as an inference of fact, that the wires were charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1110-1117.]

3. Same—Exceeding Instructions.

Plaintiff, an experienced electric lineman, was given a general order to assist in transferring a transformer from one pole to another. He had been informed that there was necessity for haste, and after he had attached the cross-arm on the pole, ready to receive the transformer, he saw his fellow servants on the ground getting ready to throw to him the rope necessary to hoist the block and tackle to be used in raising the transformer to its place, and also saw the foreman take the cart containing the transformer and run it up under the pole. *Held*, that plaintiff was not negligent in exceeding his instructions in proceeding at once to the top of the pole to attach the pulley to hoist the transformer without special instructions, which he was attempting to do when he was burned by a heavily charged wire; plaintiff being ignorant of the fact that his foreman intended to delay the raising of the transformer until after the lunch hour.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 778-788.]

4. Same—Duty of Master—Contributory Negligence.

An experienced electric lineman was not negligent, as a matter of law, in working near wires which he did not know were charged, without inquiry as to the current of electricity; it being the duty of the electric company to use reasonable care to so control and manage the operation of the system and the place where plaintiff was put to work that the wires should be free from dangerous currents under the company's control while the work was in progress, or to give plaintiff necessary warning and instructions to enable him to avoid the danger, in so far as it was reasonably possible and compatible with the nature of the work.

5. Same—Fellow Servants.

The defense that plaintiff was injured by the negligence of his fellow servants cannot be invoked, unless pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 857.]

6. Appeal — Review—Specification of Error.

Where there was no specification that the evidence was insufficient to show that the negligence which caused plaintiff's injury was that of the principal, and not plaintiff's fellow servants, whether plaintiff's foreman, with respect to the duty to turn off the electric current, by which the injury occurred, or to warn plaintiff of the danger, was his fellow servant, could not be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3086-3089.]

7. Damages — Personal Injury—Excessiveness.

Where plaintiff, an electric lineman, was severely burned through defendant's negligence by a heavily charged electric wire, and suffered and would continue to suffer indescribable pain in consequence of the injury, a verdict of $30,000, sustained by the trial court, will not be set aside on appeal as excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 372-396.]

McFarland, Henshaw, and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Action by Frank Reeve against the Colusa Gas & Electric Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, defendant appeals. Affirmed.

Garret W. McEnerney, W. B. Treadwell, Seth Wellington, J. W. Goad, and William M. Pierson, for appellant. Garber, Creswell & Garber, J. L. Geary, Jr., and Milton Shepardson, for respondent.

SHAW, J. This is an action to recover damages caused by personal injuries. There was a verdict and judgment in favor of the plaintiff for $30,000. A motion for a new trial was denied, and from the judgment and order defendant appeals.

The complaint avers that the plaintiff, a lineman in the employ of the defendant, engaged in the construction of an electric system for the distribution of electric light and power to the city of Colusa and its inhabitants, was directed by the defendant to ascend one of its poles, situated at Fifth and Jay streets, in said city, and to attach thereto a cross-arm and transformer; that at the top of the pole, 14 inches above the place where the cross-arm and transformer were to be affixed, there were certain wires attached for use in carrying a current of electricity and constituting a part of said system; that about the time plaintiff, in obedience to said directions, ascended said pole and began said work, the defendant, without plaintiff's knowledge, caused a heavy current of electricity to be turned on and transmitted through said wires, making them very dangerous, and making the place where the plaintiff was so set to work a very dangerous place; that defendant failed and neglected to inform plaintiff that said current was turned onto said wires, or to give him any warning of the danger therefrom; that plaintiff did not know that the electric current had been turned on, or was being carried through said wires, or that they were in a dangerous condition, but believed them to be free from such current and harmless; that while so engaged at such work plaintiff was likely to come in contact with said wires; and that, without fault on his part, he did come in contact therewith, received a heavy charge of said electricity, and was very greatly injured thereby, particularly describing his injuries.

It is to be noted that it is not claimed that the plaintiff was not fully aware of the fact that an electric shock would inflict great injury and that it was highly dangerous to get in contact with the wires when charged with an electric current. The evidence shows that he had full knowledge of that danger, and also that the defendant had informed him of the fact and warned him not to touch a live wire. He freely admitted all this. The neglect of which plaintiff complains is the failure of the defendant to inform him that the wires near which he was set to work were then charged with electricity. The answer makes a complete denial of all the facts charged. Upon the trial, however, it was not disputed that the current was turned onto the wires in question a short time before plaintiff was set to work on the pole. The claims of the defense are, first, that the plaintiff, though not directly informed of the switching of the current to the wires in question, had knowledge of facts which, in connection with the warnings which were given him, were sufficient to put him on inquiry, and charge him with contributory negligence if he failed to apprehend that the current was on and to act accordingly; second, that the instructions given him by the defendant went no farther than to require him to affix the cross-arm, which he did in safety, that in subsequently proceeding to fasten the pulley to the top of the pole, nearer the wires, preparatory to raising the transformer therewith, he was acting voluntarily, without instructions from defendant, that no duty was cast on defendant to caution him as to a danger which it did not direct him to incur, and that it is not liable for the injury from such voluntary exposure; third, that as the plaintiff confessedly knew of the danger attending proximity to live wires, he was guilty of negligence if, upon going near a wire in performance of his duty as a servant, he failed to make due inquiry and ascertain beforehand that the wire carried no electric current; fourth, that the danger which caused the injury was one of the ordinary risks of his employment, assumed by the plaintiff himself, for the consequences of which the defendant is not liable; fifth, that the turning on of the current and the failure to tell the plaintiff thereof were the acts of a fellow servant, for which the defendant is not responsible; and, sixth, that the damages are excessive.

1. At the time of the injury the defendant's system of wires was divided into two separate circuits, usually called "Phase A" and "Phase B," respectively; one carrying a positive and the other a negative current of electricity, and one serving one part of the city of Colusa and the other the remaining part thereof. The system had then been in operation but a short time. The wires from which the plaintiff was injured were those of "Phase A." It is conceded that Reeve knew that the current had been turned onto the wires of "Phase B," but there is no evidence that he was ever informed that it was also turned on to those of "Phase A," where he was then at work. Did the facts known to him impute to him such knowledge of the working of the system that his failure to apprehend that the wires of "Phase A" were also charged was contributory negligence on his part? This is a question of fact, to be decided in the first place by the jury. That decision was in favor of the plaintiff, and the trial court refused a new trial. Hence this court cannot reconsider any conflicting evidence to determine how it ought to have been decided. We are bound to consider as true all the evidence in favor of the plaintiff, as well as all reasonable inferences that may be deduced therefrom, and, if two or more inferences may reasonably arise, to take that most favorable to plaintiff. The evidence must be considered in the light of these rules.

For some months prior to the injury the defendant had been constructing its electric system for Colusa. Reeve had been assisting in the work during the entire period of its construction, first as a laborer and then as a lineman. He had had some previous experience as a machinist and in working on an electric plant, and at the time of the injury he had a general practical knowledge of the constructive work of such a system, so far as the lines, poles, and apparatus connected with and attached thereto were concerned, and considerable knowledge of the practical operation and effects of electricity. The city had been lighted from defendant's system for about three weeks at the time of the injury, which occurred on September 25, 1901. Up to September 20th the current had been used only at night, for lighting the city. On or about the 20th a motor was installed in the Sun printing office, to which power was supplied in the daytime. So far as Reeve knew, or had been informed, the Sun motor was situated in the district exclusively supplied from "Phase B." On the morning of the accident, Reeve, with one Putnam, also a lineman, and one Howard, as foreman, set out with the purpose, announced by Howard then and on the previous day, to take down a transformer from a pole in Chinatown, on the "Phase B" circuit, carry it to the corner of Fifth and Jay streets, and there put it up on a pole carrying the wires of "Phase A." They proceeded to the Chinatown pole, took down the transformer, and put up a smaller one in its place; the current to the Sun office being turned off for their safety while so engaged, as Reeve knew. As soon as this was done Putnam was told by Howard to go to the power house and turn the current on, so that it could be used at the Sun office. Reeve heard this order, understood its purpose, and saw Putnam depart to obey it. Reeve then took the large transformer and the tools in a handcart to the pole at Fifth and Jay streets. At the top of that pole were some wires of "Phase A." In proceeding with the work of attaching the transformer, he came in contact with these wires and was injured by the current. A few days previously, unknown to him, the wires of "Phase A" had been extended to the Sun office, and Putnam had turned the electric current onto both phases.

On the vital question whether or not Reeve should have known that Putnam would turn on both phases, or was justified in believing, as the evidence shows he did believe, that it was turned on "Phase B" only, the facts known to him and which are to be considered as imputing to him such knowledge, if he is to be so charged, were as follows: During the few weeks that the current had been used for lighting the city it had been the invariable custom, when turning on the current for lighting, to turn on both phases at the same time. The wires of "Phase A" ran to one part of the city and those of "Phase B" to another, so that, in order to light the whole of the city, it was necessary to turn on both phases. There is no evidence that Reeve knew of any other reason for turning on both phases, and we must assume that the jury determined correctly that he knew of no other reason, unless such knowledge is implied by law. On September 14th, by the fall of a hammer on his head, he was injured to such an extent that he did not work until September 20th, and during that time he did not know of the progress of the work nor of the customary operation of the system. On September 14th no wires were up along the street on which the Sun office was situated, except those of "Phase B," and there is no evidence that he knew of any intention to extend the wires of "Phase A" thereto. While he was laid off work the wires of "Phase A" were, without his knowledge, extended along the street on which the Sun office was situated and connected with the Sun motor. In taking the detached transformer from the Chinatown pole to the Fifth and Jay street pole, he passed under those wires of "Phase A" while going from Sixth street to Fifth street, and, if he had looked up, he would have seen them, and by further examination he could easily have discovered that they extended down Sixth street to the Sun office. He knew the danger from live wires, and had been instructed by the defendant's manager never to work around wires which were carrying the current, and while taking down the transformer from the Chinatown pole, although the current was off, he was told to be careful of the current. He also knew that in some parts of the defendant's system, though not at the place of the injury, the wires of the two phases were run along the same poles and were close together for a considerable distance, and that, if a live wire touched a dead one and the insulation was not good, the dead wire might be infused with electricity. It had always been the custom of the defendant to turn off the current while men were connecting or disconnecting transformers.

These facts do not warrant the conclusion, as a matter of law, or as a necessary inference of fact, that Reeve should have known that the current was on the wires at Fifth and Jay streets at the time he was injured. There was evidence on behalf of the defendant to the effect that when electricity is operated in two separate currents or phases, carried on different wires, it is necessary to the economical management of the system and to the proper "balancing" of the currents that both phases be turned on at the same time, but that they would work separately, though not so well, or so economically. Reeve testified that he had no knowledge of this fact. It is not, in the present state of scientific knowledge, a fact so generally known that it has become a matter of common knowledge of which all must take notice, and hence Reeve cannot be charged with such knowledge as matter of law. The verdict implies that the jury believed his testimony that he did not know it, and their decision is conclusive here. The custom, during the brief period of the operation of the system, of turning on both phases to light the city, was, to one of his knowledge and information, completely explained by the fact that it was necessary to do so for that purpose, else one district of the city would be illuminated and the other dark. No scientific or special knowledge was brought home to him, which required him, in the exercise of reasonable prudence, to inquire for other reasons for the custom. At the time he passed along the street under the wires of "Phase A" running to the Sun office, he was propelling a handcart loaded with the large transformer and the tools and machinery for attaching it to the other pole. It does not appear that anything occurred to cause him to look upward, or to call his attention to the wires overhead. It was for the jury to say whether or not he should have observed them, and should have followed up the inquiry to ascertain what current they carried and where they led, and the jury has decided in his favor. Any person not informed in regard to the scientific operation of electricity might reasonably suppose that the motor at the Sun office was operated by a single phase, and that, if it was located (as Reeve supposed) upon one of the phases only, it would be operated by that phase alone; and having been ordered to work upon a pole carrying wires of the other phase only, without warning to the contrary, it was not unreasonable or necessarily negligent for Reeve to believe that those wires were not at that time charged with electricity. Under all the circumstances, it was, at most, a question for the jury, and the verdict concludes us.

The crossing of the wires of the two phases was a thing which might occur at any moment. It would be very infrequent unless the defendant was negligent. The danger arising from the fact that it might occur at a time that would afford no opportunity for defendant to warn him was one of the risks of his employment. 20 Am. & Eng. Ency. of Law, pp. 57, 119. It is not claimed that any means existed, or had been furnished to Reeve, whereby the wires could be tested by him before going close to them. It is true that, if he had been sufficiently alarmed at the possibility to have made inquiry about crossed wires, he might, in guarding against a nonexistent danger, have received warning as to the real danger. But the failure to make such inquiry concerning this remote danger can scarcely be deemed, as matter of law, such contributory negligence concerning another danger of which defendant negligently failed to inform him as to defeat his action for injuries arising from the latter. Other facts were proven by the defendant which, if known to Reeve, would possibly have been sufficient, in connection with the facts above stated to be known to him, to have informed him that the current would be turned on both phases. It was shown that the Sun motor was a two-phase motor, made to be worked by both phases at once; that the wires of "Phase A" had been extended to the Sun office, as stated; that that motor, after installation, had been uniformly operated by both phases at once; and that the custom of turning on both phases to light the city was principally due to the necessity of doing so to "balance" the currents and thus secure economy and efficiency, and not simply for the purpose of lighting all parts of the city. But he was ignorant of all these things. He believed that a motor could be run as well by one phase as by both. He is not shown to have had knowledge or information which, as matter of law or proof, conclusively demonstrates that he was negligent in failing to perceive that the current would be turned on both phases to operate the Sun motor, or in assuming, without further or special inquiry, that the wires at the top of the pole at Fifth and Jay streets, which he knew belonged to "Phase A," were dead.

It is suggested that the wires were themselves a sign of danger, which made it negligence for him to work near them without inquiry as to their condition. Inasmuch as it had been the custom always to turn off the current when men were connecting the transformer, and he had been put to work at that operation in close proximity to the wires, the jury were authorized to conclude that he was not negligent in assuming without further inquiry that the wires were dead, as he actually believed them to be. It cannot be said that he had good reason to believe or that he knew that the Sun office was supplied from "Phase A." While working on the Chinatown pole, which was on "Phase B," he knew the current was turned off those wires to allow him to work in safety, and that it was to be turned on at once for the use of the Sun office. This was practically direct information to him that it was supplied from that phase, and, if he did not know that the concurrent use of the two phases was necessary or customary, he would have no occasion to suspect that the other phase was also used there. The proposition that the evidence of contributory negligence in this respect is such as to require a reversal of this judgment can only be supported by a disregard of the rule that this court will not weigh conflicting evidence. In order to reach such conclusion, this court must proceed to consider the weight of the evidence, and determine whether or not the jury decided according to its preponderance—a thing which it has neither the right nor the lawful power to do.

2. The claim that he exceeded his instructions is also untenable. It is true that, after Reeve had affixed the cross-arm, he was not then specifically or expressly directed to prepare for hoisting the transformer. But, under the circumstances shown, an express order was not necessary. He was told a day or two before, and also on that morning, that he was to assist the others in removing the transformer from the Chinatown pole and affixing it to the pole at Fifth and Jay streets. As a lineman, his part of such work consisted in climbing the poles, detaching and attaching the transformer, and affixing the necessary cross-arm on which to place the transformer. After affixing the cross-arm, the next act in the process was to attach a pulley at some point on the pole far enough above the cross-arm to allow the hoisting of the transformer to the cross-arm by means of a rope through the pulley. To attach the pulley at the proper place, it was necessary to climb the pole to the top, where the electric wires were strung. Being a skilled and experienced lineman, Reeve knew all these details as well as if they had been expressly mentioned. The general order was, to him, the equivalent of a specific instruction as to each detail. He had been told by the foreman that there was haste required to get the transformer in place in time to furnish the electricity through it for the Catholic fair soon to be held near by. After the cross-arm was attached, and while he was near the top of the pole, he saw the other men on the ground below getting ready to throw to him the rope necessary in hoisting the block and tackle thereafter to be used in raising the transformer, and he also saw the foreman take the cart containing the transformer to run it up under the pole. Howard had told plaintiff before that he wanted to get the transformer up as soon as he could. In view of all these circumstances and statements, as a diligent and faithful servant he would be required to assume, or at least would be justified in assuming, as he did, that the transformer was to be immediately hoisted, and in preparing to do so by ascending the pole far enough to attach the pulley to it. If he had been slow to perceive these preparations, and dilatory in his part of the work, awaiting a specific direction for each act in the process, he would have been justly chargeable with inefficiency and neglect of duty. It would be strange doctrine to hold that the promptness of a servant in going forward to perform the well-known parts of a task he is set to do would relieve the master from his duty to furnish a safe place and warn the servant of the dangers of the situation to which his duty calls him. The master expects and is entitled to the exercise by the servant of reasonable zeal to see and do what is to be done by him in the course of the work in which he is engaged. Expecting this, he must anticipate it in the performance of his own duty to the servant, and his warnings and protection must extend to all dangers which the servant will usually incur in the exercise of such reasonable zeal and diligence, as are not known to the servant or obvious to ordinary observation, and which arise from causes controlled by the master. The plaintiff's diligence did not go beyond this ordinary and reasonable diligence to which he was bound. Under all the circumstances of the case the master cannot be allowed to excuse himself on the ground that specific directions to attach the pulley were not given by Howard to Reeve. The foreman, it is true, had decided to postpone the raising of the transformer until after the lunch hour; but he had said nothing to that effect, and he was proceeding with his part of the work as if he expected to raise it immediately. The plaintiff was, therefore, authorized to assume that he also was expected to proceed as he did.

3. There is no established rule of law to the effect that a servant, when directed to work near wires of an electric system controlled by the master, must, at his peril, ascertain whether or not the current has been regularly turned on at the time. Such a rule would tend to embarrass the master in the work by causing continual delays while the servant was prosecuting his inquiries. In such cases it is the duty of the master to use reasonable care to so control and manage the ordinary operation of the system and the places where the servant is put to work that the wires shall be free from dangerous currents under the master's control while such

work is in progress, or to give the servant warning of the danger and all instructions necessary to enable him to avoid them so far as may be reasonably possible and compatible with the nature of the work. If the master gives the order to work at a particular place and gives no warning of danger, the servant may rightfully assume it to be free from danger from causes under the master's control, and which he could remove with reasonable care and effort, and which are not apparent to the servant, after such observation as the circumstances reasonably require. 20 Am. & Eng. Ency. of Law, pp. 73, 88; Silveira v. Iverson, 128 Cal. 192, 60 Pac. 687; Dyas v. S. P. Co., 140 Cal. 309, 73 Pac. 972. Although he knew the dangerous character of live wires, Reeve was not, as matter of law, negligent, under the circumstances, in working near them without inquiry in regard to the current of electricity. It was a question properly submitted to the jury. This also disposes of the fourth proposition; that is to say, that the danger was one of the risks of the plaintiff's employment, which he assumed himself and for which the master is not liable.

4. The answer does not aver that the persons whose negligence caused the injury were fellow servants of plaintiff. This defense cannot be invoked, unless it is pleaded. Layng v. Mt. Shasta Co., 135 Cal. 143, 67 Pac. 48; Peters v. McKay, 136 Cal. 73, 68 Pac. 478. There is no specification that the evidence is insufficient to show that the negligence which caused the injury was that of the principal and not of a fellow servant. For these reasons the question whether the foreman, Howard, was, with respect to the duty to turn off the current or warn Reeve of the danger, a fellow servant of Reeve, cannot be considered.

5. It is impossible adequately to describe the suffering and misery, past, present, and future, inflicted upon the plaintiff as a consequence of the injury. The verdict is large, the amount of damage was a question for the jury, subject to the supervision and correction of the trial court, and, having been passed by the latter without disapproval, it is not for us to say, under the circumstances, that it is excessive.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; BEATTY, C. J.; ALLEN, J.

We dissent, and adhere to the opinion heretofore rendered herein in department: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

NOTE.—SLOSS, J., being disqualified, ALLEN, J., one of the justices of the District Court of Appeal for the Second Appellate District, participates herein pro tempore, pursuant to section 4, art. 6, of the Constitution, and order filed September 18, 1907, pursuant thereto.

The following is the opinion in department:

HENSHAW, J. Plaintiff, a lineman in the employ of defendant, came in contact with an electric current upon defendant's wires, and received permanent and shocking injuries. He brought his action for damages for these injuries and recovered judgment. From that judgment, and from the order denying its motion for a new trial, defendant appeals.

The two principal contentions of defendant are that the evidence fails to establish any negligence on its part toward its employé; and, second, that the evidence affirmatively establishes the employé's contributory negligence. The two propositions may be considered together on the following statement of facts: Plaintiff, while not a scientific electrician or electric engineer, was a skilled and experienced lineman. He had entered the employ of the defendant company, and had assisted in the general work of erecting poles, running wires, and placing transformers. He had been in the employ of the defendant before it actually commenced its business of furnishing electric power and light. He was familiar with the construction of the entire system. He understood the difference between direct and alternating currents. He was familiar with the construction and use of the switchboard. He understood generally the nature, and was familiar with the workings, of the system. He had previously been employed by the San Jose Railway Company as electrician and machinist, and had been injured by coming in contact with a live wire. He knew when a wire had become infused with electricity. He had been called into consultation with reference to the apparatus and machinery in the substation generally. He was able to turn on or off any current, if so instructed. He was acquainted with and understood what was meant by "Phase A" and "Phase B." He had assisted in constructing "Phase A" and "Phase B," and understood the details. He was quite familiar with the methods of operating the power and knew when it was turned off and on. He was injured on the 25th day of September, 1901. About ten days before this date, while at work, a hammer fell on his head and he temporarily "laid off" from the 14th to the 20th of September. On the 20th of September he returned to work, and spent the next five days building a switchboard. At the time he was injured by the falling of the hammer three currents were in use by the company: A current for supplying arc lights, carrying a voltage of 110; and two alternating currents ("Phase A" and "Phase B") for incandescent lights, carrying a voltage of 2,300. These currents for the incandescent lights were known as "primary currents." "Phase A," "Phase B," and the arc light current were each two-wire currents; that is to say, two wires for each of the three currents ran from the substation through the town of Colusa. It appears that in the economical administration of the system it was necessary that the current should be turned on and off "Phase A" and "Phase B" together. The current upon "Phase A" or "Phase B" could be cut off, and the one current used independently of the other; but this was never done, as it impaired the efficiency of the service and of the machinery. In practice, therefore, these two currents were always turned on or cut off together. Plaintiff knew this practice, knew that such was the "custom" of the company, but did not understand scientifically why the practice was adopted. Respondent's witness Putnam furnishes additional proof of this practice in the following language: "Referring to the custom of the defendant company, it was customary to turn on both phases when we turned on one; an unvarying custom so far as I know. I never heard of an instance when one phase of an electric and light power system was turned on when another corresponding phase was not turned on to balance it, except in cases when we wanted to test some particular piece of work. The customary meaning of the phrase 'to turn the current on,' the custom of the electric company, of its foreman and manager and as the term is used with all the employés, that would mean to turn all the currents on of the two phases; and the customary meaning of the phrase 'to turn the current off' would be to turn the current off both phases." There was but one occasion within the plaintiff's knowledge when the two currents of "Phase A" and "Phase B" were not operating concurrently, and upon that occasion it was plaintiff himself who cut off one of the phases. He testifies: "There was one time when one of the phases was turned off and the other remained on. On the night when Hamburg's saloon burned, at the fire alarm, I went down and turned out the 'B' phase. I know of no other time." Plaintiff further explains why upon that occasion he turned off the "B" phase. The firemen were working in close proximity to this phase and using a great deal of water, and he was afraid that some one might come in contact with the current. In substantiation of this custom of the defendant company, plaintiff further testifies: "I do not remember that I ever heard an order to turn on a specific current of the power and light phases. I do not know of an order ever given in the town of Colusa to turn on one current."

Before the time of plaintiff's injury the defendant company had been supplying incandescent lights through Phases A and B to the town of Colusa. The service of the defendant to this time had been a night service. The currents were turned on between 5 and 6 in the afternoon and turned off before working hours the next day. While plaintiff was recovering from his injury, the printing office of the Colusa Sun took electricity to run a motor, and this electricity was supplied from Phases A and B. Plaintiff knew from his reading, and from conversation that took place upon the day of his accident, that the Colusa Sun was using electricity for power, and knew that electricity was supplied by defendant company from one of its phases, but did not know that it was supplied in conjunction by the two phases. During the time that plaintiff was ill from the effects of the blow of the hammer, the wires of "Phase B" had been carried into the office of the Colusa Sun, and the wires of "Phase A" had been extended from the pole on Fifth and J streets, where the accident occurred, to the same office and connected with the same motor. Upon the day of the accident, plaintiff, with Howard, the foreman, and Putnam, a fellow employé, had gone to Chinatown to take down a transformer connected with "Phase B," and substitute therefor one of lesser lighting capacity. Plaintiff's work as lineman was to climb the pole, make the necessary changes, and, with the assistance of the others, lower the old transformer and hook the new one in place over a cross-bar. This work was done, of course, while the current was off. Having been successfully performed, plaintiff testifies: "Howard and Putnam each called my attention to the fact that the power must be turned on as soon as the transformer was placed. I understood it must be turned on. Putnam got on a bicycle and went down to turn it on. I told him I was now ready for him to turn it on and started to climb down the pole. I understood that the power was to be turned on for the motor at the Colusa Sun office. I understood that a motor had been placed in the Sun office to operate their machinery in the printing establishment. I understood that it was to be operated in the daytime. At this time I did." It appears, therefore, that plaintiff knew, at least, that the Sun office was taking power in the daytime, and that the power had been turned on as soon as he had descended from the pole along which ran the wires of "Phase B." He knew, also, that at least the Colusa Sun was supplied with power by "Phase B," and he knew, also, the invariable practice of the company to turn the currents of both phases on at the same time. This indisputably was the knowledge which he took with him to Fifth and J streets—his next place of working. The pole at Fifth and J streets, where the accident occurred, carried the wires of "Phase A." They had, as has been said, been extended from that point on to the office of the Colusa Sun. The extension of these new wires was, of course, visible. Plaintiff reached the pole at Fifth and J streets, accompanied by Howard and Putnam. He climbed the pole as directed, to put another cross-arm 14 inches below the cross-arm which carried "Phase A," to which new cross-arm was to be hung the transformer which had been brought from Chinatown. This work could be, and was, performed with perfect safety, notwithstanding the fact that the current was on the wire of "Phase A" above.

It is important here to note just what was the particular work which plaintiff was at that time called upon to do, and the evidence is indisputable that his orders or directions went no further than the placing of the cross-arm. He testifies that, when he started from Chinatown to the pole on Fifth and J streets, "Howard asked if I had a cross-arm, and I answered, 'Yes.'" When he reached the spot he says: "I took what tools, then, that I needed, and went up the pole. The tools I took were a saw, brace and bit, wood chisel, hammer, pliers, connectors, and two screw-drivers—such things as I always carried, my belt tools—and proceeded up the pole to put on the cross-arm to hold the transformer." He further testified: "I next saw Howard and Putnam a few minutes before I was hurt. The cross-arm was up. Putnam sighted the cross-arm for me to see that it was level, and I put on the two braces. This was done after they were there. During the time after I had finished placing the cross-arm, Howard at no time instructed or directed me with reference to placing the transformer, or issued any instructions or directions at all. He said nothing to me in any way, simply went to work with the transformer; I knowing that was next to go on. He was in no mood to be questioned that day. Putnam said nothing to me with reference to placing the transformer." Howard testifies that, after finishing the work in Chinatown, he "told Reeve to go down to the corner of Roach's across from the armory and put a cross-arm up there." And, further, he testifies: "I can give no explanation or reason why plaintiff should have ascended to the top of the pole, based upon anything I had said to him or any order or direction. There was no occasion, need, or necessity for him to ascend to the top of the pole in order for him to place the cross-arm as I had ordered and directed him." And again: "I remember clearly the specific directions that I gave plaintiff with reference to the work he was to do on the pole on the corner of Fifth and J. I told him to put a cross-arm on that pole. I am positive I told plaintiff to put up a cross-arm, and that only." The cross-arm having thus been placed in position, plaintiff's own testimony is that, without any further direction, he climbed to the top of the pole, came in contact with the live wires of "Phase A," and received his injuries. He says: "I then climbed up the pole to take in the situation below me preparatory to fastening a rope and raising the transformer. By 'take in the situation' I mean the situation I saw below, and its position, and the transformer that he had there working with, and the position of Putnam, and what he as doing, and causing the hand-line to be thrown up."

From plaintiff's own testimony, therefore, it appears that of his own initiative, after having set the cross-bar, he climbed to the top of the pole to take in the situation, and was there hurt. He did this without any directions and without anything to prompt him so to do; for it appears that the transformer was not ready to be set in place, and that it was in the contemplation of Howard to have it set at the noon hour after the power had been turned off. But, conceding that plaintiff knew nothing of Howard's intention, still he did know the custom of the company invariably to turn on the two phases at the same time, and he knew also positively that the current in at least one of the phases ("Phase B") had been turned on to supply the Colusa Sun. Needlessly climbing into the wires to the top of the pole, and coming into contact with the live wires of "Phase A," under these circumstances, was, as matter of law, contributory negligence. True, he testifies, as anyone would testify, truthfully, that he would not have climbed to this dangerous position if he had knowledge that the current was running over those wires. But this statement cannot relieve against the undisputed facts. He was an experienced man, he did have knowledge of the uniform habit and practice of the company in regard to turning on the two currents, and the conclusion is inevitable that this knowledge had temporarily slipped his mind in a moment of forgetfulness. But for such forgetfulness the defendant company cannot be held responsible. There was no failure of duty upon the part of the employer. The plaintiff's knowledge, experience, and skill relieved the company from the necessity of giving warnings which, under other circumstances, it might have been its duty to give. As plaintiff himself testifies: "If I had known that both currents would have been turned on, I would have known that the wires on the pole where I was injured were live wires." And, again, having testified that upon one occasion he was warned, he says: "On no other occasion during my work for the company was I warned by any person representing the company with reference to being careful in working with live wires. I never had occasion to be warned." It appears, therefore, irresistible that, with full knowledge of the danger and risk of his employment, and chargeable with knowledge sufficient to warn him of the danger of climbing to the top of the pole, amongst wires which he should have remembered were probably carrying a current, he did this act either recklessly or in a moment of forgetfulness. Sad and deplorable as the consequences were to him, he alone, under the evidence, is responsible for them.

Certain preliminary objections of the respondent to the hearing of this appeal are without substantial merit. On the day after the verdict was rendered the attorneys for the plaintiff entered into a stipulation with the attorney for the defendant wherein defendant was given 30 days in addition to the time allowed by law within which to serve and file its notice of intention to move for a new trial, its bill of exceptions, statements, or motions in the matter of a new trial, and for the purpose of securing a new trial of the cause. The defendant's attorney construed this stipulation as giving defendant 30 days in addition to the time allowed by law within which to serve his notice of intention to move for a new trial, and also 30 days in addition to the time allowed by law after service of the notice of intention within which to serve the statement on motion for a new trial. The court heard the matter upon the papers and upon affidavits, and construed the stipulation in accordance with defendant's understanding. The stipulation was certainly open to this construction, and it was not error for the court so to have construed it.

The second objection urged to the hearing arises from the fact that counsel for plaintiff were brought before the judge to settle the statement without having received any notice from the clerk that the date had actually been appointed for the settlement. The statement of the case was served upon July 12th, the amendments served on August 5th, the statement and amendments delivered to the clerk for the judge on August 12th, and the settlement came on to be heard on August 18th. At the time of the settlement plaintiff's counsel made their objection that they had not been notified of the time fixed for the settlement. The court overruled this objection by an order made August 22d. The bill of exceptions was settled on the 19th of September, and filed with the clerk upon the 20th of September. The objection that the clerk did not notify counsel of the hearing is sufficiently answered by the fact that they were present thereat and made their objection to further proceedings. The objection is extremely technical, and it appears that they were present at the time set for hearing. It is not made to appear that they suffered in any substantial right by failure of the notice, and, moreover, their objection having been overruled upon August 22d, the bill of exceptions was not, in fact, settled until nearly a month thereafter. It thus appears that there was ample time afforded them for all purposes, and the irregularity impaired none of their rights. The court was, therefore, justified in overruling this objection.

For the foregoing reasons, the judgment and order appealed from are reversed.

We concur: McFARLAND, J.; LORIGAN, J.

6 Cal. App. 333

Ex parte BARGAGLIOTTI. (Cr. 53.)

(Court of Appeal, Third District, California. Aug. 30, 1907.)

1. Criminal Law—Evidence—Judicial Notice.

Judicial notice may be taken that the sheriff is the legal keeper of the jail of the county of which he is sheriff, and in that capacity is the custodian of all prisoners confined therein.

2. Habeas Corpus — Commitment — Sufficiency.

A judgment or "commitment" of a justice of the peace sentencing a person convicted in his court of crime to imprisonment in the county jail is sufficient, on habeas corpus, to warrant the sheriff in holding such person, notwithstanding it does not specify in the jail of what county he is to be imprisoned, and especially where the uncontroverted facts in the return to the writ show that such person is confined in the county jail, which is the only jail wherein the justice is authorized to imprison persons.

Habeas corpus on behalf of Victor Bargagliotti against J. K. Smith, sheriff. Writ discharged, and prisoner remanded.

W. F. Cowan, for petitioner. G. W. Hoyle, Asst. Dist. Atty., for respondent.

HART, J. The petition of W. F. Cowan, Esq., alleges that the prisoner is unlawfully restrained of his liberty by J. K. Smith, sheriff of Sonoma county. The principal point relied upon for the release of the prisoner is that the certified copy of the judgment of conviction and sentence, or the commitment, from which said sheriff derives his authority to hold said prisoner, does not "state or describe in what jail, or the jail of what county, said Victor Bargagliotti shall be imprisoned."

Bargagliotti, it appears, was arrested on a warrant issued by the justice of the peace of

Cloverdale township in the county of Sonoma, upon a complaint charging him with the crime of assault upon his wife. Upon his arraignment before the justice, the prisoner entered a plea of guilty to the offense charged in the complaint, and thereafter said justice pronounced upon him the following judgment or sentence: "* * * It is, therefore, ordered and adjudged that you, the said Victor Bargagliotti, as a punishment for the offense committed, be confined in the county jail for the period of 90 days." The title of the court is, as is usual in such documents, given in the certified copy of the judgment here, and is as follows: "In the Justice's court of Cloverdale township, county of Sonoma, state of California." There is also inserted therein, but not in the body of the judgment, the following: "Complaining witness—Katie Bargagliotti. Charge of Assault. Committed at Cloverdale Township." The contention on behalf of the prisoner is that the certified copy of the judgment upon its face shows that the justice of the peace, in imposing judgment upon the prisoner, exceeded his jurisdiction, because it does not appear therefrom to what particular "county jail" the prisoner was committed or sentenced; that, so far as it appears from such judgment, the prisoner might be confined in some "county jail" other than that in which the justice of the peace has jurisdiction to sentence him; that under said judgment said prisoner could be confined in any of the "county jails" of the state. It may be admitted that the certified copy of the judgment upon which the sheriff holds the prisoner is not as specific as it should be, and that the jail to which it is within the jurisdiction of the justice to commit the prisoner should have been specifically designated or described; yet the point involves technicality pressed to its utmost limit. The return of the sheriff discloses that he is the sheriff of Sonoma county, and that, as such officer, he has the prisoner in custody under and by virtue of the certified judgment to which objection is made. This court may take judicial notice of the fact that a sheriff is the legal keeper of the jail of the county of which he is sheriff, and in that capacity is, under the law, the custodian of all prisoners confined therein. It is therefore quite clear that, notwithstanding the fact that the "commitment" is somewhat indefinite as to the particular jail to which the justice intended to commit him, the prisoner is, nevertheless, and in truth and in fact, in the only jail to which the justice of the peace has the power and right to sentence any person convicted of crime in his court. Besides, we do not think it would do any very great violence to the rule that no presumptions are to be indulged in favor of the jurisdiction of "inferior courts" to hold, in a case where admittedly a justice of the peace has jurisdiction of the offense and of the person of the alleged offender, that a judgment or sentence in which the "county jail" to which the prisoner is committed is not particularly designated may be assumed to refer to the jail of the county for which alone the justice is authorized to exercise the duties of his office, for it is the only jail in which he has authority to imprison a person convicted of a public offense in his court.

We think the certified copy of the judgment, or "commitment," as it is sometimes termed, is sufficient to warrant the sheriff in holding the prisoner until the judgment against him is satisfied, and particularly does this appear to be so since, as we have seen, the uncontroverted facts set forth in the return to the writ show him to be in the proper custody and in the proper jail. It is no answer to our conclusion to say that, under the process by which the prisoner is detained, he could be taken to another county jail and there be kept until his term of imprisonment expired. There is no need of "crossing that bridge" until it is reached. If so improbable an event should happen to occur, the prisoner would have no difficulty in securing his immediate release from such unlawful restraint through the summary remedy sought to be invoked here. We can see no legal reason, from the facts as they are presented here, for ordering the release of the prisoner.

The writ is therefore discharged, and the prisoner remanded.

We concur: **CHIPMAN, P. J.; BURNETT, J.**

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6 Cal. App. 309

CRAGIE et al. v. ROBERTS. (Civ. 337.)

(Court of Appeal, Third District, California. Aug. 27, 1907.)

1. PUBLIC LANDS — CHARACTER OF LANDS — MINERAL OR AGRICULTURAL.

The decision of the land officers of the government in an adversary proceeding that certain land in controversy was mineral and not agricultural is conclusive on the courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 301.]

2. SAME — REMEDIES FOR FRAUD—CONSTRUCTIVE TRUST.

Complainants' grantor applied to purchase certain public land as agricultural, after which defendant's predecessors in interest filed on the land as mineral. In an adversary proceeding, the register of the land office found that the land was mineral and issued a patent to defendant's ancestor, at which hearing complainant's grantor, though knowing that certain of the testimony that the land was mineral was perjured, did not so claim, nor object that his witness to the contrary had been suborned, nor attempt to obtain other evidence as to the character of the land which was available. *Held*, that complainants were not entitled to have defendants declared constructive trustees of the land for their benefit on the ground that such decision was obtained by fraud and perjured testimony, without any claim that the patent was obtained through mistake or misapplication of the law by the officers of the Land Department.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 344.]

Appeal from Superior Court, Nevada County; F. T. Nilon, Judge.

Suit by Harold M. Cragie and others against Virginia L. Roberts, as administratrix of Edmund Roberts, deceased. From a judgment for defendant, complainants appeal. Affirmed.

Leon E. Prescott and Tyrell & Hennessy, for appellants. Eugene Aram and J. M. Walling, for respondent.

HART, J. This is a suit to secure a decree declaring certain property to be held in trust for the plaintiffs and to compel a conveyance to them of the legal title thereto. The complaint contains two counts, to both of which a general and special demurrer was filed. Said demurrers were sustained, and judgment entered dismissing the action. This is an appeal from said judgment.

The complaint states that in the year 1852, one Harrison McCharles, a citizen of the United States, over the age of 21 years, entered and settled upon and took possession of the N. W. ¼ of the S. E. ¼ and the N. E. ¼ of the S. E. ¼ of section 19, in township 16 N., range 8 E., Mount Diablo base and meridian, lying in Nevada county and embracing about 80 acres of land. Said property is alleged to have been at that time public land of the United States, open to the right of purchase from the general government under the provisions of the pre-emption and homestead laws. It is stated that on the 7th day of May, 1869, said McCharles filed in the United States land office at Sacramento his pre-emption declaratory statement for the purchase of said land. It is further alleged that in the month of May, 1868, one E. W. Roberts, for the purpose of defeating the issuance of an agricultural patent to said McCharles, and for the purpose of obtaining the title to said land in his own name, "fraudulently caused and procured divers persons to file mineral claims against said land, claiming the same to be mineral in character." The said parties filing such mineral claims, it is charged, at the instance of said Roberts assigned all of their rights, title, and interest in and to their said claims to said Roberts. McCharles thereafter (on the 16th day of July, 1895) filed an application in the United States land office at Sacramento for the issuance to him of an agricultural patent for said property under the provisions of the homestead laws of the United States. In the year 1895, said Roberts died, and thereafter (on the 14th day of January, 1896) Edmund A. Roberts, defendant's intestate and heir at law of said E. W. Roberts, deceased, filed an application in the United States land office at Sacramento to purchase all of the land in dispute under his mineral entry thereof.

It appears from the complaint that McCharles, from the year 1852 to the month of February, 1900, had continuous possession of the land, had lived thereon with his family and had cultivated and improved the same; "that said improvements consisted in the erection of a dwelling house upon said land and in fencing and taking care of the same, all of which amounted to over $3,000." A patent for said land as of agricultural character was refused McCharles by the Secretary of the Interior, who, after due proceedings, ordered a hearing before the register and receiver of the United States land office at Sacramento, to determine the character of said land, whether agricultural or mineral. Said hearing was accordingly held on the 23d day of August, 1897. It is alleged in the complaint that, for the purpose of defeating the agricultural claim of McCharles and for the purpose of securing for himself said land, said Edmund A. Roberts caused certain false and perjured testimony to be introduced at the hearing and thereby imposed and committed a fraud upon said register and receiver. All the testimony offered in support of the mineral claim of said Roberts is alleged to have been false, untrue, and perjured, and known by said Roberts to be false and untrue when it was so given. The complaint in the second count thereof alleges that certain witnesses, William and Francis Torpe, who promised McCharles to testify before the register and receiver that said land was agricultural and not mineral in character, were induced by means of intimidation and threats to remain away from said hearing and to refrain from so testifying; that one witness, McManus, testified that he had mined the land with William Torpe, and it proved to be paying mineral land; that McManus would not so have testified had said Torpe been present, or if under such circumstances he had so testified, he would have been flatly contradicted by said Torpe. The complaint alleges that the land at all times was suitable for agriculture and not mining purposes, and that said Roberts and all the witnesses who testified in his behalf "well knew that said land was agricultural in character and easily cultivated and adapted to farming pursuits, and that it was nonmineral and absolutely worthless for mining and had no value as such."

It is alleged that, upon the conclusion of the hearing, the register and receiver reported to the Commissioner of the General Land Office at Washington, D. C., that said land was mineral in character and more adapted to mineral than agricultural purposes, and recommended that said Commissioner "cause to be issued to said Edmund A. Roberts, deceased, and to his heirs and assigns, a mineral application for said land"; that thereafter and on the 16th day of September, 1904, there was issued to the heirs of said Roberts a mineral patent for said land. The complaint asserts that, but for said alleged fraud so practiced by said Roberts upon the register and receiver of the land office by the introduction of false testimony, said land would have been determined to be agricultural, and not mineral, and that said McCharles would have been permitted by said register and said receiver to have completed and perfected his application for a patent for said land, and that an agricultural patent therefor would have issued to said McCharles and his successors and heirs.

From the complaint it appears that McCharles died on the 9th day of February, 1900; that on the 1st day of February, 1900, by a certain instrument in writing, he transferred and deeded to the plaintiffs all his right, title, and interest in and to said land covered by said homestead application.

The demurrers submit three distinct grounds, to wit: (1) That the court has no jurisdiction of the action; (2) that the complaint does not state facts sufficient to constitute a cause of action; (3) That the action is barred by the provisions of subdivision 4, § 338, of the Code of Civil Procedure.

We think that the general demurrer was properly sustained, and likewise the special demurrer, based upon the ground that the allegations of the complaint were insufficient to give the court jurisdiction to try and determine the issues thereby raised. The first count of the complaint, in substance, merely charges the defendant's intestate with having procured his patent for the land from the government through false and perjured testimony. It is not alleged in said count, or anywhere in the complaint, that the patent was obtained through a mistaken notion or misapplication of the law by the officers of the Land Department of the government. If the complaint were held to be sufficient, a trial in a state court of the issues thus presented would result in a retrial of the issues of fact heard and determined by a tribunal specially appointed by the general government and having exclusive jurisdiction to pass upon all questions of fact involving the sale and disposition of the public land belonging to the government of the United States. The vital question at issue before the officers of the Land Department was whether the land in controversy was of agricultural or mineral character. A day was set for the hearing of the evidence to be addressed to the disputed question, and the parties given due notice thereof. The hearing or trial was had, evidence received, and the judgment of the register and receiver was that the land was mineral in character, suitable only for mineral purposes. Upon the recommendation of the register and receiver, a patent for said land was finally issued to the intestate of the defendant. The grantor of the plaintiffs had full opportunity to present his evidence and to meet and overcome the testimony of his adversary, if he could. If the testimony produced by the latter was false, and his witnesses suborned upon the question of the character of the land, he was in as good a position to know the fact as any one present at the hearing, and it was his duty then to have taken the necessary steps to bring the facts to the attention of the officers before whom the trial was proceeding. It does not appear from the averments of the complaint that he undertook before the register and receiver to establish the charge of false and perjured testimony, nor does it clearly appear that he pursued the matter by way of appeal to the Commissioner of the General Land Office or the Secretary of the Interior. But even if he had done so, the decision of the land officers upon the question of the character of the land would be conclusive upon the courts, and therefore not subject to review by them. In Wormouth v. Gardner, 125 Cal. 318, 58 Pac. 20, a case dealing with questions arising over a contest between claimants for a certain tract of government land, it is said: "* * * That contest was one entirely within the jurisdiction of the United States Land Department; that is, each party was endeavoring to get title to what each admitted to be United States government land, which was subject to disposition under the laws of the United States. The Land Department therefore had exclusive jurisdiction to determine all facts which arose in the contest, and in order to successfully attack the decision of the department the defendant in this present case would have to show that such decision was founded upon an erroneous notion of the law." That case also approvingly quotes the following language employed in declaring the same doctrine in the case of Wormouth v. Gardner, 112 Cal. 506, 44 Pac. 806: "Whether Throckmorton did, in fact, purchase the land for a valuable consideration, or whether after his purchase he used and improved and continued in the actual possession of the same, according to the lines of his purchase, were questions of fact to be determined by the Secretary of the Interior. The good faith of Throckmorton in making the purchase, as well as his belief that the land he purchased was included within the original limits of the Mexican Grant, were also facts to be determined by that officer from all the circumstances under which the purchase was made. Whether that officer properly considered the weight to which the evidence before him was entitled, or whether he drew correct conclusions from the evidence, his determination with reference to the facts, whether correct or erroneous, is conclusive upon the judicial tribunals. These tribunals cannot exercise a revisory jurisdiction over him in matters which are within the scope of the authority conferred upon him; but if, upon the undisputed facts, he made an erroneous application of the law pertinent to these facts, his action is open to review."

A very interesting discussion of the principle under consideration may be found in U. S. v. Throckmorton, 98 U. S. 69, 25 L. Ed. 93, wherein Mr. Justice Miller, speaking for the court, among other things, says: "To overrule the demurrer to this bill would be to retry, 20 years after the decision of these tribunals (the land offices of the government), the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on 20 years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit, and the litigation endless, about the single question of the validity of this document." See, also, Stewart v. McHarry, 159 U. S. 643, 16 Sup. Ct. 117, 40 L. Ed. 290; Vance v. Burbank, 101 U. S. 519, 25 L. Ed. 929; U. S. v. White (C. C.) 17 Fed. 561. It is as well settled as any other rule of law that to set aside or annul upon the ground of fraud a former judgment or decree, except by some appellate tribunal, there must be alleged and proved fraud extrinsic and collateral to the question tried and decided. "It is always a condition precedent to the proper action of a court of equity in interfering with a judgment or decree not before it upon appeal that facts be disclosed establishing that the matter now in the form of an adjudication is in truth, without any fault of the party seeking to avoid its effect, a determination in which he could not present his cause of action or his grounds of defense, as the case may be, to the consideration of the court, either because the court was not competent to hear it and to grant relief thereupon, or because he was prevented from presenting it or from having it properly considered through fraud, accident, surprise, or for some other sufficient cause for the interposition of equity." Freeman on Judgments, § 486. In Pico v. Cohn, 91 Cal. 133, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, Chief Justice Beatty, in a characteristically forceful opinion, says: "* * * And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, and that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interests"—citing U. S. v. Throckmorton, supra. See, also, In re Griffith, 84 Cal. 113, 23 Pac. 528, 24 Pac. 381, and Langdon v. Blackburn, 109 Cal. 19, 41 Pac. 814.

Tested by the rules declared by the foregoing authorities, it is manifest that the averments in the first count of the complaint are plainly deficient in the statement of a cause of action. There is nothing in said averments which shows that the grantor of the plaintiffs was prevented by fraud extrinsic to the proceeding from making out his case or from exposing and thus destroying the force of any perjured testimony which may have been offered in opposition to his claim as to the character of the land and his right to a patent therefor under his homestead filing.

Nor do the allegations of the second count of the complaint make any better showing in an effort to state a cause of action than those of the first. It is therein stated, it will be remembered, that the intestate of the defendant, by means of threats and other fraudulent persuasions, induced certain witnesses, who, it is alleged, would have testified that the land in controversy was solely adapted to agricultural, and therefore absolutely valueless for mining, purposes, to remain away from the hearing before the register and receiver, thereby depriving the grantor of plaintiffs of the benefit of their testimony. We have already said that an opportunity was afforded McCharles of presenting his case fully and fairly and showing every fact essential to the establishment of his claim, including any alleged fraud which might have been practiced upon him or attempted to be practiced or imposed upon the officers before whom the contest was pending and tried. If, through his own fault, he failed to avail himself fully of all his rights at the hearing, there is, then, little if anything in his own conduct which would appeal to a court of equity to interpose its power in his behalf and relieve him of an alleged wrong due to his own inexcusable negligence. The complaint in the second count alleges: "That before said hearing said Francis Torpe and William Torpe informed said Harrison McCharles that they would be witnesses for him at said hearing and testify as to the agricultural character of said land; that said William Torpe at the time of said hearing before said register and receiver, as aforesaid, informed said Harrison McCharles that he could not appear as a witness for him for the reason that if he did the said Edmund A. Roberts would interfere with him in his business affairs to such an extent that he would materially suffer." It is obvious from this allegation that had McCharles himself exercised only ordinary diligence, if, having been informed of the conduct of his adversary in thus dissuading material witnesses for his side of the dispute from being present at the hearing of the contest at the very time the contest was proceeding, he had called the attention of the register and receiver to the fact, it cannot be doubted that he would have been given opportunity to have produced said witnesses or other witnesses by whom he could have proved the necessary fact, if it were capable of proof, or, in any event, have weakened his opponent's case materially and maybe destroying it altogether by disclosing the alleged dishonest methods he was pursuing to obtain a mineral patent for the land. Besides, it is alleged in the complaint "that said Harrison McCharles, and since his death plaintiffs, have applied to the officers of the United States Land Office for the relief and redress herein complained of, but that they have refused any redress or relief." It is not clear from the allegation just quoted, whether such application for relief was made by appeal to the Commissioner of the General Land Office and to the Secretary of the Interior within a reasonable time after the conclusion of the hearing before the register and receiver, or at some time subsequently to the issuance of the patent to Roberts. But in either case the allegation is of no assistance to the plaintiffs in the statement of a cause of action. If an appeal was taken to the authorities at Washington, and the question of the alleged fraud imposed upon the register and receiver presented there, the decision against the plaintiffs was an adjudication of said question, and, under the principles to which we have referred, cannot be re-examined in the courts.

The authorities upon which plaintiffs rely to support their contentions are not in point. It is not doubted, as we have seen, that a party may be relieved of a judgment which can be shown to have been procured by some extrinsic fraud, or fraud dehors the judgment; or that a judgment may be annulled where it appears upon the face thereof that there was wanting some fact essentially jurisdictional, or necessary to give the tribunal jurisdiction to hear and determine the matter. In Dolhequy v. Tabor, 22 Cal. 280, all that is decided is (we quote from the syllabus, which correctly states the point) that "where, pending an appeal from the decision of the register and receiver to the Commissioner of the General Land Office, a third person, with full knowledge of its pendency and the rights of the first applicant, procures the issuance to himself of a certificate of purchase, under the same act, he will be deemed to hold the certificate in trust for the former applicant in whose favor the appeal is decided, and may be compelled by bill in equity to transfer it to him upon being reimbursed his expenses." In Bird v. Wilcox, 45 Cal. 686, the complaint alleged that one Clark confederated with the defendants to procure by false evidence the cancellation of the plaintiff's homestead entry, succeeded in so doing, and that plaintiff was never notified that Clark was making such application. In Mery v. Brodt, 121 Cal. 332, 53 Pac. 818, the evidence disclosed, among other acts of fraud, that "these proceedings were all had by defendant and the government without any actual notice to plaintiffs, and, consequently, without objection upon their part."

It will thus be observed that there appeared in the cases mentioned, either through the pleadings or proofs, some act of fraud sufficient to meet the test declared by the Chief Justice in Pico v. Cohn, supra, and to thereby vitiate the proceedings upon which the decision rested. The other cases to which our attention has been invited by counsel likewise contain a state of facts altogether different from the facts found here.

There are other points presented and discussed which the views we have expressed render it unnecessary to notice.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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MATTESON et al. v. SOUTHERN PAC. CO.

(Civ. 336.)

(Court of Appeal, Third District, California. Aug. 28, 1907. Rehearing Denied by Supreme Court, Oct. 26, 1907.)

1. APPEAL—VERDICT—CONCLUSIVENESS.

The court on appeal will not disturb the implied findings of fact, on a substantial conflict in the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935–3937.]

2. SAME.

The court in reviewing the sufficiency of the evidence will only determine whether there is sufficient to justify the verdict, and will not pass on the credibility of witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3901–3906.]

3. RAILROADS—INJURIES AT CROSSING—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for the death of a pedestrian at a crossing, evidence *held* to justify a finding that the pedestrian was guilty of contributory negligence proximately resulting in her death, precluding a recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1144–1149.]

4. SAME.

In an action for injuries to a pedestrian struck by a backing train at a crossing, there was no evidence that she thought the train was moving away from the crossing, and there was evidence that she could see the train; that lights were in the caboose and on its rear end; that the brakeman shouted to her; that she hesitated, and then attempted to go around the moving train and that the instant she disclosed such purpose the brakeman acted as quickly as possible to stop the train. *Held*, insufficient to show as a matter of law that the brakeman should have anticipated the pedestrian's purpose and attempted sooner to stop the train.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1160, 1165.]

5. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

The rule that he who has a clear opportunity of avoiding injuring another by exercising proper care must do so does not apply where the negligence of the person injured continued to the very moment of the injury, and he had the last clear opportunity to avoid the accident by the exercise of proper care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 115.]

6. RAILROADS—INJURIES TO PERSON AT CROSSING—FAILURE TO GIVE SIGNALS.

Where a pedestrian approaching a railroad crossing attempted to cross without listening or looking for the approach of a train, and by listening the approaching train could have been heard, or by looking could have been seen, the company was not liable, though it negligently failed to give signals on approaching the crossing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1073.]

7. SAME.

The employés in charge of a train may assume that a person is in possession of his faculties, and will retain his place of safety and not recklessly expose himself to danger, and, though such person gives no indication of knowledge of an approaching train, the employés are not bound to assume that he will heedlessly leave a place of safety and put himself on the track and in danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1016.]

8. SAME—EVIDENCE—ADMISSIBILITY.

Where it was admitted that signals were not given on the train approaching the crossing, and the pedestrian was familiar with the crossing, the exclusion of evidence whether the bell could be heard at the pedestrian's residence was proper.

9. SAME.

Where the issue related only to the existence of lights on the rear car, and a witness testified as to lights on that car, the refusal to permit the witness to state whether he saw any lights on other cars was not error.

10. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where, in an action against a railway company for an accident at a crossing, a brakeman had explained that he could have stopped the train anywhere, the exclusion of the question whether he could have stopped the train before it reached the crossing was not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194–4199.]

11. RAILROADS — INJURIES TO PERSONS AT CROSSINGS—EVIDENCE.

In an action for the death of a pedestrian struck by a backing train at a crossing, evidence whether or not there was a lantern on the end of the train was admissible.

12. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where the evidence showed that it was so dark that a person, unless close to the train, could not observe any one on the train, and a witness testified that he did not know that a caboose was on the train, and that he saw no light at any place on the train, the sustaining of an objection to a question asked the witness whether or not he saw any person on the train with a lantern was not prejudicial error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194–4199.]

13. SAME—REVIEW—IMMATERIAL QUESTIONS.

Where the question of damages is eliminated by a verdict for defendant, any question as to instructions on the subject of damages is immaterial on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3331–3341.]

14. TRIAL—INSTRUCTIONS INVADING PROVINCE OF JURY.

Instructions invading the province of the jury are properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 407.]

15. SAME—IGNORING EVIDENCE.

Instructions ignoring evidence are properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 613–617.]

16. SAME—PRESUMPTION OF FACTS.

Instructions assuming facts as proven, about which the evidence is conflicting, are properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 420–431.]

17. APPEAL—REVIEW—BILL OF EXCEPTIONS.

Where the bill of exceptions fails to show on what grounds or on what showing the court refused to enter a default against defendant, and the record does not contain all the proceedings on the motion for default, the order denying default is not reviewable on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2951–2955, 2966.]

18. SAME—PRESUMPTIONS.

Error must be made affirmatively to appear on appeal, and all presumptions must be indulged in support of the rulings of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3667, 3672.]

19. SAME—DISCRETION OF TRIAL COURT—REVIEW.

The refusal to order a default against defendant for not serving an answer is within the discretion of the court, and will not be disturbed unless abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3810.]

Appeal from Superior Court, San Joaquin County; A. H. Smith, Judge.

Action by Edward J. Matteson and others against the Southern Pacific Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

A. H. Carpenter, for appellants. Buck & Middlecoff, for respondent.

CHIPMAN, P. J. Action for personal injury by defendant to Catherine Matteson, mother of plaintiffs. The cause was tried to a jury, and defendant had the verdict. Plaintiffs appeal from the judgment.

The accident happened on Sacramento street, at the crossing of Channel street, in the city of Stockton, on January 21, 1904. A train of 13 or 14 freight cars and caboose came into Stockton on the Oakdale Branch of the Southern Pacific Railroad from the east along Weber avenue, which runs east and west. Approaching Sacramento street the train moved on a Y diagonally through a block northward to get to the main line on Sacramento street at a point a short distance north of the Channel street crossing. Reaching the main line with all its cars the train backed south towards the depot, situated on the southwest corner of Sacramento street and Weber avenue. At the rear end of the train was the caboose used for passengers. As the caboose approached the north foot crossing leading across Sacramento street from the pavement along the north side of Channel street, Mrs. Matteson, going east, started to cross Sacramento street, and when about in the middle of the street was struck by the lower step on the west side of the caboose and in falling was caught by the car wheel, receiving the injuries complained of. She died on February 24, 1904.

1. It is urged that "there is absolutely no evidence to support the verdict in any particular." This court will not disturb the implied findings of fact by the jury where there is substantial conflict in the evidence upon which such findings are based. In its review of the record the court is not called upon to set forth even briefly all the evidence submitted in support of the issues. It is required only to determine that there was sufficient evidence given to the jury to justify their verdict. The court cannot pass upon the credibility of witnesses, or say that the jury erred in giving credit to one or more witnesses called by one party and in refusing credit to one or more witnesses called by the opposing party, or erred in believing part of the testimony of a witness and in disbelieving a part, or erred in arriving at a verdict by accepting a part only of the testimony submitted by both parties. The privilege as well as the duty of the jury is to reach a verdict from a consideration of all the evidence and the surrounding circumstances disclosed, and, having thus reached a verdict on sufficient evidence, this court is powerless to disturb it. We are moved to make these observations because of our being constantly confronted by arguments against the sufficiency of the evidence to support judgments and verdicts on the erroneous assumption that this court will reach a conclusion of its own from the evidence found in the record.

In this class of cases the stress of the argument is usually found to be directed to the question as to whose negligence was the proximate cause of the injury, and the present case is no exception to the rule. There was evidence that deceased was about 74 years old, but was in possession of all her faculties. She testified that at the time of the accident her hearing and eyesight were good, and her family physician testified: "For a lady of her age she was a remarkably healthy woman, remarkably so, a woman with a great deal of vitality." The train arrived at the point of the injury shortly after 6 o'clock p. m. Some of the witnesses speak of its being "dark," and others as "dusk." Deceased testified: "It was dark, but light enough so that I could see the train." Other witnesses testified that it was light enough to observe at the crossing of Channel street whether the train was moving towards or away from that street after it had got to the main line. There was a brakeman on the second freight car from the front end of the train and another brakeman at the rear end of the caboose. The front brakeman ran to the main line to see if it was clear and signaled from there. The train moved along the Y to the main track; the front brakeman taking his place on the ladder of his car as it passed. From this position he was signaled by the rear brakeman when the caboose had passed the switch, and he in turn signaled the fireman in the engine, who gave the word to the engineer. The rear brakeman threw the switch and signaled all clear to back. The engineer gave three long blasts of the whistle and commenced to back, and as the caboose passed him the rear brakeman jumped on to the rear lower step on the west side of the caboose, from which point he could signal with his lantern to the engineer. When the train started to back the caboose was about 200 feet north of Channel street. There was nothing to obstruct a view of the track or the train. It started slowly and did not attain a speed greater than four to six miles an hour. There was evidence that the caboose lamps inside were lighted before reaching Stockton and two lamps on the outside at the rear of the car, and the rear brakeman was on the lower rear step of the caboose with a lighted lantern. There was evidence that the bell was started to ring automatically when the train began to back, and that it was heard by the rear brakeman. He was asked what happened when the caboose passed the switch backing down towards Channel street. He testified: "I got on the rear platform of the caboose, the step on the west side, and I stood on the rear steps of the caboose. As I stood on the steps passing over the switch I came along down here, and as I came near Channel street—it was dusk, I couldn't tell whether it was a lady or man —I noticed a form start from the sidewalk or from that direction, towards the sidewalk on the west side of the track, right from this sidewalk here. As they came toward the track I called out, 'Look out there,' and at that they came up near the track, I can't say exactly how far, and hesitated, and then started to go in a direction around behind the caboose. As they did I thought to myself they will never make it, so I jumps on the platform of the caboose (we have an air valve there—we call it the 'gun' in speaking on the railroad), and I pulled that wide open, threw all the air we had on the brakes of the train to stop. As I did this party was just struck by the steps on the east side and thrown over on the ground. I immediately jumped down and see how it was. I was pretty well excited because I felt pretty bad to think it was an old lady of that kind. If it was my mother I couldn't have done any more to prevent hurting her. I raised her up and kind of drew her back from the track. At that time I only could see the one foot, and that was the left foot, was crushed, and the shoe was torn. I didn't examine it to see how bad it was hurt, and I raised her up on my knee and my arm partly, and it was very near time for the passenger to come from Sacramento, and we was on the main line, and as I was there there was another employé of the company, an engineer by the name of Chase that I knew personally and once worked with, an employé of the company, and I says to him: 'Dick, hold this lady here. Look out for her until the ambulance comes. I have sent for the ambulance. I will have to get this train off of the main line.' He took charge of her, and then I resumed my position on the back end of the train and gave the signal to back. As soon as I took the lady up on my knee and on my arm, there was a young boy, I don't know who he was, I said: 'Run to the depot immediately and have them telephone for the ambulance, because this lady is hurt, and we want to get her up from here as quick as possible.' And the boy went as quick I guess as he could, and I resumed my position and backed the train into the yard, and after I got down into the yard I came back, and by that time the ambulance had taken the lady and gone. * * * After I applied the air the train stopped in about half the length of the car—of the caboose."

On cross-examination he testified: "When I first saw her she was on the north side of Channel street and the west side of Sacramento street going east. With reference to the railroad track when I first saw her she was nearer the sidewalk than the track, I can't say exactly how many feet or how far, just come from the sidewalk. It must have been 20 feet I guess, in my judgment. I won't state any definite distance. The train was backing at the time. Q. When did you next see her? A. Why, I saw her when she hesitated before she went across. When I saw her hesitate I should judge she was about six feet from the track, and the train was still backing. Q. Describe her actions as you saw her at this time. A. Well, she hesitated, and then started to take a circular position around the hind end of the train. Q. Did you see any movement of her body? A. Any movement? Nothing more than seeing the form as it went. I observed that she had an idea that she was going across, and I put the air on immediately. * * * Q. When you first saw Mrs. Matteson approaching the track, did she hesitate at any time prior to the time that she got near or close to the track? A. She hesitated as I called to her. Q. After you called to her, what happened? A. Well, she hesitated. Q. And what happened? A. Then she started to go around the train. Q. And what happened? A. Well I threw the air on, and the step of the east side of the car hit her and threw her down. Q. You could have stopped the train sooner, could you not? A. Not after she started to go across. I stopped it as quick as I could. Q. You may state whether or not you had an opportunity to stop the train before it reached the crossing after you first saw her approaching the track. A. I could have stopped the train anywhere as far as that is concerned. * * * The Court: At the time you called to Mrs. Matteson about how far, if you can tell, was she from the rear end of the caboose? A. Well, she must have been, I can't just exactly answer that definitely, but she was about a car length, and about six or eight feet, whatever I gave it there, from the track. Q. What I want is how far she was from the end of the caboose? A. I should judge about 20 to 30 feet from the caboose, about the length of it, might have been a little more." On recross he testified: "Q. How far was the train away, the end of the train away from Mrs. Matteson when she attempted to walk around it, as you say that she did do? Mr. Buck: We object to that. He said she started to run around it. Mr. Carpenter: I don't care whether you call it running or walking. A. Well. That is the same answer, 12 or 15 feet. Mr. Buck: That means around the end of it? A. Yes, sir. The Court: In what direction was she approaching the track? Was she still on the crossing that was perpendicular to the track or not? A. She left the crosswalk immediately as she started to run behind the train."

It appeared that the conductor of the train registered its arrival at 6:05 p. m., and that the register at the receiving hospital showed that Mrs. Matteson arrived there at 6:20 p. m. There was evidence that the ambulance came for her within a few minutes after she was injured; that meanwhile she was cared for by direction of the trainmen as well as it was possible under the circumstances; and that the trainmen moved the train without waiting for the ambulance in order to clear the track for a passenger train due about that time. Some of the most important facts narrated by this brakeman were corroborated by witnesses. It is true that there was testimony given by witnesses that they heard no whistle or bell; that the caboose was not lighted; that a warning bell placed at this crossing by the defendant company did not ring, and this latter fact was undisputed. And Mrs. Matteson in a deposition taken, at which defendant was not represented, testified: That she thought the track was clear, that she saw no lights on the end of the train, that there was no one near the end of the train, that she heard no one call or shout to her, and that she heard no bell. But she was not asked, and did not testify, whether she stopped or looked or listened.

Without pursuing the evidence further, it is manifest that the jury accepted the testimony given by the trainmen and other witnesses whose testimony tended to corroborate them. It seems to us that it cannot be said as matter of law that the jury were not warranted in reaching the verdict rendered by them. Much of the argument of plaintiffs' counsel is based upon testimony as to facts which the jury probably did not accept as true. If it be conceded that defendant was guilty of negligence in backing its train in the nighttime through the streets of a city without placing guards or warning signals at cross streets, conceding that when the rear brakeman first saw Mrs. Matteson start to cross the street from the pavement he could have put the air brake on and stopped the train for her to pass, still the question remained for the jury to determine whether under the circumstances it was the brakeman's duty to do this at that moment, or whether she was not guilty of contributory negligence in attempting to pass around the train when she must have known that it was there and was moving towards her but a few feet distant, and whether her negligence was not wholly the direct and proximate cause of her injury. The jury must have reached this latter conclusion, and we cannot say as matter of law that they were not justified in doing so. The plaintiffs contend that when she started to cross the street she thought the train was moving north instead of south and was thus deceived through the failure of defendant to ring its warning bell at the crossing and its failure to have lights on the caboose or at the rear of the car. Furthermore, it is contended that by the brakeman's own testimony it appeared that he could have stopped the train, had he tried to do so, when he saw Mrs. Matteson step into the street to cross it. But there is no evidence that she thought the train was moving away from her. There was evidence that she could see the train; that lights were in the caboose and on its rear end outside; that the brakeman shouted to her, and she hesitated, and then left the cross-walk and attempted to go around the moving train, showing that she must have known the direction the train was moving, but thought she could thus avoid the danger. The instant she disclosed this purpose the brakeman acted as quickly as was possible. We cannot say as matter of law that the circumstances were such as to have required the brakeman to anticipate Mrs. Matteson's purpose and to have applied the brake sooner than he did in order to free his company from responsibility for the accident.

The principle that he who has a clear opportunity of avoiding an accident by the exercise of proper care to avoid injuring another (or, we may add, avoid being injured) must do so, is wise and humane, but we do not think the facts here make the rule applicable to defendant. It cannot be reasonably claimed that when the brakeman saw Mrs. Matteson move towards the train from the pavement he believed, or had reason to believe, that she intended to continue her course to the extent of attempting to pass around the moving train. The more natural and reasonable assumption would be to a person in his position that she would stop until the train had passed. Failing to do so, the principle above stated finds peculiar application to her. She had the last clear opportunity to avoid the accident by the exercise of proper care, and should have done so. In the case of Sego v. S. P. Co., 137 Cal. 405, 70 Pac. 279, it was said: "In discussing this rule of law it is said in Everett v. Los Angeles Ry. Co., 115 Cal. 128, 43 Pac. 210, 4 L. R. A. 350: 'This rule can never apply to a case where, as here, the negligence of the injured party continued up to the very moment of the injury, and was a contributing and efficient cause thereof, for it is apparent by the slightest care and effort on the part of the deceased he could have put himself out of danger up to the last moment before he was struck.' And that is exactly the case the court now has before it. The negligence of the party killed continued up to the very moment of time when he was struck by the approaching train. There is here no question of remote or earlier negligence upon his part, and, conceding him guilty of negligence, that negligence necessarily contributed directly to his death. The case at bar is quite similar in its facts to Glascock v. Central Pacific R. R. Co., 73 Cal. 140, 14 Pac. 518, where this court said: 'Mr. Glascock either saw the train before he reached the track, or he did not look toward the track as he approached it. * * * If he looked he saw, and, having age and faculties to understand the dangers, is charged with a knowledge of them, and was bound to act upon that knowledge as a prudent and cautious man would under the circumstances. His failure so to act was negligence, which, notwithstanding the negligence of the defendant, the law regards as such a contributory cause on his part as will make the injury his own misfortune and relieve the other party from liability therefor.' "

The court gave the following instructions (marked 40 and 42), which we think correctly stated the law applicable to the facts of the case:

"(40) The jury are instructed that the sole purpose of signals at crossings or on trains, such as the ringing of bells or the sounding of whistles or the presence of lights or of the presence of gates or of flagmen or of the stationing of employés at any particular portion of the track or train, so far as the same relates to persons approaching a railroad crossing for the purpose of crossing the same, is to warn such person of the presence of a railroad track and of an approaching train. And the jury are instructed in this connection that if they believe from the evidence that, even if defendant was negligent in failing to provide any or all of the foregoing modes of warning at any of the times mentioned in the complaint herein to Catherine Matteson while she was approaching defendant's track on Sacramento street for the purpose of crossing the same, still if you further believe from the evidence that at any time while Catherine Matteson was on Channel street approaching said track, and while she was still in a position of safety, she could by listening have heard defendant's approaching train, or by looking have seen it, and without so doing attempted to cross defendant's track and was injured, then your verdict must be for the defendant."

"(42) The jury are instructed that there is no conflict in the evidence that at all the times Mrs. Matteson was approaching along the pathway to the crossing of the track she was in a position of absolute safety up to the time she stepped in front of the train, and there is no rule of law which would charge any of defendant's employés with knowledge that while she was in such position of safety she would change her position of safety for one of peril. On the contrary, the employés of defendant had a right to assume that Mrs. Matteson was in possession of her faculties and would retain her place of safety and not recklessly expose herself to danger. And even if you believe that Mrs. Matteson gave no indication of knowledge of the approaching train, still the defendant's employés were not bound to assume that she would heedlessly leave a place of safety and put herself upon the track and in danger of her life. And you are instructed, if you believe from the evidence that any of defendant's employés saw Mrs. Matteson approaching the train on Sacramento street, that such employé had the right to presume that Mrs. Matteson was in possession of her ordinary faculties and alert to the danger which might ensue from passing trains, and that she would not attempt to cross in view of the train, and that therefore such employé was not required to check the speed of the train in order to enable Mrs. Matteson to cross in front of it, or to ascertain whether or not she was about to do so."

2. Numerous errors of law are assigned as occurring at the trial. In plaintiffs' brief some of these are grouped under 10 different paragraphs. These relate to the question of damages, which become immaterial in view of the verdict of the jury that defendant was not liable for the injury complained of. Some others will be noticed. A witness for the plaintiffs was asked whether the alarm bell at the Channel street crossing could be heard at Mrs. Matteson's residence. The court sustained an objection to the question as irrelevant and immaterial. We cannot see that it was material, inasmuch as it was an admitted fact that the bell did not ring, and that it clearly appeared that Mrs. Matteson was familiar with the crossing. The witness Haley for plaintiffs was asked if he saw any lights on any of the cars. The question was refused on the ground that there was no issue raised by the pleadings except as to the lights on the rear car. The witness was permitted to testify as to lights on this car. The ruling was not error. The rear brakeman, Slocum, was asked on cross-examination by plaintiffs the following question: "And you could have stopped it (the train) very handily, couldn't you, before it reached Channel street crossing?" Plaintiffs were not injured by the ruling excluding the question. The witness had fully explained "that he could have stopped the train anywhere." The question had no necessary bearing upon the stopping of the train at the crossing. A witness for the plaintiffs was asked to state whether or not he saw any person on the end of the train with a lantern, and the court refused the question, to which plaintiffs excepted. The question was pertinent and should have been allowed. We do not think, however, that plaintiffs were prejudiced by the ruling, for the witness had just answered the question whether he noticed any brakeman on the rear platform of the caboose: "It was so dark without a person was right close up, and I was pretty close, that you could not observe any one on the train." He had also testified that he did not know at the time that a caboose car was on the train, and that he saw no light at any place on the train. Plaintiffs had the benefit substantially of all that this witness knew.

3. Plaintiffs asked for 32 separate instructions, some of which were given as asked. Others were given with some modifications, and still others were refused. Ten instructions were given at defendant's request, and 12 on the court's motion. Plaintiffs excepted to the instructions asked by them and given with modifications by the court, and excepted to the ruling of the court in refusing to give other of their instructions. Some of defendant's instructions are not objected to in plaintiffs' brief, and others are challenged. It would needlessly prolong this opinion to state the grounds on which these numerous rulings of the court may be sustained. Quite a number of the instructions objected to relate to matters of damage which are eliminated by the verdict. Others of plaintiffs' instructions, if given, would have been an invasion of the exclusive province of the jury. In the instances where the court modified plaintiffs' proposed instructions, the ruling of the court, it seems to us, was necessary to make the instruction conform to law. Others entirely ignored the evidence of contributory negligence on the part of Mrs. Matteson. Others assumed facts as proven about which the evidence was conflicting. Others were framed on the assumption of facts as proven as to which there was no evidence, and still others contained several distinct propositions, some of which, if separately stated, were proper to be given, but which were associated with propositions not proper to be given. We have given all the instructions careful consideration and are satisfied that no prejudicial error was committed by the court. The jury were fully and correctly instructed on all pertinent points relating to liability arising from negligence as applicable to both parties.

4. Defendant filed a general demurrer and also a special demurrer to the second amended complaint. The demurrer was, on November 28, 1904, sustained as to certain paragraphs and overruled as to the balance of

the complaint, and plaintiffs were given 10 days in which to amend. Notice of the order was served on defendant on December 5, 1904, also notifying defendant "that plaintiffs decline to amend their complaint," and on December 12, 1904, plaintiffs moved the court for a default against defendant for not serving or filing its answer to the complaint, and also on the same day made a written demand upon the clerk to enter a default against defendant. On December 19, 1904, the court ordered: "That the motion of plaintiffs for a default against defendant be denied, to which ruling of the court the plaintiffs then and there excepted." And the court also ordered that defendant have 10 days from and after said December 19, 1904, to answer plaintiffs' second amended complaint, if defendant should be so advised. It appears from the record that plaintiffs' motion for a default to be entered against defendant was made on the seventh day after notice to defendant above referred to, and not after 10 days, as claimed by plaintiffs in their brief. But, aside from this fact, the bill of exceptions fails to show upon what grounds or upon what showing the court refused to order the default of defendant to be entered, or that the record contains all the proceedings upon the motion. Error must be made affirmatively to appear, and all presumptions must be indulged in support of the order. The matter was within the discretion of the court, abuse of which is not shown.

Upon full consideration of all questions before us upon the appeal, we discover no prejudicial error, and the judgment is therefore affirmed.

We concur: HART, J.; BURNETT, J.

6 Cal. App. 305

KERR v. MOORE. (Civ. 334.)

(Court of Appeal, Third District, California
Aug. 26, 1907.)

1. SPECIFIC PERFORMANCE—COMPLAINT—SUFFICIENCY.

Though an allegation of a complaint in specific performance that the consideration which plaintiff was to pay was adequate would hardly meet the requirement that the adequacy of the consideration and mutuality of the contract should be shown, yet the further allegation that the consideration was not disproportionate to the value was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 358.]

2. SAME—CONTRACTS ENFORCEABLE—MUTUALITY.

It is proper, in determining whether a contract for a conveyance of land is of such a character as to warrant specific performance, to consider the fact that vendee, without vendor's objection, made improvements thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 132, 133.]

3. SAME—DEFINITENESS OF CONTRACT.

An agreement that first party would sell to the second party certain land for an amount named, and that second party agreed to pay that amount when he received a deed, that all rents should be considered as part payment, and that second party had leased the land for a four-year term with the privilege of buying on or before the expiration of the lease, was definite and certain enough to be specifically enforced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 61-68.]

4. SAME—DILIGENCE.

Where, under an agreement that first party would sell to second party certain land for an amount named, and that second party had leased the same for a four-year term, with the privilege of buying on or before the expiration of the lease, vendee demanded a deed on the last day of the lease, and within a little over a month after demand commenced suit for specific performance, and such delay was due to vendor's conduct, leading vendee to believe for a time that the deed would be executed, the action was not barred by the statute of limitations, and vendee was not guilty of laches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 249-251.]

5. TENDER—SUFFICIENCY.

Where vendee, after previous ineffectual attempts to secure a deed from vendor and pay him the balance of the price, went to vendor's place of business and put the money on a table and presented a deed in proper form, which he asked vendor to execute, and on vendor's refusal deposited the money in a bank and notified him, the tender was sufficient, though the certificate of deposit was payable to vendor and another; the bank having been directed to pay the money to vendor on his delivery of a deed properly executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tender, §§ 55-57.]

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Specific performance by J. C. Kerr against W. P. Moore. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Ashley & Neumiller, for appellant. A. L. Levinsky, for respondent.

BURNETT, J. This is an action for specific performance. Plaintiff had judgment, from which and from the order denying his motion for a new trial defendant appealed. Appellant claims that the record discloses quite a number of errors, but there are only three specifications that we deem of sufficient importance to justify special notice.

1. The contention that the complaint does not state a cause of action is based upon the assumption that sufficient facts are not alleged to show the adequacy of the consideration and the element of mutuality in the contract. In Windsor v. Miner, 124 Cal. 492, 57 Pac. 386, it is said: "Specific performance is an equitable remedy, and it is incumbent upon the plaintiff in an action of this character to show both in the averments of his pleading and in the evidence at the trial that he is entitled to the equitable relief which he seeks." In Arguello v. Bours, 67 Cal. 447, 8 Pac. 49, this advice is given: "In view of the intimation in Bruck v. Tucker, 42 Cal. 346, it will always be safer to aver (as was done in this case) that the price paid was a just and fair price and the full value of the premises." The complaint here contains

this allegation: "That the consideration which the said plaintiff was to pay to the said defendant, and which the said defendant was to receive from the said plaintiff for the lands herein described, was adequate in amount and not disproportionate to the value of said lands." To allege that it "was adequate in amount" would hardly meet the requirement of this rule, as that is the averment of a legal conclusion, but "not disproportionate to the value" is rather a circumlocutory form for "equal in value," and we think it is sufficient. Besides, there is an allegation that the plaintiff expended $600 in improvements on the land within the knowledge of defendant and without his objection. It was proper to consider this circumstance in determining whether it was a case justifiable in an action for specific performance. The element of mutuality must be present in a contract before it can be enforced by either party, but, as said in Sayward v. Houghton, 119 Cal. 548, 51 Pac. 854, 52 Pac. 44: "Assuming that the element of mutuality was lacking at the time the contract was entered into, it was supplied upon the offer of performance being made by plaintiff, since thereby the remedy to enforce it clearly became mutual." Thurber v. Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; Richards v. Green, 23 N. J. Eq. 536.

2. The action was not barred by the statute of limitations, nor was plaintiff guilty of laches. We understand the contract to constitute a lease with an option to buy. It may be inartificially drawn, but the intention of the parties seems clear. It was agreed that: "The said party of the first part (W. P. Moore) * * * agrees to sell and convey unto the said party of the second part (J. C. Kerr) that certain lot or parcel of land * * * for the sum of nine hundred dollars and the said party of the second part agrees to pay to the said party of the first part the said sum of nine hundred dollars as follows, to wit: To be paid when the party of the second part asks for and receives a deed for the within described land and is further agreed that all rents be excepted and considered as part payment on said land. The party of the second part having leased the within described land for the term of four years from the first day of December, 1899, at the yearly rental of seventy-five dollars with the privilege of buying the same on or before the expiration of said lease." It is true that plaintiff did not exercise his option of buying the land until the last day of the lease, but he was acting within the terms of the agreement. If the land in the meantime had greatly increased in value, it might be that specific performance should be denied; but the evidence discloses no increase in its value. The contract was definite and certain enough to be enforced, and the evidence shows that it was not inequitable. Suit was brought January 6, 1904, within a little over a month after demand was made for a deed, and even that delay was excused by the conduct of defendant, who led plaintiff for a time to believe that the deed would be executed.

3. The tender was sufficient. Plaintiff testified: "I met defendant on the street, and I told him I was ready to pay up the money, had the money, for him to come in and make me a deed, and I would pay him the money. He said he didn't have time, and I said it won't take long, only a few minutes. I had the money in my pocket, and as I went to pull it out of my pocket he drove off." This first conversation and offer to pay took place November 30th. Plaintiff had several succeeding conversations with defendant of similar import, in one of which he told defendant that the money was at Bruml's store, and Moore said: "Just let the money rest there a few days, and we will go to town and examine the records, and if the records are all right I will make you a deed." Finally, defendant agreed to meet plaintiff at Stockton on Saturday, and if the records were all right he would make the deed; but he failed to keep his appointment, and when plaintiff went to see him Monday he said he did not go to the recorder's office, but went to see his lawyer and plaintiff "was out." Plaintiff, on December 18th, went to defendant's place of business and put $600 on the table and presented a deed in proper form and asked defendant to execute it. On his refusal the money was deposited to his credit in the Stockton Savings Bank, and he was notified of it. It is true that the certificate of deposit was made payable to A. L. Levinsky or William P. Moore, but the bank was directed to pay the money to the defendant upon his delivery of the deed properly executed, and the evidence shows that the defendant upon that condition could have secured the money at any time, although in this class of cases there seems no reason why the tender should be kept good (Sayward v. Houghton, supra), as the plaintiff by the judgment would be required to pay the purchase money before receiving the deed. The plaintiff did all that the law demands. Englander v. Rogers, 41 Cal. 422; Chatfield v. Williams, 85 Cal. 521, 24 Pac. 839.

The cases cited by appellant to sustain his position are not in point here, and we have considered it unnecessary to refer to them specifically.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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6 Cal. App. 298

BUSH v. NYE, State Controller, et al.

(Civ. 368.)

(Court of Appeal, Third District, California. Aug. 26, 1907.)

1. JUDGES—CREATION OF OFFICE—POWERS OF LEGISLATURE.

Under Const. art. 6, § 9, authorizing the Legislature to increase or diminish the number of judges of the superior court in any county in the state, the Legislature has such incidental power not inconsistent with other provisions of the organic law as it may deem essential to the power expressly conferred.

2. SAME—APPOINTMENT—VACANCIES—CONSTITUTIONAL PROVISIONS.

Act March 20, 1905 (St. 1905, p. 315, c. 301), providing for an additional judge of the Shasta superior court, the incumbent to be appointed by the Governor to hold office until the first Monday after January 1, 1907, and for the election in November, 1906, of a judge to be the appointee's successor and hold office for the regular constitutional term, was not in violation of Const. art. 6, § 6, fixing the term of superior judges, and providing that if a vacancy occur the Governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, etc., as such constitutional provision has no application to the provisional arrangement for the filling of a newly created office of judge for a provisional term.

3. SAME.

Const. art. 6, § 9, authorizing the Legislature to increase or diminish the number of superior court judges in any county, authorized so much of Act March 20, 1905 (St. 1905, p. 315, c. 301), providing for an additional judge of Shasta superior court as authorized the appointment by the Governor of a person to fill such office until the commencement of the next constitutional term.

4. SAME—QUALIFICATION.

A person appointed judge of the superior court is not eligible to assume, control, and discharge the duties of his office until he has qualified as required by law.

5. SAME—TERM—DETERMINATION.

Act March 20, 1905 (St. 1905, p. 315, c. 301), provided for an additional judge of the superior court and conferred power on the Governor to appoint a person to hold such office until the first Monday after January 1, 1907, when the appointee's successor elected at the November, 1906, election should assume office. The Governor appointed D., who refused and failed to qualify, whereupon petitioner was appointed and qualified, and, his successor having failed to qualify within the time prescribed by law, petitioner claimed to hold over under Const. art. 6, § 6, declaring that a judge appointed to fill vacancies should hold until the election and qualification of a judge to fill the vacancy, etc. *Held*, that the failure of D. to qualify did not create a vacancy in the provisional term, but that such term was not filled until petitioner qualified under his appointment, and that petitioner's term ended on the date specified, regardless of his successor's failure to qualify.

Appeal from Superior Court, Shasta County; Chas. M. Head, Judge.

Petition for a writ of mandate by George W. Bush against A. B. Nye, as State Controller, and another. Demurrer to writ sustained. Petition denied.

Morrison, Cope & Brobeck, for appellant. U. S. Webb, Atty. Gen., for respondents.

HART, J. This is a petition for a writ of mandate, addressed directly to this court, to compel the respondents to draw their warrants, upon the treasuries of the state of California and the county of Shasta, respectively, in favor of the petitioner, for such sum or sums as are alleged to be now due and payable to said petitioner for and on account of his salary as a judge of the superior court of the said county of Shasta.

The controversy arises out of the following facts: The Legislature, on the 20th day of March, 1905, passed, and the Governor approved, an act entitled "An act to increase the number of judges of the superior court of the county of Shasta, state of California, and for the appointment of such additional judge." St. 1905, p. 315, c. 301. By said act the number of judges of the superior court in and for the county of Shasta was increased from one to two. Thereafter the Honorable Geo. C. Pardee, then the Governor of the state of California, under and by virtue of the powers conferred upon him by the Constitution and by the provisions of said act of the Legislature, duly appointed and commissioned one Thomas B. Dozier to the said office of judge of the superior court provided for by said act, but said Dozier "failed, neglected, and refused, within the time prescribed by law or at all to qualify for the said office," etc. Thereafter the Governor appointed the Honorable Geo. W. Bush, the petitioner herein, to said office, and said Bush thereupon duly qualified and entered upon the discharge of the duties of said office. The act provides that the appointee of the Governor should hold the office and exercise its duties until the first Monday after the 1st day of January, 1907, and that "at the next general election to be held in November, A. D. 1906, one additional judge of said superior court shall be elected in said county who shall be the successor to the judge appointed hereunder to hold office for the term prescribed by the Constitution and by law." Accordingly, at the general state election held on the 6th day of November, 1906, the voters of Shasta county voted for and elected a successor to the petitioner for the term of six years, to begin on and after the first Monday after the 1st day of January, 1907. The petitioner and the Honorable Chas. M. Head were rival candidates for the office at said election, and the latter, having received the highest number of votes for the same, was declared elected thereto. It is alleged in the petition that "the said Charles M. Head failed, refused, and neglected within the time prescribed by law or at all to qualify to and for the office of judge of the superior court of Shasta county, to which he had been declared elected." It is further stated "that on and after the first Monday after the first day of January, 1907, the said Geo. W. Bush was then and there the duly qualified and acting judge of said superior court, and did continue to perform the duties of such office and to occupy the same in accordance with the Constitution and laws of the state of California." A demurrer to the petition, based upon the grounds that said petition does not state facts sufficient to constitute a cause of action, was filed by the Attorney General. The single question thus presented for determination is: Could the petitioner, under the circumstances exhibited by the allegations of the petition, legally continue to hold and exercise the duties of the office to which he had been appointed after the expiration of the term fixed by the act of the Legislature and for which he was appointed and until his successor was elected and qualified? The solution of this question involves the construction and application of certain provisions of the Constitution dealing with the term or terms of judges of the superior court.

Section 2 of the act creating an additional judge of the superior court in and for the county of Shasta reads as follows: "Within thirty days after the passage of this act the Governor shall appoint one additional judge of the superior court in the county of Shasta, state of California, who shall hold office until the first Monday after the first day of January, A. D. 1907. At the next general election to be held in November, A. D. 1906, one additional judge of said superior court shall be elected in said county who shall be the successor to the judge appointed hereunder to hold office for the term prescribed by the Constitution and by law." St. 1905, p. 316, c. 301. So much of section 6 of article 6 of the Constitution as is pertinent to this inquiry reads as follows: "* * * The term of office of judges of the superior courts shall be six years from and after the first Monday of January next succeeding their election. * * * If a vacancy occur in the office of judge of the superior court, the Governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term."

The contention of the petitioner is that, having been appointed by the Governor to fill a vacancy in the office of judge of the superior court, he was entitled to hold such office until, in obedience to the commands of said section 6 of article 6 of the Constitution, his successor was elected and qualified. The failure of Judge Head, who it is alleged was elected as his successor at the next general state election after the vacancy occurred and which was filled by appointment, to qualify within the time prescribed by law brought about, it is urged, the contingency referred to by section 6 of article 6 of the Constitution upon which he was entitled to hold over and until his successor was elected and qualified. It is agreed that by and from the very meaning of the word "vacancy" itself the passage of the act providing the additional judge created, ipso facto, a vacancy in the office of such judge; but petitioner argues that a second vacancy occurred when Dozier, having been appointed by the Governor to the office, refused or failed to qualify therefor. In other words, as we understand petitioner's argument, the provisions of the act authorizing the Governor to appoint for the term fixed by the act, if valid at all, became, by the appointment of Dozier, functus officio, and the power of the Governor to appoint thereunder consequently null and void, and that the appointment of Bush by the executive thereafter could have been made by virtue of no other authority than that conferred by the Constitution. It is further argued that so much of the act under consideration as attempted to fix a determinate term for the newly created office is unconstitutional, because the Constitution itself has established all the various terms of a judge of a superior court. These several contentions by petitioner are plausibly and ably presented, but we think an examination of them will show them to be untenable. We are of the opinion that section 6 of article 6 of the Constitution has no application to the case under the facts discovered by the record. We are rather of the conviction that the whole question here is determinable by the provisions of section 9 of article 6 of the Constitution, and that the Legislature by the creation of an additional judge of the superior court of Shasta county, and prescribing the provisional term thereof, acted clearly within the power thus conferred upon it. It will not be denied that the Legislature would exceed its power were it to attempt to interfere, by enlarging or diminishing, with the terms of judges of the superior court prescribed by section 6 of article 6 of the Constitution; but in the case at bar there was no such attempt by the Legislature, nor does the term fixed by the act in any manner or degree trespass upon or interfere with the terms fixed by section 6 of said article. Section 9 of article 6 reads: "* * * The Legislature of the state may, at any time, two-thirds of the members of the senate and two-thirds of the members of the assembly voting therefor, increase or diminish the number of judges of the superior court in any county, or city and county, in the state." The power thus vested in the Legislature by the Constitution is necessarily accompanied by such other power, not inconsistent with other provisions of the organic law, as the Legislature may deem essential to exercise in order to execute and enforce the power expressly conferred. Therefore it may arrange provisionally for the filling of the vacancy occurring in said office with the creation thereof until, if it be, as here, an elective office, the people shall have been afforded an opportunity under the law of filling it themselves by the election of some one to discharge its duties for and during the regular term thereof. As was said in People v. Markham, 104 Cal. 232, 37 Pac. 918: "Whenever one of these new offices is created, there is, of course, a necessity that it should be provisionally filled in some manner until the commencement of a regular constitutional term, and if the Constitution is silent upon this point, the power of the Legislature to make such provisional arrangement by statute cannot be questioned."

In the case before us, the Legislature, in making the "provisional arrangement" for filling the vacancy in the term of the additional judge, has seen fit to fix that term for a specified and determinate period, covering the entire time during which the term could run without impinging upon any terms established by the Constitution and beyond which, under that instrument, it, of course, could not extend. In other words, the term was so prescribed by the act of the Legislature as to terminate on the very day on which the constitutional term of six years would begin. It is thus readily to be seen that there is nothing in the provisions of the act as to the provisional term of the office which can by any possible construction be held to be in conflict with any of the provisions of section 6 of article 6 of the Constitution. The Legislature having fixed a determinate period as constituting the provisional term of the office, said term, as we have seen, expiring coincidently with the beginning of the constitutional term, the appointment by the Governor to fill the vacancy in that term was, necessarily, an appointment for the full term. The appointment could not be made to extend to a time when "his successor" was elected and qualified, because, under the provisions of the act, while the appointee held the office, there could be no vacancy in that term necessitating the election and qualification of "his successor" to that term, and a vacancy could only be caused therein by his own death or resignation or retirement, from any reason, before the expiration of the provisional term fixed by the act. And it is our opinion that if such a vacancy had occurred the appointment by the Governor of his first appointee's successor would be only for the remainder of the unexpired provisional term. Our reason for expressing this view is because we are of the opinion, as before stated, that the provisions for filling a vacancy in the office of judge of the superior court found in section 6 of article 6 of the Constitution have no application to the provisional arrangement which it is competent for the Legislature to make with reference to the filling of a newly created office of judge for the time intervening the time of the creation of said office and the time when, under the Constitution, a regular term thereof is to begin. We think that that section of article 6 has reference exclusively to vacancies occurring in the constitutional term of that office, and that this conclusion is sustained by reason of the fact that by the act of the creation of an additional judge of the superior court the Legislature is controlled entirely by section 9 of article 6, supra, not only as to the creation of the office, but also as to making "provisional arrangement" for filling the same ad interim.

It follows from the views thus expressed that the proposition that the failure of Dozier to qualify after his appointment created a "second vacancy" in the provisional term fixed by the Legislature is of no importance in the decision of the main question. But it may be well to say that we are not prepared to accept as sound law the contention that the mere appointment of Dozier amounted to the filling of the vacancy synchronously happening with the creation of the office, and that his failure to qualify caused a second vacancy in the provisional term. The appointment of Dozier would rather appear to have been an ineffectual attempt of the executive to fill the vacancy occurring, ipso facto, with the creation of the additional judge; that the Governor could succeed in filling the vacancy in the term fixed by the act only when whosoever he might appoint accepted such office by qualifying within the time required by law. It would seem that, in order to fill the vacancy, two facts should exist concurrently at some time, to wit: The fact of appointment and the fact of acceptance. Or, as we would say in contracts, the minds of the executive and his appointee should meet before the vacancy could be filled; and it is obvious that, after the appointment, the act of actual acceptance could be manifested only by the fact of qualifying by the appointee. The act of acceptance did not occur in the case of Dozier, and the vacancy still remained, we think, the same "old vacancy." If a man is offered a chair in which to sit, but refuses and does not in fact sit in the chair, the latter, so far as that man is concerned, remains unoccupied and vacant. There can be discovered no distinction between the two propositions. Can it be truthfully said that Dozier, by the mere act of his appointment by the executive, is an ex judge of the superior court of Shasta county? Under our laws, no man elected to the office of judge of the superior court is eligible to assume control and discharge the duties of that office until he has qualified as required by law. And, if, after his appointment or election, he does not qualify and does not assume to discharge the duties of said office, as under such circumstances he would have no legal right to do, it could not be said that he had occupied the office by reason of the mere appointment any more correctly than it could be said that the man refusing to sit in the chair had occupied the chair.

Our conclusion is: That it was competent for the Legislature under section 9 of article 6 of the Constitution, to fix the provisional term of the additional judge to cover a determinate period of time, so long as the term so fixed did not interfere with or trench upon the terms established by the Constitution itself. That the Legislature in thus fixing such term was entirely controlled by said section 9 of article 6 of the Constitution. (2) That the term so fixed by the act under review did not interfere with or trespass upon any terms fixed by the Constitution itself. (3) That the provisional term fixed by the act, in analogy to the regular constitutional terms of judges of the superior courts, expired, ex vi termini, at the time to which it was limited, or with the beginning of the succeeding constitutional term. (4) That therefore and of necessity the term of the appointee of the Governor ceased absolutely with the expiration of said provisional term.

For the foregoing reasons the demurrer will be sustained, and the writ denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

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UNION ICE CO. v. DOYLE et al. (Civ. 354.)

(Court of Appeal, Third District, California. Aug. 26, 1907.)

1. PLEADING — DEMURRER — SPECIAL DEMURRER.

Where a complaint states imperfectly all the facts essential to a recovery, a demurrer, to be effectual, must be special and point out the very defect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 510, 511.]

2. REFORMATION OF INSTRUMENTS — COMPLAINT.

L., being the owner of the whole of a quarter section of land on the east half of which was an ice plant, acquired the plant, and later intended to and in fact believed that he had conveyed the same with the east half to defendant ice company. The deed, however, in fact conveyed the west half of such quarter section, which was rocky and worthless, for the ice business. Immediately after the conveyance, defendant ice company took possession, believing that the land was the east half of the quarter section, and subsequently conveyed the plant to plaintiff under the same description. The mistake was not discovered until years afterwards, when D. claimed to own the plant under a deed from L. to the east half of the section which was also made under a mistaken impression by both D. and L. that the lands conveyed to him were not those occupied by plaintiff. *Held* that a complaint alleging such facts sufficiently charged that the mistake was mutual so as to authorize reformation of the deeds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, §§ 141-146.]

3. SAME—CONSIDERATION.

Where a complaint for the reformation of a deed to certain land, in connection with the conveyance of an ice plant thereon, alleged that the grantors sold the plant and land in order to secure payment of a debt due them from the owners of the plant, it sufficiently alleged the receipt of a consideration for the conveyance to render the complaint for reformation impervious to a general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 142.]

4. LIMITATION OF ACTIONS — RECOVERY OF REAL PROPERTY.

A suit to reform a deed is one for the recovery of real property, the correction of the deed being merely incidental, and is therefore within the five years' limitation prescribed by Code Civ. Proc. § 318, for actions for the recovery of real property, and not within section 338, subd. 4, limiting actions for relief from fraud or mistake to three years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 75, 175.]

5. EQUITY—LACHES.

Laches will not be imputed to a complainant if it appears that his negligence has not resulted in prejudice to the opposite party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 212-214.]

6. REFORMATION OF INSTRUMENTS—LACHES.

Land was conveyed to plaintiff's grantor in 1898; the deed describing it as the west half of a certain quarter section, instead of the east half, which was intended to be conveyed. The deed to complainant contained the same mistake, which was not discovered until 1904, when D., under a conveyance of the east half of the quarter section which was intended to convey the west half, claimed to be the owner of the land, and shortly after this suit was brought to correct the mistake. *Held*, that the complainant was not barred by laches; the owners of the west half not having changed their position to their prejudice in the meantime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, §§ 119-121.]

7. APPEAL—FINDINGS OF FACT—REVIEW.

Findings of fact in the trial court, based on conflicting evidence, will not be set aside on appeal because of insufficiency of the evidence.

8. REFORMATION OF INSTRUMENTS—CONSIDERATION.

In a suit to reform a deed, evidence *held* to sustain a finding that the grantor received a consideration for the conveyance.

9. SAME—EQUAL EQUITIES.

Where, in a suit to reform a deed, mutual mistake in the description was established, and defendant D., a subsequent purchaser of the land intended to be conveyed, testified that he knew before the date of the deed to him that a fractional portion of the land purchased had been transferred by his grantors to plaintiff's predecessor, and it also appeared that D. resided in the neighborhood and was employed as a bookkeeper by one of his grantors, and that he learned the facts concerning the original transfer, plaintiff was not barred from relief under the rule that where the equities are equal relief would be denied.

Appeal from Superior Court, Placer County; J. E. Prewitt, Judge.

Suit by the Union Ice Company against P. M. Doyle and others. From a judgment for complainant, defendants appeal. Affirmed.

L. L. Chamberlain, for appellants. Wilson & Wilson and Tuttle & Tuttle, for respondent.

HART, J. This is a suit in equity, the object of which is to correct an alleged misdescription of the land involved in two certain deeds, to quiet title thereto, and to compel conveyances of said land in accordance with the true description thereof. The court invoked the aid of a jury, to which certain special issues were submitted, some of which, as found by said jury, were adopted by the court, and thereafter a judgment and decree entered reforming and revising said deeds, adjudging plaintiff the owner and entitled to the possession of the land, as described under such reformation, and peremptorily enjoining the defendants from "asserting or in any way setting up any right, title, or interest in or to said last described land or any part thereof." From the judgment Doyle and the Lewisons take this appeal.

The facts, as gleaned from the record, are these: The defendant J. L. Lewison, prior to the execution of the deed, the reformation of which is one of the purposes of this suit, was the owner of the whole of the S. E. ¼ of section 26, township 17, N., range 15 E., Mount Diablo base and meridian, in the county of Placer. Situated on the east half of the quarter section just described, at the time of the transaction leading to this litigation were "ice ponds, the necessary buildings and tools of an ice plant, and a railroad siding." The west half of said section, it was shown, is made up, principally, of rocky hills "unfit for any practical use and entirely worthless for the purposes of cutting ice." The ice plant and appurtenances thereto were, it seems, the property of a Mr. McLellan and his wife. They were indebted to Lewison in the sum of $1,800, and they turned the plant and improvements over to Lewison by a bill of sale to secure his debt; but Lewison was authorized to sell the plant, take his money out of the result of such sale, and then turn the balance over to the McLellans. On the 7th day of December, 1898, in pursuance of an agreement previously reached by the parties, the Lewisons made a deed to defendant Union Ice Company, of which the plaintiff is the successor in interest, intending to convey to said defendant the east half of said quarter section, embracing 80 acres of marsh land, and upon which, as seen, the ice plant was situated; but by and through a mistaken understanding on the part of the parties as to the correct description of said land so sought and intended to be conveyed, the west half of said quarter section, instead of the east half, was in fact described in said deed of conveyance. At the time of the execution of the deed, a bill of sale conveying to said Union Ice Company the ice plant and all the personal property belonging to said ice plant was executed and delivered to said defendant by the Lewisons, and to which bill of sale C. R. and Frances M. McLellan, who had, as seen, some interest in the property, are also parties. It may be here stated that the ice plant which was involved in the sale was known and designated as the "Cold Stream Ice Company." The bill of sale described the land upon which said ice plant and other personal property were situated at the time of the sale as "eighty acres, comprising the west half of the southeast quarter of section 26, township 17 north, range 15 east, Mount Diablo base and meridian." As a consideration for the ice plant and land, the Lewisons were paid by the Union Ice Company the sum of $6,375. On the 8th day of March, 1902, the defendant Union Ice Company made a conveyance of all said property, real and personal, to the plaintiff, the Union Ice Company, and assuming that the deed from the Lewisons to said Union Ice Company contained a correct description of the land upon which the ice plant was situated, followed said description, and therefore erroneously conveyed the west instead of the east half of said quarter section. On the 3d of October, 1904, the Lewisons executed a deed to the defendant P. M. Doyle, conveying to him the east one-half of the quarter section; that is, the land upon which the ice plant was situated, and which the plaintiff and its predecessor believed had been conveyed to them. The plaintiff, the Union Ice Company, and its grantor, have had possession of the premises since the 17th day of December, 1898. The mistake in the description of the land in the two deeds was not discovered by plaintiff until some time in October, 1904, when the defendant Doyle declared that he was the owner of the land.

The complaint is verified. Demurrers to the complaint, general and special, were interposed on behalf of both Doyle and the Lewisons. The grounds of the special demurrers by the Lewisons and Doyle are the same, and are that "it appears from the complaint that the alleged cause of action is barred by the provisions of section 338, subdivision 4 thereof, of the Code of Civil Procedure," and "that plaintiff and its grantor have been guilty of gross laches in delaying to bring suit, from the 7th day of December, 1898, the date of the deed from the Lewisons to Union Ice Company, to the 12th day of June, 1905, and the said complaint states no facts sufficient to excuse said gross laches." The demurrers were overruled, and thereafter the defendants filed their answers, specifically denying all the material averments of the complaint, setting forth a history of Lewison's connection with the Cold Stream Ice Plant, and setting up the bar of the statute under the provisions of section 338, subdivision 4 thereof, and of section 318 of the Code of Civil Procedure.

The special issues upon which the jury were instructed to pass were involved in the following questions, submitted in writing by the court: (1) Was there a mutual mistake in the deed from Lewison to Union Ice Company? (2) Did the defendant Doyle at or before the time of his purchase have notice of the claims of the Union Ice Company, defendant, or the Union Ice Company, plaintiff? (3) Did the plaintiff or its predecessor discover the mistake prior to June 12, 1902? The jury answered in the affirmative all the questions thus submitted to them. The court approved and adopted the findings of the jury as to questions 1 and 2, rejected the answer to the third, and found that all the important and material facts alleged in the complaint and essential to the establishment of plaintiff's case had been proved by the evidence.

Appellants contend most strenuously that the demurrers should have been sustained, for the reason that the complaint, by its averments, fails to disclose a case for equitable interference. It is claimed that the "mistake" upon which respondent relies for a reformation of the deeds is not shown by the allegations of the complaint to have been the "mutual mistake" of the parties essential to the granting of the relief demanded; that there is no allegation "that anything was paid for the land"; that hence a valuable consideration is not shown, and the complaint shows "that the plaintiff and its predecessor in interest were guilty of laches."

An impartial examination of the complaint justifies the conclusion, we think, that the objections urged by counsel for appellants in their briefs against plaintiff's pleading are rather hypercritical. Most of the objections pointed out in argument against it appear to go more to the sufficiency of the statement of the facts than to the facts themselves, and in that view involve criticisms based upon the ground of uncertainty or ambiguity. The special demurrers interposed are restricted in their attack upon the complaint to the grounds of a bar under the statute of limitations and "gross laches in delaying to bring suit." No demurrer was interposed upon the ground of uncertainty or ambiguity. Hence we are of the opinion that, even if it may be conceded that the complaint is not as clear and specific and direct as it should be as to the fact of "mutual mistake," it is nevertheless sufficient to overthrow the force of a general demurrer. The same may be said as to the objection that the complaint does not show by proper averments that a valuable consideration passed for the deed from the Lewisons to the defendant corporation. We think that it will not be disputed that it is a well-settled rule of pleading that where a complaint states all the facts essential to a recovery, but states them imperfectly, a demurrer, to be effectual, must be special and directed against the very defect apparent. Tehama County v. Bryan, 68 Cal. 59, 8 Pac. 673, citing Himmelmann v. Spanagel, 39 Cal. 401; Ward v. Clay, 82 Cal. 505, 23 Pac. 50, 227; Amestoy v. Electric R. T. Co., 95 Cal. 314, 30 Pac. 550. The complaint, which contains 20 lengthy paragraphs, sets out quite fully the circumstances of the transfer of the property in dispute by the Lewisons to the defendant Union Ice Company, and subsequently by the latter to the plaintiff. The facts therein show with reasonable clearness and certainty: That plaintiff's grantor intended to and did in fact buy the land upon which the ice plant and its appurtenances were situated; that the Lewisons intended to and in fact believed they did convey to the corporation that half of the quarter section; that the principal reason moving defendant Union Ice Company to buy the particular land in dispute was the fact that the ice plant was situated on said land; that said Union Ice Company immediately upon the execution of the deed to it by the Lewisons took possession of that particular piece of land; that said Union Ice Company and the Lewisons believed that said tract of land was the west half of the quarter section, and under that belief caused the land to be so described in the deed; that said Union Ice Company, under the belief that said deed contained a correct description of said land, conveyed it to the plaintiff under the same description, and that plaintiff thereupon took possession of it; that the Lewisons as well as Doyle knew that the plaintiff and its predecessor took and held possession of the land under that description; that, concurrently with the execution of said deed, the Lewisons executed and delivered to Union Ice Company a bill of sale, conveying to it all of "the said property (ice plant, etc.) situated on the said east half of said northeast quarter of section 26"; that plaintiff and its grantor were ignorant of the misdescription in the deed until after the 15th day of October, 1904, when "defendant, Doyle, proclaimed himself the owner of said land" upon which were situated said improvements connected therewith; that the sum of $6,375 was, prior to the 7th day of December, 1898, agreed upon between Union Ice Company and the Lewisons as the price to be paid for the tract of land and the ice plant and improvements situated thereon; that on said 7th day of December, 1898, Union Ice Company paid to the Lewisons said sum and thereupon received said deed and bill of sale and took possession thereof as aforesaid. It is, moreover, alleged that at the time of the execution and delivery of the deed by the Lewisons to Doyle, said Lewisons "believed and understood that the lands described in said deed were not the lands so as aforesaid in the possession and occupation of plaintiff," and "that neither the said J. L. Lewison nor the said Mary Lewison intended to convey or transfer by the said deed (to Doyle) the lands so as aforesaid in the possession and occupation of plaintiff, to wit [describing the land in question], all of which facts were at all of the times herein mentioned well known to the defendant P. M. Doyle."

From the foregoing synopsis of the allegations of the complaint it is obvious that a cause of action is stated. In fact, we do not see how a much stronger statement of a cause of action could well have been set out without averring evidentiary facts, contrary to the rules of good pleading. In any event, the averments are, as we have declared, sufficient to resist the effect of a general demurrer. But counsel declare that "the complaint constantly alleges that the mistake was mutual," and that such allegation "is a mere conclusion." They say that "no facts are alleged from which the chancellor may draw the conclusion that both parties participated in the mistake beyond the allegation that both parties to the deed 'supposed and believed.'" Counsel evidently attaches no significance to the allegation to which we have adverted that the plaintiff's grantor took possession of the east half of the quarter section, with the knowledge and consent of the Lewisons, immediately upon the execution of the deed. Obviously they see no importance in the averment that the defendant Union Ice Company and the plaintiff, ever since the execution of the deed to the former, have been, under the authority of said deed, in the actual possession of the land with the full knowledge and consent of not only the said Lewisons, but with the knowledge of the defendant Doyle. Manifestly there is no force, in the minds of counsel, in the declaration in the complaint that when Lewisons executed the deed to Doyle they did not intend thereby to convey to him the land upon which was situated the ice plant and in the possession of the plaintiff, and that the deed so conveying said land to Doyle was due to a mistake on the part of said Lewisons. We can perceive no difficulty in determining from the averments of the complaint that the wrong description of the land bought by plaintiff's grantor from the Lewisons was the result purely of a mistaken notion of the description on the part of all the parties to the first deed.

As to the consideration, appellants' claim is, in effect: That the complaint does not contain a direct and specific statement that any money was in fact paid for the land, and that, if inferentially it may be said that some money was paid for it, it does not appear how much was paid therefor; that there might have been but one dollar or less or nothing paid for the land and the balance or all paid for the ice plant and its essential concomitants, so far as the allegations of the complaint show. This is, we say, in effect the contention of counsel upon this point, and, as before declared, is in effect an objection to the complaint which can be taken advantage of only through the instrumentality of a special demurrer addressed directly to the question of the alleged uncertainty involved in the allegation. But we think that, under the circumstances of the transaction, as disclosed by the pleaded facts, the allegation as to consideration is sufficiently clear, direct, and specific. It is not disputed that in suits for the reformation of deeds upon the ground of mistake in the description of the land sought thereby to be conveyed the question of consideration is often an important factor in the determination of the ultimate question. Where the grantor conveys only a portion of a certain tract of land and misdescription through mistake is alleged, the inadequacy of the consideration may be the fact determinative of the controversy against the party seeking relief. But, according to the averments of the complaint here, the land which plaintiff contends it was its intention and that of its predecessor to buy from the Lewisons, and the latter's intention to sell, was essentially as much a part of the ice plant as the other necessary equipments, and valuable to plaintiff and its grantor only because it was a necessary part of said ice plant. The averments of the complaint show that the Lewisons were the owners of the ice plant and the land on which it was located at the time of the sale. It is true, as we have seen, that the fact is developed by the evidence that the Lewisons were the owners of the land, but not of the ice plant equipments situated thereon; that the ice plant had been turned over to them only to secure the payment of a debt due them from the owners of said ice plant. But the ability of the complaint to successfully meet the challenge of the general and special demurrers must be measured by its averments. These, the demurrers must admit, speak the truth, and therefore, so far as the complaint is concerned, there can be no question that it appears clearly that a sufficient consideration passed for the ice plant, of which, under the allegations of the complaint, the land was an essential part. This being so, there was no overruling, if any, necessity for segregating in the complaint the lump sum paid for the entire property, thus showing the exact proportion thereof paid for the land and the proportion paid for the other equipments of the ice plant.

The order overruling the special demurrers was proper. One of the grounds of said demurrers is that the action was barred by the provisions of section 338, subdivision 4 thereof, of the Code of Civil Procedure. Said subdivision of that section prescribes a limitation of three years within which an action for relief on the ground of fraud or mistake may be brought, and provides that "the cause of action in such case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." But it seems to have been held by our Supreme Court in some comparatively recent cases, and that it is now the settled law in this state, that an action of the nature of the one at bar, where the relief sought is the revision of a deed because of misdescription of the land through a mutual mistake of the parties and to compel a conveyance of the land according to the corrected description and to quiet title thereto, is one "for the recovery of real property, and that the correction of the mistake in the deeds is merely incidental to that action" and "is not barred except by the five-year limitation contained in section 318" of the Code of Civil Procedure. Goodnow v. Parker, 112 Cal. 442, 44 Pac. 738; Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820. Nor do the allegations of the complaint betray laches on the part of plaintiff or its predecessor in interest in the assertion of its right. The complaint, as we have seen, shows very clearly that the grantor of plaintiff intended to purchase, and did in fact purchase, the east half of the quarter section; that both it and its grantors believed, at the time of the execution of the deed, that the land sought to be conveyed comprised the west half of said quarter section; that the defendant Union Ice Company took possession of the east half under the deed thus executed; that it and its grantee have at all times since remained in possession of said land continuously and uninterruptedly; and that the plaintiff did not make discovery of the misdescription until about eight months prior to the institution of this suit. There is absolutely nothing in the averments of plaintiff's pleading which can justify the contention that it appears from the face of the complaint that the plaintiff and its predecessor were guilty of laches. While there are certain general rules by which a court of equity is guided in determining whether the complaining party has been guilty of such negligence in the assertion of his claim or right as to justify the court in refusing to award him relief, yet each instance of negligence must depend to a great extent upon its own circumstances. "It is not," says Mr. Pomeroy in his work on Equity Jurisprudence (section 856), "every negligence that will stay the hand of the court. The conclusion from the best authorities seems to be that the neglect must amount to the violation of a positive legal duty. * * * Even a clearly established negligence may not of itself be a sufficient ground for refusing relief, if it appears that the other party has not been prejudiced thereby." It should clearly appear, in order to impute laches to one seeking the relief, that he had knowledge, or failed to obtain knowledge where it was obtainable after notice; or that there should be circumstances which should have induced an inquiry and an effort to obtain knowledge. Am. & Eng. Ency. of Law, vol. 18, p. 102 (2d Ed.). The complaint in the case at bar shows that neither the Lewisons nor Doyle could have been prejudiced, even if it could be said that the plaintiff and its grantor were negligent in appealing to equity to straighten out the erroneous description, for, as before observed, the defendants had full knowledge of the possession and the claim of ownership of the east half of the quarter section by the plaintiff and its predecessor under the deed to the latter from the Lewisons. But the complaint does not show negligence or laches. On the contrary, it clearly sets out the fact that the plaintiff and its predecessor had no knowledge, nor did circumstances arise to put them upon inquiry with reference thereto, of the defective description of the land until some four years after they took possession under the deed, when Doyle claimed that he was the owner of said land. The necessary effect of the argument of counsel on this point would seem to be that the plaintiff and its predecessor should have suspected, without any special reason therefor, from the moment of the execution of the deed, that something must be wrong in the description of the land intended to be conveyed, and that their failure to do so constituted a want of the exercise of that degree of diligence with which in such a case an aggrieved party is charged. The complaint nowhere shows that the plaintiff or its grantor had any conceivable reason for doubting the correctness of the description until Doyle announced, in the month of October, 1904, that he was the owner of the land, and then, having for the first time obtained knowledge of the erroneous description, it proceeded within a reasonable time to seek the relief to which the complaint clearly demonstrates it to be entitled.

Upon the conclusion of the introduction of testimony on behalf of the plaintiff, the defendants presented a motion for a nonsuit upon the specific grounds: (1) That the evidence failed to show that notice, actual or constructive, was ever brought to the defendant Doyle that Lewison had sold to the defendant Union Ice Company the land in dispute; (2) that the evidence adduced through plaintiff's witnesses shows that the discovery of the alleged mistake in the description of the land in the deed of conveyance from the Lewisons to Union Ice Company was in December, 1898, "shortly after the purchase of the land, and that therefore more than the statutory time has elapsed within which suit can be brought to correct such a mistake." The court denied the motion, and the ruling was, under the evidence, unquestionably proper. All that is necessary to justify the refusal of a nonsuit asked for on the close of plaintiff's testimony is that a prima facie case in support of the material allegations of the complaint has been made out. Janin v. London, etc., Bank, 92 Cal. 14, 27 Pac. 1100, 4 L. R. A. 320, 27 Am. St. Rep. 82; Felton v. Millard, 81 Cal. 540, 21 Pac. 533; Pac. Mut. L. I. Co. v. Fisher, 109 Cal. 567, 42 Pac. 154; Archibald Estate v. Matteson (Cal. App.) 90 Pac. 723. More than a prima facie showing upon the points forming the basis of the motion was made by plaintiff here in its original case.

But the principal point urged by appellants, aside from those arising under the order overruling the demurrers, is that the evidence does not sustain the findings of the court. Counsel for appellants in their briefs expressly recognize the rule, established by the Constitution, that this court is restricted, in its appellate jurisdiction, to the determination of questions of law alone, and is therefore without power or right to disturb a judgment because of the insufficiency of the evidence to sustain the findings of fact upon which it rests, where there is a substantial conflict in such evidence; yet they undertake to demonstrate, in their briefs here, through a process of metaphysical reasoning and subtle refinement, in their treatment and analysis of the evidence, that there is such a clear failure of proof upon certain points essential to the maintenance of the claims of the complaint as to justify this court in declaring that, as a matter of law, the evidence is insufficient to sustain the court's findings. We are not at liberty, after a careful examination of the record, to adopt the views thus entertained by the learned counsel.

The claim that there is no evidence to show that the Lewisons received any consideration for the land is not supported by the record. Mr. Toby, one of the vice presidents of plaintiff's predecessor at the time of the transaction, testified that when the agreement was reached for the sale of the Cold Stream Ice

Company property there was some conversation between him and defendant J. L. Lewison that the latter was to receive $10 per acre for the 80 acres of land, which included the portion upon which were situated the ice plant and other improvements. Lewison, it is true, denied this, but the court's finding upon the point is sufficiently supported by Toby's testimony. Besides, we think there are certain circumstances, independent of Toby's testimony, which strongly tend to show that the Lewisons received a sufficient consideration for the land. The land, it will be kept in view, is, according to the testimony of surveyor Uren, who surveyed it, of only nominal, if any, value for any other purpose than for cutting or harvesting ice thereon. The ground consists of low, flat land, partly marshy. Lewison himself virtually admitted it to be of little value, in detailing a conversation he had prior to the sale with Mr. Hopkins, president of the corporation defendant, and even if we disregard the positive testimony of Toby, and it be true, as has been suggested, and as may well be inferred from the evidence, that his anxiety to secure the payment of the $1,800 due him from the McLellans, solely influenced said Lewison in transferring the land to the corporation, without any other specific monetary consideration therefor, we think that fact of itself, under the peculiar facts of this case, and considering the insignificance of the intrinsic value of the land, would stand as a sufficient consideration, for it appears sufficiently clear from the whole record that the payment of the large sum of money due him from the McLellans was largely contingent upon the sale of the ice plant. But there is other significant testimony presented by the record in connection with this question of consideration which should not be overlooked. Lewison testified that he received from the defendant corporation the sum of $6,375, and declared that, after paying himself out of said sum the amount due him from the McLellans, he turned the balance over to the latter. But McLellan testified that all that he received from Lewison out of said $6,375 was the sum of $1,350. There was, he said, $125 paid for "ground rent," but that he knew nothing of what became of the balance of the sum paid for the property by the corporation, except the sum that Lewison kept for the liquidation of the debt due him. When asked if Lewison had ever rendered to him a statement as to the balance, McLellan replied: "That ended the matter as far as I had anything to do with it [speaking of the receipt from Lewison of the sum of $1,350]. When I got the $1,350, I don't remember whether Lewison represented anything or not." Lewison testified that, after he took out what was due him and paid the McLellans $1,350, he either paid the balance to said McLellans or paid it to their creditors on their order. Upon this point McLellan declared that there were "some other debts due by the Cold Stream Ice Company, did not amount to much, and I paid them since, maybe $400 or $500. They were not paid by Lewison. There were no other large debts than the $1,800." It is thus to be seen that, after Lewison's debt was paid, and the sum of $1,350 turned over to the McLellans and the further sum of $125 paid for ground rent, there remained a balance of $3,000, approximately. McLellan declared that he did not receive said balance, nor did he know what became of it. Lewison's explanation of the disposition of the balance is, so far as the record enables us to judge, indefinite and unsatisfactory. The record, it is quite apparent, discloses an abundance of evidence to justify the finding that a sufficient consideration passed for the land.

But there is no room for even the remotest doubt that the land in dispute is the particular tract of land which the Lewisons intended and attempted to convey to the corporation. Lewison himself admitted and explicitly declared that he intended to convey to the corporation the land upon which the ice plant and its necessary adjuncts were located. He said that at the time of the execution of the deed and the bill of sale he did not know the description of the land. He stated, further, that when he sold to Doyle the balance of the land owned by him in the locality of the land in question he did not intend to convey, nor did he at any time after the execution of the deed believe that he had conveyed, to him the 80 acres upon which the ice plant was situated. That this is absolutely true is further evidenced by the fact that Lewison, in his deed to the corporation, expressly reserved to himself the right to use the "Stanford siding," or railroad track, which the evidence shows to be located on the east half of the quarter section.

The rule, attempted to be invoked here, that, where there appear in a case of this nature equal equities between the parties, a court of equity will remain silent and passive, and refuse to award relief, finds no room for play under the facts as displayed by the record before us. Doyle testified that he knew, before the date of the delivery and execution of the deed by Lewison to him, that a fractional portion of the large body of land purchased by him had been transferred by Lewison to the corporation. Doyle had lived in the neighborhood for many years, during most of which time he was employed as a bookkeeper by Lewison. He was in a position in which he could have learned, and the evidence shows that he did learn and know, of the transaction between Lewison and the corporation. "A court of equity," says the court in Enos v. Stewart, 138 Cal. 112, 70 Pac. 1005, "interferes to correct a mistake in a written instrument only in furtherance of justice, and to prevent fraud or some injustice." The relief granted in the case at bar, under the evidence disclosed by the record, is the result only of the application of the principle as it is stated in that case and of other equitable principles established and practiced in courts of equity "in the furtherance of justice and to prevent injustice."

The findings of the court upon all the other essential issues involved in the case are fully sustained by the evidence. There are certain rulings of the court in admitting and rejecting testimony of which complaint is made and presented here. We have examined all those assignments carefully and are satisfied the rulings were correct.

We find no error in the record invading the rights of appellants.

The judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

152 Cal. 188

HAWLEY v. HARRINGTON. (S. F. 4,341.)

(Supreme Court of California. Oct. 7, 1907.)

1. APPEAL—TIME OF TAKING—REVIEW OF EVIDENCE.

Under the express provisions of Code Civ. Proc. § 939, subd. 1, an exception to a decision or verdict as not supported by the evidence cannot be reviewed, unless the appeal is taken from the judgment within 60 days after rendition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1877–1888.]

2. SAME—RECORD—SUFFICIENCY OF BILL OF EXCEPTIONS.

Under Code Civ. Proc. § 648, providing that, if the exception is to the verdict or decision for insufficiency of the evidence, it must specify the particulars in which the evidence is insufficient, where the bill of exceptions on appeal from an order denying a new trial contains no specifications of particulars, the evidence cannot be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2910–2927.]

3. FRAUDULENT CONVEYANCES—GROUNDS OF INVALIDITY—CONSIDERATION.

Under the express provisions of Civ. Code, § 3442, prior to the amendment of 1895, a transfer could not be declared void solely on the ground that it was not made for a valuable consideration, and a conveyance valid thereunder when executed as to existing creditors could not be rendered void by the amendment of that section in 1895, declaring that any transfer made voluntarily or without a valuable consideration by a party while insolvent or in contemplation of insolvency shal be void as to creditors.

Department 1. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action to quiet title by Mary A. Hawley against Sarah B. Harrington. From a judgment for plaintiff and an order denying her motion for a new trial, defendant appeals. Affirmed.

George Reed, R. M. Brown, and Z. W. Sawyer, for appellant. Olney & Olney, for respondent.

SHAW, J. This is an action to quiet title. The complaint is in the customary form. The answer alleges that the defendant is the owner of the property in fee simple by virtue of a sheriff's sale and deed made and executed in pursuance of an execution and judgment against one J. C. Hawley, the grantor of plaintiff. The court gave its findings and judgment in favor of the plaintiff. The defendant appeals from the judgment and from an order denying her motion for a new trial.

It is claimed that the evidence is insufficient to justify the decision. The sufficiency of the evidence to support the decision cannot be reviewed on the record before us. The judgment was rendered on September 21, 1904. The appeal from the judgment was taken on January 21, 1905. This being more than 60 days after the rendition of the judgment, the provisions of subdivision 1 of section 939 of the Code of Civil Procedure prevent any review of the evidence upon that appeal to ascertain whether or not it supports the judgment. The appeal from the order denying a new trial is based on a bill of exceptions purporting to contain the evidence. Section 648 of the Code of Civil Procedure provides that "when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." The bill of exceptions contains no specification of particulars, nor any specifications at all. Hence the evidence cannot be reviewed on appeal from the order.

The findings show that J. C. Hawley, against whom the judgment was rendered under which the defendant claims, conveyed the land to the plaintiff some 17 years before the judgment against him was rendered, and that, although the conveyance was without consideration other than love and affection, it was made without intent to hinder, delay, or defraud creditors, and that it did not include all of the grantor's property. It therefore follows that it was not void, as claimed by appellant. Section 3442 of the Civil Code, prior to 1895, provided that such a transfer could not be declared void solely on the ground that it was not made for a valuable consideration. Not being void as to existing creditors in 1885, when it was executed, it could not be rendered void by the amendment to that section enacted 10 years afterward. We have taken the trouble to read the evidence contained in the bill of exceptions, although not reviewable here, and we think it fully justifies the findings in favor of the plaintiff. The appeals appear to have been taken without any reasonable foundation, and the appellant should pay damages.

The judgment and order are affirmed, and the court below will give judgment in favor of respondent against the appellant for costs of appeal and damages in the sum of $100.

We concur: SLOSS, J.; ANGELLOTTI, J.

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152 Cal. 190

CITY OF PETALUMA v. WHITE et al. (S. F. 4,394.)

(Supreme Court of California. Oct. 7, 1907.)

1. APPEAL—REVIEW—PRESUMPTIONS.

Where findings were attacked on motion for new trial for insufficiency of the evidence, the order granting a new trial being in general terms, it will be presumed on appeal, in favor of the order, that the motion was granted for insufficiency of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3673.]

2. EMINENT DOMAIN—PROCEEDINGS TO TAKE PROPERTY—DESCRIPTION OF PROPERTY TAKEN.

In condemnation proceedings under St. 1877–78, p. 203, c. 170, authorizing the trustees of a city to widen a street, land taken was described in the decree as "all that portion of the following described tract of land which is included between the southeasterly line of W. avenue and a line drawn parallel with said boundary line distant 12½ feet therefrom, to wit: that portion of lot 186 as laid down and numbered upon the official map of said city." *Held*, that the southeasterly line of the avenue referred to must be taken to be the line of the avenue as shown on the official map, and not the line established by fences constructed by occupants of lots, not on the southeasterly line of the avenue, as shown on the map, but to the north thereof.

3. APPEAL—REVIEW—DISCRETION OF COURT—GRANTING OF NEW TRIAL.

Where there is a substantial conflict in the evidence, the trial court is authorized to grant a new trial for insufficiency of evidence, and its action is conclusive on the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3871.]

4. EMINENT DOMAIN—PROCEEDINGS TO TAKE PROPERTY—PROCESS OR NOTICE—AFFIDAVITS OF PUBLICATION.

Affidavits filed under St. 1877–78, p. 203, c. 170, § 5, providing that the district court should have jurisdiction of proceedings to widen a street on filing a copy of all the proceedings of the board of trustees and the original affidavits of publication of notices and proof of service, etc., were sufficient, though not signed by affiants; the rule being that, in the absence of a statute or rule of court requiring it, the affiant's signature to an otherwise regular affidavit is not necessary.

5. SAME.

The failure to notify one or more of the landowners in a proceeding to widen a street will not vitiate the proceedings as to those properly notified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 489.]

6. SAME—WAIVER OF IRREGULARITIES.

Where an owner of land voluntarily accepts the amount awarded in condemnation proceedings for the taking of his land, he waives irregularities in the proceedings, and his act is binding on his successors in interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 443.]

Department 1. Appeal from Superior Court, Sonoma County; J. Q. White, Judge.

Action by the city of Petaluma against Eliza J. White and others. Judgment for defendant White, and, from an order granting a new trial, White appeals. Affirmed.

F. A. Meyer, for appellant. Lippitt & Lippitt and T. J. Geary, for respondent.

ANGELLOTTI, J. This is an action to recover for the use of the public as a part of a street a strip of land about 7½ feet wide, extending along the front of the lot of defendant White a distance of about 150 feet. Defendant White had judgment, and plaintiff made a motion for a new trial. The motion was granted, and this appeal is from the order granting such motion.

The defendant's lot is a portion of block 186 of the city of Petaluma, according to the official map of said city. This land has a frontage of about 150 feet on the southerly line of the public street known as Western avenue. Proceedings for the widening of this street were had in 1879, resulting in a decree of condemnation made by the district court on October 21, 1879, by which a 12½-foot strip of land along the southerly line of the street was condemned for the use of a public street, upon the payment to the owners of the land taken of the several amounts awarded to them as damages. At that time one J. R. Robinson was the owner of a portion of lot 186, which portion included all thereof subsequently acquired by defendant. The decree of condemnation described the portion of such land taken as follows: "All that portion of the following described tract of land which is included between the southeasterly line of Western Avenue and a line drawn parallel with said boundary line, distant twelve and one-half feet therefrom, to wit: That portion of lot 186 as laid down and numbered upon the official map of said city of Petaluma fronting 315 feet on Western Avenue and adjoining Baker street and lands of D. B. Franklin, and belonging to J. R. Robinson." The damages to the owner caused by such taking were assessed at $141. The damages awarded were accepted August 13, 1881, by John A. McNear, a grantee under Robinson, in "full satisfaction of his judgment against the said city in that matter." In the year 1885 said McNear, by grant, bargain, and sale deed, transferred defendant's portion of said lot 186 to her, the deed reciting an understanding that a small strip of about seven feet along the front of the lot is a portion of Western avenue. Plaintiff's claim in this action is that the land sued for is a part of the 12½-foot strip condemned in the proceedings hereinbefore referred to. Upon the claim thus made by plaintiff, the findings of the trial court were in favor of defendant. These findings were attacked on the motion for a new trial, on the ground that they were not sufficiently supported by the evidence. The order granting a new trial being in general terms, not purporting to exclude any particular ground specified in the notice, we must here assume in favor of the order that the motion was granted upon the ground by insufficiency of evidence to sustain these findings.

The question whether the land involved in this action is a part of such 12½-foot strip must be determined by an ascertainment of the location of the southeasterly line of Western avenue mentioned in the condemnation proceedings and decree. The defendant claims that there was no substantial conflict upon the proposition that taking the avenue as then fenced upon the ground as constituting the street referred to, and the fence on the southerly side of the avenue as constituting the southeasterly line mentioned, the land here involved did not fall within the strip here described. It may be assumed that this claim is well founded; but it is very clear to us that the southeasterly line of the avenue referred to is the one established by the Stratton survey and delineated on the official map of the city of Petaluma, made in conformity therewith, and not the line established by fences constructed by the occupants of the lots. It is uncontradicted that the width of this street as laid out by Stratton and as shown on said map was 60 feet. The act of the Legislature authorizing the widening proceedings gave the trustees of the city the power to take proceedings for the widening of the street from Howard street to the city limits to a uniform width of 72½ feet, and required the trustees to describe the lands to be taken by reference to the numbers of the lots in which they were contained, as the same are laid down upon the official map of the city. St. 1877–78, p. 203, c. 170. There is no pretense that any land was acquired for this purpose other than such as was acquired by the condemnation proceedings. The only land sought to be taken by the trustees of the city for this purpose consisted of portions of various designated lots "as laid down upon the official map of said city," fronting on the southerly line of the street, constituting a 12½-foot strip on the southerly side thereof. No description of any other land to be taken is to be found in any of the proceedings for the widening before the trustees or in the condemnation action in court, and the decree of condemnation embraced no other land. It is therefore apparent that if an existing fence line not on the southerly line of the street as shown on the map, but somewhere to the north thereof, was the line intended, there would be a strip of land between such fence and the northerly line of the lots as shown on the map that would not be condemned to the use of the public, but would remain in private ownership, which strip would separate the street as inclosed by fences from the strip acquired by condemnation to constitute a part of the street. The land lying to the north of the northerly line of and outside of the lots as laid down on the map, and to the south of the existing fence and owned by the adjoining lot owners, if not already a part of the street, would not be included in the description of the land condemned, if that description is to be read as contended for by the defendant. Such a result would be most absurd, and, of course, was never intended. The intention was to condemn the northerly 12½ feet of each of the lots as the same were "laid down and numbered upon the official map of said city." Land fronting on the street was to be taken, not land fronting on the strip in private ownership separating it from the street. The description contained in the decree as to lot 186, which is the same as the description as to each of the other lots affected, cannot reasonably be construed otherwise than as including the northerly 12½ feet thereof as shown upon the map. Defendant's construction thereof would make it include land not a portion of lot 186 as laid down on the map, which is impossible in view of the language used. The southeasterly line of Western avenue when taken as the northerly boundary of lot 186 as such lot is laid down and numbered upon the official map of the city, which is the effect of the description in the decree, cannot, in the nature of things, be other than the southeasterly line of the street as shown upon such map, the line on which said lot fronts according to said map. There is nothing in the case of Alemany v. City of Petaluma, 38 Cal. 553, that supports defendant's contention in this regard. That was an action to compel a conveyance by the city to the plaintiff, under the townsite act of Congress, of a strip of land, where the city attempted to assert title to such strip of land as a part of a street merely because it appeared on the map of the city as a part of the street, while, as a matter of fact, it was at the time of the making of the map, and had been for many years preceding such making, in the actual, exclusive, and bona fide occupation of the plaintiff's grantor, and had never been part of any existing street. It was held that, as against an occupant not consenting thereto, any such attempt "to open a new street through his premises, or to enlarge an old one so as to infringe upon them, or to convert the land in his possession into a public square or park, finds no warrant in the act of July 1, 1864," the act of Congress known as the "Townsite Act" (13 Stat. 343, c. 205), the act under which the survey and map of the city of Petaluma were made. This has no application here. There is nothing to indicate that Western avenue as laid out by Stratton and shown on the map included any land without the consent of any occupant thereof, and, so far as appears, all the persons claiming land fronting thereon, including defendant's predecessor in title, accepted deeds from the city for their lots according to said map. The decision might be of aid to defendant were she seeking to establish title in herself as to the strip lying between the fence in the street and the northerly boundary line of lot 186 as shown upon said map, but it cannot, upon the record before us, affect the question of the proper construction of the description in the condemnation proceedings. Upon the question as to the location on the ground of the southeasterly line of Western avenue, or the northerly line of lot 186, as shown upon such map, the most that can be said for defendant is that there was a substantial conflict in the evidence. The trial court was therefore authorized to grant a new trial on the ground of insufficiency of evidence to sustain the decision, and its action in that regard is conclusive upon us. Section 5 of the act of the Legislature under which these proceedings were had provided that the district court should "have and take jurisdiction" upon the filing in such court of "a copy of all the proceedings of the board of trustees * * * and the original affidavits of publication of notices and all proof of service," etc., and it is claimed that this section was not complied with, in that two purported affidavits of publication were not signed by the affiants, and that all the proceedings were therefore void. The affidavits were correct in all other respects. Regardless of other possible answers to this objection, the affidavits were sufficient, although not signed by the affiants. In the absence of a statute or rule of court requiring it, the affiant's signature to an otherwise regular affidavit is not necessary. Ede v. Johnson, 15 Cal. 53; Lutz v. Kinney, 23 Nev. 279, 46 Pac. 257; 2 Cent. Dig. p. 27. There was no such statutory requirement here.

It is further urged that the condemnation proceedings were void because the affidavit of personal service of notice of the application to the court did not show personal service upon the owners of several lots. It did, however, show such service on Robinson as the owner of lot 186, as well as upon the owners of all but a few of the lots. It appears to be held that the failure to notify one or more of the landowners in a proceeding of this character will not vitiate the proceedings as to those properly notified. Lewis on Em. Dom. (2d Ed.) §§ 383, 531; Poundstone v. Baldwin, 145 Ind. 139, 44 N. E. 191. It is well settled that, when the owner voluntarily accepts the amount awarded for the taking of his land, he waives his right to claim that the condemnation proceedings were irregular, and affirms the validity of such proceedings. See Lewis on Em. Dom. § 531; Matter of Woolsey, 95 N. Y. 135; Poole v. Breese, 114 Ill. 594, 3 N. E. 714; Marling v. Burlington, 67 Iowa, 331, 25 N. W. 268. Such an act is, of course, binding on his successor in interest.

The order granting a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

152 Cal. 211

NEW ENGLAND & COALINGA OIL CO. v. CONGDON et al. (S. F. 4,383.)

(Supreme Court of California. Oct. 11, 1907.)

1. Public Lands — Possession — Rights of Possessor.

One in actual possession of public land is entitled to hold such possession as against every one but the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 51–53.]

2. Mines and Minerals—Oil Land—Location.

Where public land was located as oil land, failure of the locators to discover oil, in the absence of a retention of possession and a prosecution of the work, was fatal to the validity of such location under Act Feb. 11, 1897, c. 216, 29 Stat. 526 [U. S. Comp. St. 1901, p. 1434], providing that the entry of petroleum lands shall be governed by the law relating to placer claims.

3. Same—Discovery.

The discovery of mineral within the limits of a mining claim is essential to the validity of both placer and lode locations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, §§ 24–26.]

4. Same—Time.

It is not essential that the discovery of mineral should precede the location of a mining claim in order to sustain the location; but, where the alleged locator has not made a discovery and has not retained possession to prosecute work looking to a discovery, his mere posting of notice and marking boundaries on the ground will not exclude others who may peaceably enter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, §§ 24–26.]

5. Same—Evidence.

Plaintiff's predecessors located an oil claim in January, 1903, and marked the boundaries thereof. No discovery was made, except some oil sand stained with oil and a ridge of fossil. Oil had been discovered in neighboring locations, and a well existed some two miles distant. A cabin was constructed without furniture, doors, or windows in April, 1904, but no one lived in it, and a watchman employed to watch other lands was employed to watch the claim in question. From the time the notices were posted until defendants entered in October, 1904, no drilling nor actual development work was done, nor any steps taken in that direction. *Held*, that the land was subject to relocation by defendants at the time they entered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 63.]

Department 1. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the New England & Coalinga Oil Company against M. S. Congdon and others. From a judgment for defendants, plaintiff appeals. Affirmed.

E. O. Larkins, for appellant. Hannah & Miller, for respondents.

SLOSS, J. This action was brought to recover the possession of a quarter section of land situate in Fresno county, and damages for the withholding thereof. The defendants had judgment, and the plaintiff appeals from the judgment and from an order denying its motion for a new trial.

The land in controversy is a part of the surveyed public land of the United States, and is claimed by the plaintiff to contain petroleum and other mineral oils. The predecessors of the plaintiff on January 1, 1903, undertook to make a mineral location on said land by posting a notice and marking the boundaries of their location upon the ground. On the following day they filed a copy of their notice of location in the office of the recorder of Fresno county. The complaint alleges that the locators took immediate possession of the land and retained it until the 11th day of November, 1903, when they transferred their interest in said land to the plaintiff, who, upon said transfer being made, took possession of said land and remained in the peaceable possession thereof until the 24th day of October, 1904. On the last-named day the defendants entered upon said land, and have ever since excluded the plaintiff therefrom. The court found that the predecessors of plaintiff did not remain in possession after the 2d day of January, 1903, and that plaintiff never entered into possession and was not in possession at the time of defendants' entry on the 24th day of October, 1904. It also found that on January 1, 1903, no valuable mineral deposits or petroleum or mineral oil were known to be contained in the land, and that no such deposits or petroleum or mineral oils had then been, nor have they since been, discovered on or in the land. If these findings are sustained by the evidence, there can be no doubt that the court properly concluded that judgment should be entered in favor of the defendants.

Apart from any claim based on a mineral location under the laws of the United States, the plaintiff, if in actual possession of the land, was entitled as against every one but the United States, the holder of the paramount title, to retain that possession. Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708. But if, as the court has found, the plaintiff was not on the 17th day of October, 1904, in possession of the land, it had no right superior to that of the defendants entering peaceably, unless by virtue of a valid mineral location. Funk v. Sterrett, 59 Cal. 614. The finding that there had been no discovery of oil upon the land was, in the absence of a retention of possession and a prosecution of work, fatal to the validity of plaintiff's alleged location. By the terms of the statute of 1897 (Act Feb. 11, 1897, c. 216, 29 Stat. 526 [U. S. Comp. St. 1901, p. 1434]), the entry and patenting of lands containing petroleum or other mineral oils are governed by the provisions of the law relating to placer claims, and it is now well settled that a discovery of mineral within the limits of the claim is as essential to the validity of the location in the case of placers as it is in lode locations. 1 Lindley Law of Mines (2d Ed.) § 437; Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673; Olive L. & D. Co. v. Olmstead (C. C.) 103 Fed. 568. An indication of the contrary view in Gregory v. Pershbaker, 73 Cal. 111, 14 Pac. 401, was not necessary to the decision, and the rule that a discovery is requisite to a perfect placer location has been expressly declared by this court in two recent cases dealing with the location of oil lands. Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Weed v. Snook, 144 Cal. 439, 77 Pac. 1023. It is no doubt true that the discovery need not precede the location. As is said in Miller v. Chrisman, supra, at page 446 of 140 Cal., at page 1084 of 73 Pac. (98 Am. St. Rep. 63): "The discovery may be made subsequently, and when made operates to perfect the location against all the world, saving those whose bona fide rights have intervened. One who thus in good faith makes his location, remains in possession, and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession." But, where the alleged locator has not made a discovery and has not retained possession for the purpose of prosecuting work looking to a discovery, his mere posting of notice and marking of boundaries upon the ground will not serve to exclude others who may peaceably enter upon the land which he is not actually working or occupying.

The findings above referred to are fully sustained by the evidence. So far as the plaintiff's possession is concerned, the complaint itself alleges that the entry was made "during plaintiff's absence, and the absence of plaintiff's agents and employés from said premises." There was evidence that in April, 1904, a cabin had been built upon the land, that some roads had been constructed, and a watchman employed. But the cabin had never been occupied, nor had it even been completed so as to be fit for occupancy. It had neither doors nor windows, and contained no furniture. The watchman employed by plaintiff was employed to watch other lands in addition, and lived about three miles from the land in controversy. From the time of posting of notice and the marking of boundaries on the 1st day of January, 1903, down to the entry by defendants on the 24th day of October, 1904, no drilling or other actual development work was done. For all that appears, no agent of the plaintiff had actually set foot upon the ground for months prior to the entry of defendants. No steps were taken by the plaintiff's superintendent to do any work upon the land until after the defendants had located a claim upon the land, and had done acts indicating that they intended to commence operations there. Under these circumstances, we think the court had ample justification for concluding that the plaintiff had never been in actual possession of the land, but that it was merely making a pretense of occupying it without any intention of actually proceeding to develop any mineral oils that might be therein.

It is equally clear from the evidence that the court properly found that there had been no discovery. Evidence that the land was oil bearing consisted of the testimony of plaintiff's superintendent that he had found on the land "some oil sand stained with oil and a ridge of fossil," and that oil had been discovered in neighboring locations; the nearest well being some two miles distant. The geological formation indicated the probable existence of oil-bearing strata in the claim. This evidence was in no degree stronger than that presented in Miller v. Chrisman, supra, where this court said: "To constitute a discovery, the law requires something more than conjecture, hope, or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this there may be other surface indications, such as seepage of oil. All these things combined may be sufficient to justify the expectation and hope that, by driving a well to sufficient depth, oil may be discovered, but one and all they do not of and in themselves amount to a discovery." See, also, Nevada Sierra Oil Co. v. Home Oil Co., supra; Weed v. Snook, supra. The situation is, then, simply this: The plaintiff, claiming under a location made in January, 1903, is seeking to recover possession of the land from parties who entered upon it peaceably almost twenty months after the date of location, although at the time of the entry the plaintiff had not made any discovery of oil, had not diligently prosecuted, and was not then prosecuting any exploration looking toward the discovery of oil, and was not in the actual possession of the property. Showing no right superior to that of the defendants, it was not entitled to disturb their possession.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

152 Cal. 196

JOHNSON v. PHENIX INS. CO. OF BROOKLYN, N. Y., et al.

(S. F. 4,047.)

(Supreme Court of California. Oct. 7, 1907.)

1. New Trial—Notice of Intention to Move—Necessity.

An order denying a new trial will be affirmed where notice of intention to move for such new trial was not served on the adverse party, as expressly required by Code Civ. Proc. § 659.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 276–281.]

2. Same—Proceedings to Procure—Notice of Intention—Persons Entitled to Notice.

Under Code Civ. Proc. § 656, defining a new trial to be a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, and section 657, making the effect of an order granting a new trial to be to vacate the verdict or other decision, and section 659, authorizing a motion for a new trial prior to entry of judgment, the verdict or findings, rather than the judgment, determines whether or not a party to whom notice has not been given is an adverse party within section 659, requiring a party intending to move for a new trial to serve on the adverse party notice of his intention.

3. Same.

In an action on a fire policy issued to mortgagor, loss, if any, payable to mortgagee, mortgagee was made a defendant, because, as alleged, it refused to be made a party plaintiff, and a judgment was prayed for the amount due under the policy, and that out of the judgment the amount due mortgagee be paid. The verdict of the jury was for mortgagor for the amount of the policy, and by the judgment it was adjudged that mortgagor recover of the insurance company an amount specified, and that out of the judgment there be paid mortgagee the amount of the mortgage. *Held*, that the verdict, in view of the pleadings, vested in mortgagee the interest which was by the judgment declared to belong to it, and hence mortgagee was an adverse party within the rule that the verdict, and not the judgment, determines who is an adverse party on whom notice of intention to move for a new trial must be served under the express requirement of Code Civ. Proc. § 659, and was entitled to notice of such intention.

Department 1. Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Elizabeth D. Johnson, on a fire policy, against the Phenix Insurance Company, of Brooklyn, N. Y., in which action the Bank of San Mateo County, mortgagee, was joined as a party defendant. Judgment for plaintiff, and from an order denying a new trial defendant insurance company appeals.

Corbet & Goodwin and Lawrence T. Wagner, for appellant. R. H. McGowan (Galpin & Bolton, of counsel), for respondent.

SLOSS, J. This is an appeal by the defendant Phenix Insurance Company from an order denying its motion for a new trial. An appeal by the same defendant from the judgment has heretofore been dismissed for the reason that notice of appeal, although served on the plaintiff, was not served on the codefendant, Bank of San Mateo County. Johnson v. Phenix Insurance Co., 146 Cal. 571, 80 Pac. 719. In so dismissing the appeal, the court necessarily determined that the Bank of San Mateo County was "an adverse party" within the meaning of section 940 of the Code of Civil Procedure.

The motion for new trial was, like the notice of appeal from the judgment, addressed to and served upon the plaintiff and her attorneys only. At the time of moving to dismiss the appeal from the judgment the respondent moved to dismiss, also, the appeal from the order denying a new trial on the ground that notice of that appeal had not been served on the Bank of San Mateo County. That motion was denied; the court pointing out that as only adverse parties to the proceeding in the court below need be served, and as the Bank of San Mateo County had not been made a party to the motion for new trial, the failure to serve it with notice of appeal from the order made on that motion furnished no ground for dismissing the appeal. The opinion expressly recognized, however, that, while the appeal could not be dismissed, the failure to serve the notice of motion for new trial on an adverse party might furnish a good reason for denying the motion, and, on appeal, for affirming the order denying such motion. That an order denying a new trial will be affirmed where notice of intention to move for such new trial has not been served on the adverse party is well settled. In Herriman v. Menzies, 115 Cal. 16, 26, 44 Pac. 660, 661, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81, the court, after refusing to dismiss the appeal from an order denying a new trial, affirmed the order on this ground, saying: "Section 659 of the Code of Civil Procedure, however, requires that the party intending to move for a new trial shall 'serve upon the adverse party a notice of his intention.' The 'adverse party' upon whom this notice is to be served is determined by the same rules as is the 'adverse party' upon whom a notice of appeal is to be served, viz., every party whose interest in the subject-matter of the motion is adverse to or will be affected by the granting of the motion or changing the former decision of the court; and a failure to serve such adverse party with the notice of an intention to move for the new trial will be attended with the same consequences as a failure to serve an adverse party with a notice of appeal from the judgment. The superior court can have no jurisdiction to re-examine an issue of fact that it has tried, and change its decision thereon, unless all the parties to the issue and former decision are properly before it." See, also, Barnhart v. Fulkerth, 92 Cal. 155, 26 Pac. 221; In re Ryer, 110 Cal. 556, 559, 42 Pac. 1082; Estate of Young, 149 Cal. 173, 85 Pac. 145. In accordance with this rule, the respondent contends that, without examination of the points made on the motion for new trial, the order denying that motion must be affirmed, for the reason that the notice of intention to move for a new trial was not served on the Bank of San Mateo County. As we have stated, this court has already, in Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719, decided that the bank was an adverse party, entitled to service of notice of appeal from the judgment. Whether or not that decision is on the present appeal to be regarded as the "law of the case," we see no reason for doubting the correctness of the views announced in dismissing the appeal from the judgment. If the relative situation of the parties on this appeal does not differ from that there presented, it follows that the respondent's demand for an affirmance of the order must be sustained.

But it is urged by the appellant that inasmuch as a new trial is a re-examination of an issue of fact after a trial and decision by a jury or a court (Code Civ. Proc. § 656), and the effect of the order granting a new trial is to vacate the verdict or other decision (Code Civ. Proc. § 657), it is the verdict or findings rather than the judgment which must be looked to to determine whether or not a party to whom notice has not been given is an adverse party. Accordingly it is argued that the fact that the judgment conferred upon the Bank of San Mateo County certain rights of which it would have been deprived by a reversal does not establish the proposition that the verdict which it is here sought to review gave to the bank such rights. That the motion for new trial attacks the verdict rather than the judgment and that such motion may be made prior to the entry of judgment is no doubt true (Code Civ. Proc. § 659), and therefore the question who is an adverse party, entitled to notice of intention under section 659, is to be determined from the verdict rather than the judgment. It is conceivable that a judgment might declare rights in favor of a party, although the verdict did not authorize such declaration. Such party would be entitled to service of notice of appeal from the judgment, but he would not necessarily be entitled to notice of motion for new trial, which was intended only to attack the verdict. Where, however, the judgment is one which under the pleadings properly follows from the verdict found, the question who are adverse parties is the same whether we regard the verdict or the judgment. The only question here, then, is whether the judgment followed the verdict, or, in other words, whether the verdict gave to the Bank of San Mateo County the rights which were declared in the judgment to belong to it.

The action was upon a policy of fire insurance upon a dwelling house, in the sum of $1,000, issued to plaintiff by the Phenix Insurance Company. The policy contained a provision that loss, if any, should be payable to the Bank of San Mateo County, mortgagee. A loss having occurred, the plaintiff commenced this action against the insurance company and the Bank of San Mateo County, alleging that the bank held a mortgage on the property to secure an indebtedness of $400 owing from plaintiff; that said bank refused to be made a party plaintiff, and for that reason was joined as a party defendant. The prayer of the complaint was for judgment for the full amount due on the policy, and "that out of said judgment the amount due and owing to the defendant bank of San Mateo County on said mortgage be paid." The verdict reads as follows: "We, the jury, find for the plaintiff in the sum of $1,000, with interest at 7 per cent. per annum from the 5th day of June, 1903." By the judgment it is adjudged "that the plaintiff have and recover of and from the defendant Phenix Insurance Company, etc., the sum of $1,050.15" (together with costs and interest), "and that out of said judgment there be paid to the defendant Bank of San Mateo County, a corporation, the sum of $400." While the verdict is nominally in favor of the plaintiff only, we think it should be read as conferring upon the Bank of San Mateo County the benefits which were by the judgment declared to belong to it. In the opinion rendered on dismissing the appeal from the judgment, this court said: "We cannot say that the superior court was without jurisdiction to so adjudge the rights of the bank. Code Civ. Proc. § 578. The complaint states facts upon which a judgment may be based, and practically asks for the very judgment that was given." The verdict must be read in the light of the pleadings and the case made by the complaint (29 Am. & Eng. Ency. of Law [2d Ed.] 1022; Hutchinson v. Sup. Ct., 61 Cal. 119; Johnson v. Visher, 96 Cal. 310, 31 Pac. 106), and so as to carry out the intent of the jury (29 Am. & Eng. Ency. of Law [2d Ed.] 1023). Plaintiff was not seeking a general unqualified judgment for $1,000. She asked merely for a judgment for this amount, subject to the qualification that, as to $400 thereof, payment should be made to the bank. It is not to be presumed that the jury intended to grant to the plaintiff more than she asked. The verdict as it reads is entirely consistent with the view that it was intended to give to the plaintiff merely the relief sought by her and actually given to her by the judgment. So construed it vested a beneficial interest in the bank, of which the bank would be deprived by the granting of a new trial.

For these reasons the lower court could not grant a new trial upon a motion made without the service of notice upon the bank.

The order denying a new trial is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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152 Cal. 201

CAMPBELL-KAWANNANAKOA et al. v. CAMPBELL et al. (S. F. 4,175.)

(Supreme Court of California. Oct. 9, 1907. Rehearing Denied Nov. 7, 1907.)

1. Appeal — Time for Taking — Statutory Provisions.

Code Civ. Proc. § 939, subd. 1, designating 60 days as the time for taking an appeal, refers only to exceptions to a decision on an issue of fact on the ground that it is not supported by the evidence, and not to appeals from judgments sustaining demurrers to pleadings.

2. Perpetuities—Suspension of Power of Alienation.

A trust created by will suspending the power of alienation of real property for a longer period than during the continuance of lives in being at the death of the testator is void under Civ. Code, §§ 715, 716, relating to restraints upon alienation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, §§ 46, 47.]

3. Trusts—Express—Validity.

A trust created by will by which real property is devised in fee simple to the trustees to be conveyed by them to the beneficiaries is void.

4. Pleading—Allegations on Information and Belief.

Allegations in a complaint in equity as to matters peculiarly within the knowledge of defendants, and as to which plaintiffs could learn only from statements made by others, may be based on information and belief.

5. Trusts—Validity—Trusts of Real Property—What Law Governs.

The title and disposition of real estate being governed by the lex loci rei sitæ, the validity of a trust therein, created by a will, must be determined by the same law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 2.]

6. Wills—Void Trust in Will—Disposition of Property.

A testator's intention to disinherit his heirs in unavailing where a trust attempted to be created to that end by will is void, but the property attempted to be so conveyed descends to them, as provided by Civ. Code, § 1386, subd. 1, relating to the distribution of property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 2200-2203.]

7. Judgment — Equitable Relief—Attacking for Fraud.

Under the jurisdiction of equity to afford appropriate relief from judgments, where the judgment assailed is such that it cannot properly be set aside, equity may prevent an inequitable advantage being taken of it by adjudging the guilty beneficiary, or his successor with notice, a trustee for the defrauded party.

8. Same — Collateral Attack — Action by Heirs Against Fraudulent Trustees.

An action to obtain a decree adjudging persons to hold property as trustees for heirs, the title to which they are alleged to have fraudulently procured in the administration of decedent's estate as trustees under a void trust in the will, is not a collateral, but a direct attack, on the judgment of the probate court.

9. Same — Probate Orders—Equitable Relief—Attacking for Fraud.

Where the trustees of a void trust in a will, by concealing the facts from the probate court, have a sham sale of the property under an order of court and obtain a decree of distribution of the proceeds to themselves, thus carrying into effect a scheme to remove the property from administration and possession of nonresident heirs, it is a fraud extrinsic to the questions determined by the judgment of the probate court, and warrants equitable relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 838.]

Department 1. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Abigail Campbell-Kawannanakoa and others against Alice K. Campbell and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

H. L. Gear and Charles W. Slack (J. J. Dunne, of counsel), for appellants. C. J. Bird (Charles Clark, of counsel), for respondents.

ANGELLOTTI, J. This is an appeal by plaintiffs from a judgment rendered against them on the sustaining of demurrers to their amended complaint.

In addition to the ground of want of facts, various other grounds were specified in the demurrers, such as want of jurisdiction, improper joinder of causes of action, defect of parties, ambiguity, uncertainty, and unintelligibility. Defendants, however, do not discuss in their briefs any of these grounds, but confine themselves to the general ground of want of facts. We see no force in any of the other objections made by demurrer, and will not discuss them.

By the bill of exceptions settled for use on this appeal, it appears that plaintiffs, at the time of the sustaining of the demurrers, asked leave to amend their amended complaint by adding thereto certain allegations, a copy of which proposed amendment was served upon defendants and submitted to the court, and that the application was denied by the court solely upon the ground that, if said proposed amendments were considered as incorporated in the amended complaint, said amended complaint would not state a cause of action. Under the circumstances, we have no doubt that the proposed amendments should be taken into consideration in determining whether a cause of action was stated by plaintiffs in the lower court. If, with the aid of such amendments, a cause of action would have been stated in the complaint, and the amendments were essential to a statement of a cause of action, it must be held, inasmuch as the court based its refusal solely on the ground stated, that the court erred in refusing leave to amend. There is nothing in the contention that the bill of exceptions cannot be used on this appeal because the appeal was not taken within 60 days after the rendition of the judgment. The statute relied on in this regard (subdivision 1, § 939, Code Civ. Proc.) refers only to exceptions to a decision on an issue of fact on the ground that it is not supported by the evidence given on the trial.

The action is one in equity by certain heirs of James Campbell, deceased, to obtain a decree adjudging the defendants to hold one-half of certain valuable real property in the City of San Jose, in this state, known as the "St. James Hotel property," with the improvements thereon, as trustees for plaintiffs, and for an accounting as to the rents and profits thereof received by defendants, on the ground of the alleged fraud of defendants in procuring the title in the course of administration of the estate of deceased in the superior court of Santa Clara county.

The case stated by the amended complaint was as follows: The plaintiffs are three children of James Campbell, deceased, and of defendant Abigail Campbell-Parker, his surviving wife; two of them being minors. Defendant Alice K. Campbell is the only other child of said parties, and said surviving wife and four children are the sole heirs at law of the deceased. Said James Campbell died at Honolulu, in the territory of Hawaii, on April 21, 1900, being a resident of that place at the time of his death. He then owned the whole of the said St. James Hotel property as his separate property. He left a will by which he devised one-third of his personal property to his widow, and assumed to devise all the rest of his property to his wife and defendants Carter and Brown as trustees. The trust attempted to be created by the will was contrary to the laws of this state prohibiting the suspension of the power of alienation for a longer period than during the continuance of lives in being at the time of the death of the testator, and was therefore void in its creation as to real property situated within this state. Civ. Code, §§ 715, 716; In re Walkerly, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 64. It was also void as to such real property, under our decisions, because it devised the title in fee simple to the trustees to be conveyed by them to the beneficiaries. Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 100, 84 Am. St. Rep. 70; Estate of Sanford, 136 Cal. 97, 68 Pac. 494; Estate of Pichoir, 139 Cal. 682, 73 Pac. 606. According to the terms of this attempted trust, the property was to be held by the trustees during the lives of the wife and children in esse at the date of his death, and the survivor of them, and, if at the death of each survivor there should be in esse any lawful issue of any child, the trust was to continue for the further definite period of 30 years, provided any of such issue shall live so long, and, if not, then for such lesser term as the survivor of such issue shall live, and at the expiration of the trust the property was to be conveyed by the trustees to the surviving lawful issue of the children. The will of deceased was admitted to probate in the territory of Hawaii on June 26, 1900, and an authenticated copy thereof was on July 27, 1900, admitted to probate in the superior court of Santa Clara county. On December 20, 1901, the surviving wife was appointed and qualified as administratrix with the will annexed in said superior court. Thereafter she and the other defendants conspired and colluded together to prevent a distribution of the real property under the laws of this state, under which, the trust being void, the property would be distributed to the heirs at law (one-third to the surviving wife and one-sixth to each of the children), and to have the title thereto placed in the name of the trustees and the property retained by such trustees under such void trust. The plan adopted and carried into execution was as follows: The administratrix petitioned the superior court of Santa Clara county for an order of sale of said property, and the furnishings of the hotel thereon, on the ground that it was for the advantage, benefit, and best interest of the estate that a sale be made so that the proceeds could be invested in the territory of Hawaii, under the personal control and management of the persons interested in the estate. An order for the sale of all such property was procured from the court on this petition. The administratrix procured from defendant Alice K. Campbell a nominal bid for the property in the sum of $166,250. She then made a return of sale to the superior court, in which she represented that she had sold the property under the order of sale to said Alice K. Campbell for $166,250. On this an order was obtained on February 9, 1903, confirming the purported sale, and ordering a conveyance to the purchaser. On February 10, 1903, the administratrix executed a deed of the property to said Alice K. Campbell for a purported consideration of $166,250, which deed was at once recorded. Said Alice K. Campbell had no means wherewith to make the purchase, and, in fact, paid no consideration for the property. The administratrix thereupon, on February 20, 1903, procured a nominal decree of distribution of the $166,250, which she had never received, and certain other moneys in her hands, to the defendant trustees, and procured a purported receipt for the same from the trustees, although they never received any portion of the $166,250. Alice K. Campbell, the purported grantee in said probate sale, in further execution of the plan, then conveyed the St. James Hotel property to the defendant trustees, and they have ever since been in possession and control of the property. Ever since the death of deceased, the plaintiffs have been residents of the territory of Hawaii, and were wholly in ignorance of their rights in respect to the St. James Hotel property, and of the facts constituting the fraud upon them until after it was too late to obtain any adequate relief in the matter of the estate of said deceased. The defendants, well knowing the rights of plaintiffs in regard to the property, concealed the same from them, and also concealed from them the acts and facts complained of. The date of the commencement of this action does not appear in the record, but it does appear that the amended complaint was filed November 17, 1903.

Complaint is made that some of the allegations of the amended complaint are based on information and belief. These allegations are, however, as to matters which are peculiarly within the knowledge of defendants, and as to which the plaintiffs could learn only from statements made to them by others. There can be no question that such allegations may properly be based on information and belief. See McDermont v. Anaheim, etc., Co., 124 Cal. 115, 56 Pac. 779. Therefore they must here be taken equally with the positive allegations as stating facts confessed by the defendants. We are not advised of the particular reason upon which the learned judge of the trial court based his conclusion that the facts stated were not sufficient to establish a cause of action in plaintiff. It appears very clear to us that a complete case is thereby made for the interposition of a court of equity. It is the universally accepted rule that the title and disposition of real estate is governed by the lex loci rei sitæ. This necessarily includes the proposition that the validity of a trust in real estate attempted to be created by a will must be determined by the law of the situs of the real estate. See Penfield v. Tower, 1 N. D. 216, 46 N. W. 413. This is apparently conceded by counsel for defendants. In the absence of a direction by the testator for the sale of the property, we are not concerned here with the doctrine of equitable conversion. Estate of Walkerly, 108 Cal. 652, 41 Pac. 772, 49 Am. St. Rep. 97. The trust here therefore was void as to the real property of deceased situated within the state of California. It follows that as to such property the deceased died intestate, and the same descended by succession to his heirs at law (Est. of Walkerly, 108 Cal. 627, 652, 660, 41 Pac. 772, 49 Am. St. Rep. 97), one-third to his surviving wife, and one-sixth to each of his four children (subdivision 1, § 1386, Civ. Code), subject only to proper administration of his estate.

In the face of these facts, it is idle to assert that no injury resulted to plaintiffs, three of these children, from the acts of defendants. By those acts the property to which they had succeeded under the laws of this state was irrevocably taken from them without consideration under color of valid probate proceedings, and placed in the name and possession of the trustees under the void trust. It is no answer to this to say that the deceased intended that they should not have this property, and that the acts of the defendants simply result in accomplishing the intent of deceased as expressed in his will. We have already seen that, as to this property, the expressed intent of the deceased was ineffectual for any purpose and the deceased died intestate. "A testator must do more than merely evince an intention to disinherit before the heirs' right of succession can be cut off. He must make a valid disposition of his property." In re Walkerly, 108 Cal. 652, 41 Pac. 772, 49 Am. St. Rep. 97. It might as well be argued that, if a person had indicated an intention as to a disposition of his property to the exclusion of an heir at law by a writing not executed in accordance with the laws of this state and therefore absolutely void as a will, no injury would result to such heir from the concocting of a forged will expressing this intention, the probate thereof, and the distribution of the property of the deceased thereunder. Whatever other objection may reasonably be made to this action, certainly that of want of injury to the plaintiffs is not worthy of serious consideration.

That the acts of the defendants constituted a fraud upon plaintiffs, as well as upon the court, appears to be too clear for question. All the proceedings in the superior court of Santa Clara county, from the petition for the order of sale to and including the decree of distribution of the proceeds of sale, were a mere sham, a scheme devised and carried into effect by defendants to remove the property from administration under color of proceedings for the sale thereof in the manner and for the purposes authorized by our probate law, and to thus accomplish a practical distribution thereof to the trustees under the void trust. There was, in fact, no necessity for any sale of the property, no intention to sell, no sale, no proceeds of sale to be distributed or delivered to the trustees named as distributees in the purported decree. It was all a fraudulent imposition upon the jurisdiction of the superior court, an attempt by concealing the real facts of the transaction from the court to use that jurisdiction for the purpose of depriving plaintiffs without consideration of the property to which they had succeeded under our law—a mere cloak to cover what was, in fact, simply the bodily taking of plaintiffs' property without consideration and without any authority of law.

Defendants' counsel do not appear to seriously dispute that such acts would constitute a fraud, but they urge that inquiry in regard thereto is barred by the orders of the superior court authorizing the purported sale, confirming the purported sale, and distributing the purported proceeds. The jurisdiction of courts of equity to afford appropriate relief from judgments generally, and from such orders and decrees in probate proceedings as are here involved, when obtained by certain kinds of fraud, is too well established to be questioned. See Bacon v. Bacon, 89 Pac. 317, and cases there cited. Where the judgment or order assailed is of such a character that a court of equity may not properly set is aside, it may nevertheless prevent an inequitable advantage being taken of it by adjudging the guilty beneficiary or his successor with notice a trustee for the defrauded party. This character of relief is very common in the matter of fraudulent probate proceedings. The order or decree from the effect of which relief is sought cannot constitute a bar to such equitable action. As has been said, it is solely because of the order or decree, collaterally unassailable and valid on its face, that the equitable jurisdiction is necessary and exists. The contention that a proceeding of the kind before us constitutes a collateral attack on the probate orders is not well founded. It is a direct attack. Bacon v. Bacon, supra; Bergin v. Haight, 99 Cal. 52, 33 Pac. 760. In view of what has been said, it is apparent that, even if it be assumed that the order distributing the purported proceeds was an adjudication by the superior court of the validity of the trust which is not collaterally assailable (Crew v. Pratt, 119 Cal. 139, 51 Pac. 38; Matter of Trust of Trescony, 119 Cal. 568, 51 Pac. 951), such adjudication will not bar this proceeding if it was obtained by fraud of such a character as will warrant the exercise of the well-settled equitable jurisdiction.

It is true, as urged by counsel for respondents, that a court of equity is not authorized to relieve a party from the effect of a judgment or order of a court having jurisdiction to render the judgment or make the order on the ground that the same was obtained by fraud, unless the fraud be, as was said in Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, "extrinsic or collateral to the questions examined and determined" in the proceeding resulting in the judgment or order. That was a case where it was sought to annul a decree in another action between the same parties upon the ground that the prevailing party therein had obtained the decree by the introduction of evidence which he knew to be false and the giving of which he had accomplished by bribing the witness. It was held, in accordance with the views expressed in United States v. Throckmorton, 98 U. S. 65, 25 L. Ed. 93, that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. It was said in that case: "The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy."

The fraud here alleged, however, was extrinsic or collateral, within the meaning of the rule. We are not confronted with a case where a party was in a former proceeding simply deprived by some fraudulent artifice or breach of fiduciary duty on the part of the prevailing party of his opportunity to be heard upon the issues there presented and determined, which is perhaps the most common instance of what is held to be extrinsic fraud. See Bacon v. Bacon, supra; Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; Aldrich v. Barton, 138 Cal. 220, 71 Pac. 169, 94 Am. St. Rep. 43. The extrinsic character of the fraud is even clearer here than in such a case. The complaint is that the former proceedings were wholly sham, a mere fraudulent contrivance designed solely to give the appearance of legality and protection against attack to what was, in fact, nothing but the taking of plaintiffs' property without consideration and without any authority of law, and that they were carried through by means of false representation to and concealments from the court as to the real facts and purposes of the transaction. Such an imposition upon the jurisdiction of the court, to the injury of the absent property owners, from whom the nature of the transaction was concealed and who were wholly in ignorance thereof, and could not have learned concerning the same from anything appearing on the face of the purported proceedings, by one who was their trustee for the proper administration of the affairs of the estate and the preservation of the property for legal distribution (Bergin v. Haight, supra) and who was, moreover, as the natural guardian of two of the owners, under obligation to protect their rights (Sohler v. Sohler, supra), clearly constituted under the authorities what is known as extrinsic fraud warranting equitable relief. See Bergin v. Haight, supra; Tillman v. Thomas, 87 Ala. 321, 6 South. 151, 13 Am. St. Rep. 42; Fisher v. Wood, 65 Tex. 199; McCampbell v. Durst, 73 Tex. 410, 11 S. W. 380; Lawson v. Acton, 57 N. J. Eq. 107, 40 Atl. 584; Hoffman v. Wheelock, 62 Wis. 436, 22 N. W. 713, 716; Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630; Wickersham v. Comerford, 96 Cal. 433; Curtis v. Schell, 129 Cal. 208, 61 Pac. 951, 79 Am. St. Rep. 107; Anderson v. Bank of Lassen Co., 140 Cal. 695, 74 Pac. 287. See, also, Sohler v. Sohler, supra; Aldrich v. Barton, supra. No case cited by counsel for defendants sustains their claim to the contrary.

There is no other point made in support of the ruling of the trial court that requires notice here. The allegations of plaintiffs were sufficient, in our judgment, to show a cause of action.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SHAW, J.; SLOSS, J.

152 Cal. 216

CHAPMAN v. ZOBELEIN. (L. A. 1,856.)

(Supreme Court of California. Oct. 11, 1907.)

1. TAXATION — ASSESSMENT — DESCRIPTION — INSUFFICIENCY.

An assessment book contained a general introductory heading, "Assessment Book of the Property of Los Angeles County," etc., and underneath the heading, "Description of Property in the City of Los Angeles, City and Town Lots," etc., appeared "University Addition Tract, city town lot 34." *Held* that, in the absence of a reference to any map or anything to indicate the character of such tract, the location of the addition in the city, or the relative location of lot 34 thereof, the description was prima facie insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 720–735.]

2. EVIDENCE—EXTRINSIC PROOF.

Where land was assessed for taxes as a certain numbered lot of a named tract, such description might be supplemented by proof that there was a definite tract known by the name given, that a survey and map thereof had been made, and that the lot designated by number constituted a certain and known subdivision thereof, which would sustain the assessment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2117–2128.]

3. TAXATION — ASSESSMENT—DESCRIPTION OF LAND—BURDEN OF PROOF.

Where land not definitely described in a tax assessment was sold for nonpayment of the taxes assessed, the burden was on the party seeking to affirm the validity of the sale to identify the land by explanatory and supplemental proof.

4. SAME—DELINQUENT LIST — PUBLICATION — DEFECTS.

Where a delinquent list of lands sold for taxes contained a note fully explaining the figures used, it was not fatally defective because the dollars and cents were not indicated by the figures purporting to state the amount charged against the land.

5. SAME—SALE BY STATE—AMOUNT OF BID.

It was no objection to a deed by the tax collector on a sale of land by the state which had been sold to the state that the sale was to the highest bidder and for a sum largely in excess of the amount for which the land was sold to the state.

6. SAME—ASSESSMENT—DESIGNATION OF YEAR.

There having been but one assessment of taxes for the year 1898, a statement in the assessement book that it was the book of assessments for that year was a proper designation of the year, though the fiscal year began on July 1st and included the last half of that calendar year and the first half of the succeeding year.

7. SAME—DELINQUENT LIST.

Where a delinquent list of land sold for taxes contained a statement of the total amount due, it was not defective for failure to state separately the items of taxes, penalties, and costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1280.]

8. SAME—CERTIFICATE OF SALE.

A certificate of sale of land for taxes was not invalid because it recited that the amount for which the land was sold being the same as the amount charged was for taxes of every kind charged against the property and penalties and costs and "charges"; the word "charges" being mere surplusage.

9. SAME—DEED—PATENT.

A deed by a tax collector of land sold by the state was a sufficient divestiture of the state's title without a patent signed by the Governor.

10. SAME—DEEDS—SUFFICIENCY—STATUTES.

The sufficiency of a deed by a tax collector to a purchaser of land sold to the state for taxes is to be determined by the requirements of Pol. Code, §§ 3897, 3898, it being only necessary to recite so much of the proceedings subsequent to the execution of the deed by the tax collector to the state as may be necessary to show that the tax collector was authorized as agent for the state to sell the state's previously acquired title to the property, the deed by the state not being within sections 3785, 3786, 3787, regulating conveyances to the state of such land sold for taxes.

11. SAME—RIGHT TO SELL.

Whether the state had acquired the right to sell land which it claimed to hold for nonpayment of taxes must be determined by the proceedings prior to the delivery of the deed of the tax collector to the state pursuant to the original tax sale.

12. SAME—NOTICE OF SALE.

Pol. Code, § 3897 (St. 1897, p. 436, c. 267), prescribing the notice of sale of lands sold to the state for taxes to be given by the tax collector pursuant, to the order of the State Comptroller, does not require that the notice contain the name of the person owing the delinquent tax against the property or a statement of the taxes, costs, penalties, and expenses accrued to date.

13. SAME—PUBLICATION.

Where a statute provided that the notice of sale of tax lands should be published at least three successive weeks in some newspaper published in the county, a publication for one day in each of the four successive weeks in a daily paper, the days being exactly a week apart, was sufficient.

14. SAME—SALE OF LAND—AMOUNT.

The state has power to provide that the sale of its title to land for nonpayment of taxes after the expiration of the redemption period shall be made for the highest price offered, regardless of the amount of taxes, interest, etc., accrued against the property, etc.

Department 1. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by William Chapman against George Zobelein. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Reversed.

Charles Lantz, for appellant. Edward F. Wehrle, for respondent.

SHAW, J. The action is to quiet title, and the appeal is by the plaintiff from the judgment, and from an order denying his motion for a new trial.

The defendant's title depends on the validity of a tax sale to the state of California, a deed to the state in pursuance thereof, and a subsequent conveyance, for the state, by the tax collector to the defendant. The case comes precisely within the rule of the cases of Miller v. Williams, 135 Cal. 183, 67 Pac. 788, Labs v. Cooper, 107 Cal. 656, 40 Pac. 1042, San Diego Realty Co. v. Cornell, 89 Pac. 603, and Fox v. Townsend, 91 Pac. 1004, with respect to the description of the property in the assessment. The property is described in the complaint as lot 34 of the University addition tract, according to the map thereof recorded in book 15, p. 46, of Miscellaneous Records of Los Angeles County, situated in the city of Los Angeles, in said county. In the assessment book there is the following general introductory heading: "Assessment Book of the Property of Los Angeles County for the Year 1898," etc. The description of this particular property is as follows:

"Description of property in the city of Los Angeles, city and town lots" etc.	City Town Lot	or Lots Blk	Value of City and Town Lots	
University Addition Tct.	34		$ 135	"

From this it appears with sufficient certainty that the property assessed is lot 34 in University addition tract in the city of Los Angeles, in Los Angeles county. There is no reference to any map of the said tract, nor anything to indicate the character of the "University addition tract," the location in the city of the addition, nor the relative location of lot 34 thereof. Such a description, in the cases above cited, was held to be prima facie insufficient to make a valid assessment. True, in the cases of Best v. Wohlford, 144 Cal. 733, 78 Pac. 293, Baird v. Monroe, 89 Pac. 352, and Fox v. Townsend, 91 Pac. 1004, it has been decided that, while a similar description is presumptively invalid, it may be explained and supplemented by proof on the trial that there is a definite tract known by the name given, that a survey and map thereof has been made, and that the lot designated by number constitutes a known and certain subdivision thereof, and that, when so explained, the assessment will be held good. Such proof merely shows that when the surrounding natural objects and circumstances, explanatory of the descriptive words, are considered, the prima facie uncertainty disappears and thereupon the description becomes clear and definite. Such extraneous objects and circumstances must be considered in order to give a definite location on the ground to any description. The only difference between this case and one where there is a reference to some map is that maps are of such customary use that it will be presumed that one exists to answer the description and give it certainty, whereas, if there is no reference thereto, the presumptions against tax proceedings prevail, and there must be proof sufficient to make the description certain. In the case of an ordinary instrument, not subject to the strict rules applicable to tax assessments and sales, the description here in question would be prima facie good, and could only be rendered uncertain by affirmative proof of some fact which would disclose a latent ambiguity, as that there were two lots in the tract bearing the number 34. But, as pointed out in the recent case of Fox v. Townsend, 91 Pac. 1004, in cases of tax sales the proof must be made by the party who seeks to affirm the validity of the sale or other proceeding. Inasmuch as this defect may perhaps be cured by proof of explanatory circumstances upon another trial, it is proper to notice some additional points in the record for the guidance of the lower court in the subsequent progress of the case.

The objection that the publication of the delinquent list was ineffectual, because the dollars and cents were not indicated by the figures purporting to state the amount charged against the property, there being a note at the foot of the list fully explaining the figures, is answered by the decision in Carter v. Osborn, 89 Pac. 608. The objection that the deed from the tax collector to the defendant is void because it shows that the sale to the defendant by the state was made to the highest bidder, and was for a sum largely in excess of the amount for which it was sold to the state, is answered by the case of Fox v. Wright, 91 Pac. 1005.

The statement in the assessment book that it was the book of assessments for the year 1898 was a proper designation of the year. There was but one assessment for that year, namely, the assessment of property that was subject to taxation on the first Monday of March, 1898, and the designation made it certain that this was the assessment referred to. The fact that the fiscal year begins July 1st and includes the last half of one calendar year, and the first half of the succeeding year, has no bearing upon the question.

It was not necessary, in the delinquent list, to state separately the items of taxes, penalties, and costs charged against the property. A statement of the total amount is all the law requires. Bank v. Fulgham, 90 Pac. 936. Nor is the certificate of sale to the state rendered invalid by the fact that it recited that the amount for which it was sold, being the same as the amount charged, was for "taxes of every kind charged against said property and penalties, costs and charges." The addition of the word "charges" added nothing to the amount, nor did it change the items composing it. The deed made by the tax collector was a sufficient divestiture of the title of the state. A patent signed by the Governor is not necessary. Bank v. Fulgham, supra.

A number of objections are made to the sufficiency of the deed executed by the tax collector, for the state, to the defendant, on the theory that the requirements of the statute as to the deed made to the state, under sections 3785 and 3786 of the Political Code, are equally applicable to deeds made by the state in accordance with the provisions of sections 3897 and 3898 of the Political Code. Manifestly the provisions of sections 3785, 3786, and 3787 have no direct application.

The sufficiency of the deed by the tax collector to a purchaser at a sale made after the title has become vested in the state is to be determined by the requirements of sections 3897 and 3898, and it is only necessary that it shall recite so much of the proceedings subsequent to the execution of the deed by the tax collector to the state as may be necessary to show that the tax collector was authorized, as agent for the state, to sell and convey the state's previously acquired right to the property. County Bank v. Jack, 148 Cal. 442, 83 Pac. 705, 113 Am. St. Rep. 285. Whether or not the state had previously acquired the right to sell is, of course, to be determined by the proceedings prior to the delivery of the deed of the tax collector to the state in pursuance of the original tax sale. At the time the sale to the defendant was made, February 11, 1905, section 3897 of the Political Code (St. 1897, p. 436, c. 267) did not require that the notice of sale given by the tax collector, in pursuance of the order of the State Comptroller, should state the name of the person owing the delinquent tax that may be against the property, or a statement of the taxes, costs, penalties, and expenses accrued to that date. Hence the omission of such matters is immaterial. The statute in force at the time required that the notice should be published "for at least three successive weeks in some newspaper published in the county." The notice was published on one day in each of four successive weeks in a newspaper of the county which was published daily during that period, the days of such publication being exactly one week apart, but the notice was not inserted except for the one day in each of said weeks. This was a sufficient compliance with the statute. People v. Reclamation Dist., 121 Cal. 524, 50 Pac. 1068, 53 Pac. 1085.

The question of the power of the state to provide that the sale of its title after the expiration of the redemption period of five years shall be made for the highest price offered, regardless of the amount that may have accrued against the property for taxes, penalties, interest, and costs, was fully considered in the case of Fox v. Wright, 91 Pac. 1005, and it was there held that the state had such power.

There are no other questions requiring notice.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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6 Cal. App. 331

PEOPLE v. HALLAM et al. (Cr. 89.)

(Court of Appeal, First District, California. Aug. 29, 1907.)

1. Criminal Law—Appeal—Record—Appeal from Judgment—Questions Presented for Review.

Where an appeal is from a judgment, without a bill of exceptions, the sufficiency of the evidence to sustain the verdict, and the correctness of the court's rulings on the admissibility of evidence are presumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3029.]

2. Robbery—Trial—Instructions—Possession of Stolen Property.

On a prosecution for robbery, an instruction that, if the property was feloniously taken and received into the possession of defendants shortly thereafter, any failure of defendants to account for their possession was a circumstance tending to show their guilt, and they were bound to explain it in order to remove its effect, was not improper as casting the burden upon defendants to explain the possession of the property, especially when read in connection with an instruction, given at defendants' request, that possession of the goods is a circumstance to be considered in determining defendants' guilt, but is not of itself sufficient to authorize a conviction.

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Dyer Hallam and another were convicted of robbery. From the judgment and order denying a new trial, they appeal. Affirmed.

Chas. B. Rosendale, for appellants. U. S. Webb, Atty. Gen., for respondent.

COOPER, J. The defendants were charged in the information with the crime of robbery in unlawfully and feloniously taking from the person and possession of one Wigney certain personal property described in said information, without his consent and against his will and by means of force and fear. After trial a jury returned a verdict finding them guilty, and the court thereupon pronounced judgment, adjudging the defendants guilty, and directing that they be punished by imprisonment in the state prison for the term of 25 years. They made a motion for a new trial, which was denied, and this appeal is from the final judgment and from the order denying the said motion for a new trial.

The appeal comes here on the judgment roll alone without any bill of exceptions, and it must be conceded for the purposes of this case that the evidence was sufficient to sustain the verdict, and that the rulings of the court in regard to the admissibility of evidence were correct.

The sole point made by the appellants is the giving of the sixth instruction, given at the request of the prosecution, which is as follows: "If the jury believe from the evidence beyond a reasonable doubt that the property mentioned in the information, or any portion thereof, was feloniously taken from the person of the prosecuting witness, E. Wigney, as described in the information, and received into the possession of the defendants shortly after being so feloniously taken, the failure, if failure there be, of the defendants to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show their guilt, and the accused are bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts if the evidence disclose any such." It is claimed that the said instruction is erroneous for the reason that it states that the accused, under the circumstances therein stated, were bound to explain the possession in order to remove the effect of the possession as a circumstance; or, in other words, that the effect of the instruction was to cast the burden upon the defendants to explain the possession of the property. The instruction is copied almost literally from an instruction approved by the Supreme Court in People v. Wilson, 135 Cal. 331, 67 Pac. 322. It was there said, after quoting the instruction, that it is almost a literal copy of one given in People v. Abbott, 101 Cal. 647, 36 Pac. 129, and was therein approved. It has been approved by the Supreme Court in other cases, and, unless we were to overrule these cases laying down a long established rule, we will have to hold that the giving of the instruction was not erroneous. The instruction must also be read in connection with instruction No. 6 given at the request of the defendants, which stated to the jury: "The possession of the fruits of crime is a circumstance to be considered in determining the guilt of the defendants, but you are instructed that this circumstance is not of itself sufficient to authorize a conviction, and that the possession by the defendants of the articles alleged to have belonged to the prosecuting witness is not sufficient to convict the defendants of the crime of robbery."

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

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6 Cal. App. 361

In re WARNER'S ESTATE.

WARNER v. WARNER. (Civ. 357.)

(Court of Appeal, Third District, California. Sept. 4, 1907. Rehearing Denied by Supreme Court Oct. 31, 1907.)

1. Husband and Wife—Antenuptial Settlements—Construction.

An antenuptial contract that the intended wife relinquished all right to or interest in the property of the intended husband, either as heir or otherwise, relinquishes all claim to the property owned by him at the time of marriage and also at his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 182, 183.]

2. Same—Community Property—Interest of Wife.

The interest the wife acquires in community property or the husband's separate property she acquires as heir; and, where she relinquishes her rights as heir, she relinquishes her right to a part of the community property and to the subsequent acquisition of the separate property.

3. Same.

Where an antenuptial contract between an intended husband and wife provided that in consideration, among other things, of the wife receiving from his estate on his death a specified sum of money she relinquished all claim to his property, the wife is entitled to that sum, not as heir, but under the contract.

4. Appeal — Review — Presumptions — Demurrers.

Where an order sustaining a demurrer is general, and does not state on what particular grounds it is based, if correct on any ground, it should be upheld.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3706-3709.]

5. Husband and Wife — Antenuptial Settlements.

Where, in an antenuptial contract, the intended wife relinquishes all her rights in the property of her intended husband, as his heir or otherwise, in consideration of certain covenants by him, if the husband fails to perform as to material covenants, the wife may still claim her rights as heir.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 196-208.]

6. Pleading—Demurrer to Pleading Good in Part.

Though an answer filed to the opposition to the appointment of the one filing the answer as administratrix be defective in some particulars required in a pleading purporting to set up fraud and mistake, yet the defect cannot be reached by general demurrer where other defenses are sufficiently alleged in the answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 486-490.]

7. Courts — Courts of Probate Jurisdiction.

The widow of a decedent having filed a petition in the superior court that she be appointed administratrix, a son of decedent filed a petition, asking for his appointment and a contest to the widow's petition on the ground that by virtue of an antenuptial contract the widow was not entitled to succeed to any personal estate, and therefore was not entitled to letters, under the express provisions of Code Civ. Proc. § 1365. The widow by answer alleged that the contract was procured by fraud: that it was entered into as the result of a mutual mistake; that the consideration was inadequate; that the contract was waived by decedent; and that decedent had failed to perform the same. *Held*, that the superior court, sitting in probate, had jurisdiction to hear and determine the defenses raised by the answer.

Appeal from Superior Court, Sacramento County; J. H. Hughes, Judge.

Petition by Katie Warner that she be appointed administratrix of the estate of Adam Warner, deceased. Adam J. Warner filed a petition, asking that he be appointed administrator and also a contest to the petition of Katie Warner, and, from a judgment for Adam J. Warner, Katie Warner appeals. Reversed and remanded with directions.

Hiram W. Johnson and A. A. De Ligne, for appellant. A. L. Shinn and W. F. Renfro, for respondent.

ELLISON, J. One Adam Warner died intestate in Sacramento county in January, 1906, and soon thereafter the appellant, his widow, filed a petition in the superior court of that county, asking that she be appointed administratrix of his estate. The respondent, a son of the deceased, filed a petition, asking that he be appointed administrator of said estate, and also filed a contest to the petition of the widow. The respondent concedes that the appellant is the widow of the deceased, and would ordinarily be entitled to administer upon his estate, but by his pleadings makes the claim that by virtue of the provisions of a certain written agreement she is not entitled to succeed to any part of the personal estate of the deceased, and therefore is not entitled to letters of administration. Code Civ. Proc. § 1365.

It appears from the record that just prior to the marriage of the appellant and deceased they entered into a written agreement with each other, the material parts of which are as follows: Adam Warner, in consideration of the marriage thereafter to be performed, agreed to support appellant and her minor daughter and to pay to the appellant the sum of $100 per year, and agreed that at his death she should receive out of his estate, without administration, the sum of $1,000. In consideration of the marriage to be performed and of the covenants and agreements to be kept and performed on the part of the said Adam Warner, and in further consideration of the said Adam Warner paying to appellant the said sum of $100 per annum and of her receiving from his estate at his death the sum of $1,000, she "does hereby relinquish and disclaim any and ——— right, claim or interest in or to the property of the said first party (Adam Warner) either as heir or otherwise." By this agreement, the appellant relinquished all claim in and to the property owned by Adam Warner at the time of the marriage, and also all interest in any property he might have at the time of his death, and, if still enforceable, prevents her from succeeding as heir to any of the personal property of the deceased. The language of the instrument is not consistent with the theory that they were contracting in respect only to the property then owned by the deceased. The words "relinquish all claim in and to the property of Adam Warner, as heir or otherwise," cannot be thus limited. "It must first be observed that by the law no inheritance can vest, nor can any person be the actual or complete heir of another till the ancestor is previously dead. 'Nemo est hæres viventis.'" 2 Blackstone, p. 208. When appellant relinquished all claim to the property of the deceased as his heir, she was not merely relinquishing her claim in and to property then owned by him. She had in mind that deceased might die before she did without having made a will, at which time, and not before, she would occupy the position of being his heir, and she contracted that, when that event happened and that time came, she would claim nothing from his estate by inheritance. It is unnecessary to enter into any lengthy discussion of the meaning and effect of this agreement, because the Supreme Court had it under consideration in the case of Warner v. Warner, 144 Cal. 618, 78 Pac. 24, and in reference to it said: "The relinquishment and disclaimer of the defendant of all right and interest in and to the property of the plaintiff 'either as heir or otherwise' was an agreement on her part not to seek to deprive him of any of his property during his lifetime or to assert any claim thereto adverse to him during his lifetime or any claim of inheritance thereto at his death."

The suggestion of counsel that, notwithstanding the agreement, the appellant succeeds to one-half of the community property and to one-third of the acquisitions of the deceased as his separate property, cannot be accepted. Whatever interest the wife acquires in the community property or the husband's separate property she acquires as heir (Cunha v. Hughes, 122 Cal. 111, 54 Pac. 535, 68 Am. St. Rep. 27; Estate of Burdick, 112 Cal. 387, 44 Pac. 734), and, when she relinquished her rights as heir, she relinquished her right to a part of the community property and to the subsequent acquisition to the separate property. As to the $1,000, if she gets it at all, it will not be because the law of descent casts it upon her, but under the terms of the contract. Thus construing the written agreement of the parties, it is clear that, if it is to have legal effect and to be held binding according to its terms, appellant is not entitled to letters of administration. In re Davis, 106 Cal. 455, 39 Pac. 756.

But appellant by an answer to the opposition, alleged matters which she claimed would result in a finding that the agreement was not legally binding upon her, at least in its present form. In this answer she alleged that the agreement was entered into as the result of fraud, stating in what the fraud consisted; that the agreement was entered into as the result of a mutual mistake, as to the terms and conditions incorporated into it, stating in what the mistake consisted; that the consideration of the agreement was inadequate and disproportionate to the value of the property of the husband; that the agreement was waived by the said Adam Warner in his lifetime; that said Adam Warner failed and refused to support the minor daughter of appellant during his lifetime, and failed to make any provision for the payment of the $1,000. A demurrer both general and special was interposed to this answer and by the court sustained, and the answer was stricken out. The special demurrer was on the ground that the court, sitting in probate, could not inquire into these matters of fraud, mistake, and so forth, alleged in the answer. The order sustaining the demurrer was general, and does not state on what particular grounds it was based, and, if correct upon any ground or for any reason, should be sustained. It is stated in the brief of appellant, and not denied by respondent, that the demurrer was sustained upon the ground that the court sitting in probate had not jurisdiction to try these issues raised by the answer; and not much, if any, question is raised as to the technical sufficiency of the answer as a pleading. We are of opinion that the answer was good as against a general demurrer.

The allegation that the deceased did not perform the terms and conditions of the contract on his part to be performed, and did not educate the daughter of the appellant, we think raised a material issue. It seems the respondent was of the same opinion, for, in his petition and opposition, he alleged such performance on the part of the deceased, and the court has found such performance. So it would seem that the matter was deemed material by both the respondent and the lower court. We think that where a woman in an antenuptial contract releases all her rights in the property of her intended husband as his heir, in consideration of his doing certain things, if he fails to perform material covenants on his part, she may show this, and still claim her rights as heir. Mann v. Mann, 53 Vt. 55; Schouler on Domestic Relations, p. 271.

As to the fraud and mistake alleged, it may be that a careful analysis of the pleading in these particulars would lead to the conclusion that it is defective in some particulars required in a pleading purporting to set up fraud and mistake, but, if so, the defect could not be reached by a general demurrer where other defenses are sufficiently alleged in the pleading. The matter would have to be reached in some other way, where, after full investigation, the pleader could, if he so desired, ask to amend, to correct the defects and omissions, if such there be. Did the court, sitting in probate, have jurisdiction to hear and determine these defenses raised by the answer? It was the duty of the superior court to ascertain and determine which of the two parties petitioning was entitled to letters of administration, and as such it had power and it was its duty to decide and pass upon all questions necessary to be decided in order to reach a proper conclusion upon the ultimate issue to be determined. An inspection of the written agreement when presented showed that she was not entitled to administer on the estate. She had anticipated this by alleging in an appropriate pleading facts which, if true, would show that the agreement ought not to be held binding upon her.

Before it could be determined whether she was entitled to administer, it was necessary for the court to determine the validity of the agreement; an issue as to its validity and binding force having been raised. The matter was being heard in the superior court, the jurisdiction of which is fixed by the constitution and not by acts of the Legislature, and, if the answer contained allegations of facts which, if true, showed that the agreement was procured by fraud or mistake or had not been executed by the parties, it was the duty of the court and it had the power to pass upon these issues. This view seems to be in harmony with the law as stated in Re Burton, 93 Cal. 463, 29 Pac. 36, wherein it is said: "No distinct court of probate has been created or recognized by the present constitution of this state. The Constitution has created superior courts, and has given them original jurisdiction of the subject-matter of various classes of actions and special proceedings more or less distinct from each other, among which are 'all actions at law which involve the title or possession of real property' and 'all such special cases and proceedings as are not otherwise provided for' and 'all matters of probate.' * * * The superior court while sitting in matters of probate is the same as it is while sitting in equity, in cases at law, or in a special proceeding; and when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment in such case. This is an incidental power pertaining 'to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them.'" Nor is there anything in the case of Corker v. Corker, 87 Cal. 650, 25 Pac. 922, in conflict with these views when the facts of that case are clearly understood. In that case a petition had been filed for the probate of a will. The wife of the deceased objected to its probate on the ground that after its execution the deceased had married her and that this marriage revoked the will, as no provision had been made for her, either by the will or by a marriage settlement. In response to this claim of the widow, the petitioner produced a paper which he termed a marriage settlement, and claimed that it did make provision for her. The Supreme court held that a proper construction of this agreement led to the conclusion that on its face and by its terms it did not make provision for the wife, and hence that by the marriage the will was revoked.

But the superior court had gone further, and had found that the agreement was not fair and reasonable; that it was not founded upon a sufficient consideration, etc. It was in reference to these findings that the court used the language quoted in respondent's brief. At page 651 of 87 Cal., page 924 of 25 Pac., the court uses this language: "As soon as this instrument was presented to the court, and the court saw from an inspection of it that it was not a marriage contract, its power under the proceedings before it was limited to denying the probate of the will. After it had been shown that there was no marriage contract in which provision had been made for the wife, the court was only required to determine the person who had a right to administer the estate. Whether rights of property passed under the contract or whether it could be enforced or whether the widow had any rights in the estate of her deceased husband, are questions that may arise when distribution of the estate shall be sought, but could not then be investigated." All the court intended to decide in this case was that as the agreement, even if valid, did not make provision for the wife, it was of no value for the purpose for which it was offered, viz., to show that the will had not been revoked, and it was not proper for the court to decide in that proceeding whether it might not be valid and enforceable for some other purpose. The court did not intimate that, when its validity became material in some matter pending in the probate court, its validity might not there be inquired into. It distinctly states that the question whether it could be enforced is a question that may arise when distribution of the estate shall be sought, and, of course if raised, will be decided by the court in the matter of that estate; that is, by the court sitting in probate. Notwithstanding that the court had sustained a demurrer to the answer and struck it out, it has found that the appellant is not entitled to succeed to any portion of the estate of the deceased, that she entered into the agreement referred to, and that it was fully performed by the deceased.

While it is not necessary to decide the question at this time, yet it may be suggested that it is more than probable that these findings and the judgment following them, if permitted to stand, will be binding and conclusive upon the widow when the estate is distributed, and that she will not then nor in any subsequent proceeding be allowed to allege or prove any of the facts set forth in her answer to the opposition of the defendant. Howell v. Budd, 91 Cal. 342, 27 Pac. 747. If this be so, the necessity of her being allowed to allege and prove in this proceeding facts to show that the agreement is not binding upon her becomes the more apparent.

The judgment is reversed and the cause remanded, with directions to the lower court to overrule the demurrer to the answer filed by appellant to the contest of Adam J. Warner, and to deny the motion to strike out the same.

We concur: CHIPMAN, P. J.; BURNETT, J.

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6 Cal. App. 356

RUCK v. CALEDONIA SILVER MINING CO. et al. (Civ. 224.)

(Court of Appeal, First District, California. Sept. 4, 1907.)

CORPORATIONS — STOCK — ASSESSMENT — STATUTORY PROVISIONS.

An order levying an assessment on corporate stock, which, though stating that the assessment was payable to the secretary, failed to specify where it was payable, as required by Civ. Code, § 334, is void, as in cases of forfeiture there must be a strict compliance with the statute.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Francesca Ruck against the Caledonia Silver Mining Company and others. Judgment for plaintiff, and the mining company appeals. Affirmed.

Wm. P. Humphreys, for appellant. Wilbur G. Zeigler, for respondents A. Krause and others. Orrin K. McMurray, for respondent F. Ruck.

COOPER, P. J. This action was brought to recover of defendant corporation 500 shares of its capital stock, or, in case a recovery cannot be had, for the value thereof. Findings were filed, upon which judgment was entered for plaintiff. This appeal is from the judgment on the judgment roll alone.

The findings show that at all the times mentioned in the complaint the plaintiff was the owner of said 500 shares of capital stock; that at a meeting of the directors of defendant corporation held on June 5, 1902, the following resolution or order, levying an assessment, was passed, to wit: "Resolved, that an assessment of fifteen cents per share be and the same is hereby levied upon the capital stock of the Caledonia Silver Mining Company, payable immediately to the secretary, and any stock upon which this assessment shall remain unpaid on the 9th day of July, 1902, will be delinquent and advertised for sale, at public auction, and unless payment is made before, will be sold on Wednesday, the 30th day of July, 1902, to pay said delinquent assessment, together with the costs of advertising and expenses of sale." Notice of said assessment was either personally served upon each stockholder, or else, in lieu thereof, a notice was deposited in the United States post office addressed to each stockholder, and published at least once a week for four successive weeks in two newspapers of general circulation, all as required by law. There is no question as to the notices so given being in proper form, and published and served as required by law, but the record does not show that plaintiff ever received personal notice of the assessment. The assessment on the stock of plaintiff was not paid, and, after due publication of delinquency and notice of sale, the said stock was sold to defendant Krause on the 30th day of July, 1902, for the amount of the said assessment and costs, and the said shares of stock were transferred upon the books of the defendant corporation to said Krause in pursuance of said sale. In December, 1902, the plaintiff tendered to defendant corporation, and also to defendant Krause, the sum for which the said stock was sold, with interest thereon from the date of sale, and at the same time offered to pay the amount of any other assessments, with the interest thereon, and the amount of any expenses which defendants had incurred, together with a proper fee or charge for making any transfer of the stock on the books of the corporation, and demanded a transfer of said stock to plaintiff, but the defendant corporation then refused, and ever since has refused, to receive the amounts so tendered and offered to be paid, or to make any transfer of the said stock to plaintiff. Plaintiff, although claiming that the said sale of stock was unauthorized, offered to do what was equitable and right at the time of making a demand for said stock. It was held by the trial court that the assessment, as made by the board of directors, was void, and hence that all subsequent proceedings thereunder were void, and that for this reason the sale did not divest the title of plaintiff to her stock. This presents the sole question in the case.

Section 334 of the Civil Code, which is part of the corporation's charter, provides as follows: "Every order levying an assessment must specify the amount thereof, when, to whom, and where payable; fix a day subsequent to the full term of publication of the assessment notice, on which the unpaid assessments shall be delinquent, not less than thirty nor more than sixty days from the time of making the order levying the assessment; and a day for the sale of delinquent stock, not less than fifteen nor more than sixty days from the day the stock is declared delinquent." The above quoted section states in positive terms what must be specified in the order levying the assessment. It is there stated that the order must specify where the assessment is payable. We look in vain for any such specification in the order. It states the assessment is payable to the secretary, but his residence, office, or place of business is not mentioned. He may, for aught that appears, have been absent from the state. We cannot speculate as to whether or not the plaintiff could have been injured by the omission in the order. The proceedings by which the property of a stockholder is declared forfeited without suit, or personal notice of any kind, must be strictly construed. All the conditions precedent to such forfeiture must exist. Courts have not the power to dispense with any one of such conditions. The Legislature has said that the order must specify where the assessment is payable, and it is not for us to eliminate the provision for any reasons which might appeal to us. It is said that the stockholder could easily have ascertained the business office of the secretary, or the place where the assessment was payable. If the order had omitted the amount of the assessment, or the person to whom it was payable, or any other matter required, it might with equal force be urged that the stockholder could have ascertained by inquiry the amount of the assessment, the person to whom it was payable, and any other omitted matter. Such construction would leave the law as to the validity of an assessment in a sea of uncertainty. No lawyer could advise his client as to whether or not an assessment is valid, because he could not by any possible means guess what omission the court would say was harmless. To require the order levying the assessment to comply with the statute in its essentials is to leave the rule plain so that everyone may understand it. We do not mean that an assessment would be declared void if it did not literally follow the language of the Code, but it must contain the substance of every requirement therein. It is the rule, well established by the authorities, that proceedings in regard to the levy of an assessment and sale of the stock of a shareholder of a corporation for a delinquent assessment are in invitum. The right must come from the law or the charter, and can only be legally exercised in the manner provided by the law, or by the charter. The reason for a strict construction in such case is that the sale, if regular and founded upon a valid assessment, forfeits the stock, and equity has no power to relieve from such forfeiture. In Johnson v. Lyttle's Iron Agency, L. R. 5, Ch. Div. 687, where notice of an assessment call demanded payment of interest from the day of the call instead of from the day fixed for the payment, as the law required, Mellish, Lord Chief Justice, said: "I think that, if the notice departs in any respect from the statutory form, it is impossible for us to go into the question how much it departs. It is a bad notice, and the subsequent resolution, which is founded upon it, is invalid. It is the established rule of the court of chancery and of the courts of common law that no forfeiture of property can be made unless every condition precedent has been strictly complied with. A very little inaccuracy is as fatal as the greatest." In Northampton Mut. Live Stock Ins. Co. v. Stewart, 39 N. J. Law, 486, the company brought an action to enforce an assessment. The charter required that a notice of the levy of the assessment should be published in two newspapers of the county. It was not shown that such publication was made, but it was contended that personal notice of the assessment was given. The court said: "The fact even that personal notice of the assessment was served by the company upon the defendant is not sufficient to answer his objection." In Germantown Pass R. Co. v. Fitler, 60 Pa. 130, 100 Am. Dec. 546, the court, speaking through Justice Sharswood, said: "We must look to the charter for the power of the directors to forfeit the stock. No doubt the power given must be strictly pursued, and, if any restrictions or limitations therein provided have been disregarded, the alleged act of forfeiture must be declared invalid." In San Bernardino Ice Co. v. Merrill, 108 Cal. 493, 41 Pac. 488, our own Supreme Court said: "The plaintiff seeks to recover the amount of the assessment, not by virtue of any contract of subscription on the part of defendant, but solely by virtue of the obligation against him, which is created by the statute, and hence a strict observance of the statutory mode and provision is essential to its recovery." The following authorities support the conclusion we have reached in principle: 1 Cook, Stockholders (5th Ed.) § 129; Morris v. Metalline Land Co., 164 Pa. 326, 30 Atl. 240, 27 L. R. A. 305, 44 Am. St. Rep. 614; Westcott v. Mining Co., 23 Mich. 145; Raht v. Mining Co., 18 Utah, 290, 54 Pac. 889; Tomlin v. Tonica & P. R. Co., 23 Ill. 429; Hughes v. Antietam Mfg. Co., 34 Md. 316; Portland S. & P. R. Co. v. Graham, 11 Metc. (Mass.) 1; Sparks v. Liverpool Waterworks Co., 13 Ves. Jr. 428.

Appellant insists that American Pastoral Co. v. Gurney (C. C.) 61 Fed. 41, lays down a different rule, and holds that the time and place of payment of an assessment need not be stated in the order. In that case the plaintiff was a corporation existing under the laws of the kingdom of Great Britain and Ireland. Section 11 of its charter provided: "The directors may, from time to time, make such calls upon the members, in respect of moneys unpaid, on their shares, as they may think fit, but twenty days' notice at the least shall be given of each call; and each member shall be liable to pay the amount of calls so made to the persons, and at the times and places appointed by the directors." It is plain, upon inspection, that the call in that case did not have to specify the time and place of payment. The time and place were to be appointed by the directors. This was evidently the view taken by the court; for in the opinion it said: "Under these articles it seems clear to me that when the directors, being duly convened, determined that there was need for making an assessment upon the unpaid portions of the shares of the company, and fixed the amount of the assessment, and the time for the payment thereof, they did all that was necessary to constitute a valid call." In other words, in that case the directors did all that the charter required, and hence the call was valid. In the case at bar the directors did not make the order as the statute says it must be made.

The judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

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6 Cal. App. 276

DONAHUE v. STOCKTON GAS & ELECTRIC CO. (Civ. 341.)

(Court of Appeal, Third District, California. Aug. 26, 1907.)

1. NUISANCE—PUBLIC NUISANCE—ACTION BY PRIVATE PERSON.

Under Civ. Code, § 3480, defining a public nuisance as one affecting an entire community or neighborhood, etc., although the extent of damage inflicted on individuals may be unequal, and section 3493, authorizing a private person to sue for a public nuisance, if it is specially injurious to him, a private person cannot sue for damages sustained by a public nuisance, unless he suffers, not only a special injury, but one different in kind, and not simply in degree, from that suffered by the public in general.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 164-169.]

2. SAME—COMPLAINT—SPECIAL DAMAGE.

Where a complaint for a public nuisance charged that the fumes from defendant's works polluted the atmosphere in the neighborhood surrounding plaintiff's property, and also alleged that defendant so negligently constructed its works and operated them as to pollute the water on plaintiff's premises, and to injure and poison the soil so that it became unproductive, the latter allegation stated special damage not suffered by the public in general, and rendered the complaint impervious to a general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 187.]

3. PLEADING—DEMURRER TO PLEADING GOOD IN PART.

Where matter stated in a single count in a complaint is divisible in its nature, a demurrer must be confined to those parts which are defective under the rule applicable to a complaint in different counts, so that a general demurrer to an entire complaint cannot be sustained if any portion thereof states a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 486-490.]

4. LIMITATION OF ACTIONS—RAISING DEFENSE BY DEMURRER.

A demurrer on the ground of limitations can only be sustained when it affirmatively appears from the complaint that plaintiff's cause of action is barred.

5. SAME—CONTINUING NUISANCE.

In an action for a nuisance, the two-year statute of limitations would bar a recovery only for what occurred prior to the beginning of the two-year period before suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 304, 650.]

6. JUDGMENT—MERGER AND BAR—SUCCESSIVE ACTIONS—CONTINUING NUISANCE.

The originator of a nuisance is liable to successive actions for damages resulting from its maintenance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1120.]

7. NUISANCE — PLEADING — COMPLAINT — CERTAINTY.

In a suit to recover damages for the maintenance of defendant's gas works alleged to constitute a nuisance, plaintiff was not required to inform defendant of the time when it constructed the works; an allegation that they were constructed long prior to the commencement of the action being sufficient.

8. SAME—TIME.

Where an action for damages for a nuisance was barred after two years, a complaint alleging that gas from defendant's works had escaped and permeated plaintiff's soil for a period of two years last past, the claim of damages being confined to that period, sufficiently alleged the time during which the gas had escaped.

9. LIMITATION OF ACTIONS — PLEADING — ANTICIPATING DEFENSE.

Limitations being an affirmative defense, the burden is not on the plaintiff to affirmatively allege that the action is not barred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 663.]

10. NUISANCE—COMPLAINT—CERTAINTY.

Where a complaint for damages and to abate defendant's gas works as a nuisance alleged that noxious, offensive and poisonous odors, vapors, smoke, soot, and cinders were emitted therefrom which floated over plaintiff's property, the complaint was not objectionable for failure to show by what means the existence or operation of the works was a menace to the safety, health, comfort, or enjoyment of plaintiff or his home.

11. SAME—TIME.

Where a complaint for nuisance alleged the occurrence of certain damages "within two years last past," and then alleged that "within the aforesaid period" plaintiff was required to and did dig ditches, and put down water mains and pipes for the conveyance of water to his dwelling by reason of the leakage of gas, etc., from defendant's works, the complaint sufficiently alleged that the ditches were dug and the water mains put down within such two-year period.

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by Daniel S. Donahue against the Stockton Gas & Electric Company. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

A. H. Carpenter, for appellant. Nicol & Orr, for respondent.

BURNETT, J. The appeal is from a judgment of dismissal following an order sustaining a demurrer to the second amended complaint, plaintiff declining to amend again.

The demurrer was upon the following grounds: Insufficiency of the facts. Uncertainty in these respects: The time when defendant's works were constructed, the length of time plaintiff's land had been injured, the time when the water formerly used by plaintiff and his family was rendered unfit for use, when plaintiff was compelled to dig ditches or put down water mains or pipes, when the damage was sustained, wherein the damage sustained by plaintiff differs in kind from that suffered by the public or wherein the existence of defendant's plant or its operation is a menace to plaintiff or the public, and also that said complaint shows upon its face that plaintiff's cause of action is barred by the provisions of the statute of limitations of the state of California.

To understand the points made, the following synopsis of the complaint is deemed essential: Plaintiff is, and has been since 1889, the owner and in possession of a house and lot adjacent to defendant's plant. Defendant is, and since 1895 has been, the owner and in the possession of several lots in the same block as plaintiff's residence in the city of Stockton and in a portion of said city largely used for residential purposes; "that long prior to the time of the commencement of this action the defendant made, dug, and constructed on its said lot within a few feet of plaintiff's said premises certain gas works, gas tanks, reservoirs, and cisterns, which said reservoirs and cisterns were of great depth and diameter, and ever since their construction have contained and still contain poisonous gas and other obnoxious, offensive, injurious, unhealthy and poisonous matter; the said gas works * * * were so carelessly, negligently, and in sufficiently made * * * operated, and maintained that for and during the period of two years last past, and prior thereto, said poisonous gases * * * and other malodorous and offensive matter have escaped and still continue to escape through the floors * * * and sides of said tanks, etc., so operated and maintained, and have saturated, percolated, and seeped through and permeated all the land of plaintiff's said lot and have thereby polluted, injured, spoiled, and poisoned all the earth and soil of plaintiff's said premises and the water that during the aforesaid period has permeated and still permeates said realty and which said water plaintiff and his said family used and were accustomed to use for drinking, domestic, and other purposes from the time of the aforesaid purchase of said property in 1889, until the same was polluted and poisoned as herein set forth, and which said water was conducted to said dwelling house by means of wells dug and sunk in said lot, and have thereby rendered the earth of said lot unfit for another well therein * * * and have destroyed the productive qualities of the soil and rendered the same useless for the cultivation and growth of garden produce, flowers, and other vegetation." It further appears: That prior to said injury to the soil the plaintiff had two wells on his premises that furnished him with an abundance of pure water, and he raised flowers and vegetables on said lot sufficient for the use of himself and family, "and that since the aforesaid water has been rendered poisonous and unfit for any purpose and within the two years last past, the producing qualities of said soil have been destroyed and injured, as hereinbefore set forth, and the plaintiff has been compelled to carry water a long distance to his said premises, and has been obliged to purchase water from others in lieu of the water so injured and destroyed whereby he has been specially damaged, within the period aforesaid, in the sum of $400." Plaintiff was compelled to buy water from other sources and to purchase vegetables at a cost of $700. "That the damages herein specified are such as have not been sustained by other people living in the neighborhood of said gas works and gas tanks, but are such as have been sustained by plaintiff in addition to those sustained by such other inhabitants." Then follows the concluding allegation "that within the period of two years last past, and prior thereto, the defendant has operated and maintained said gas works in such a negligent manner that poisonous vapors and large quantities of smoke and other disagreeable and offensive substances are precipitated into the air, and the same corrupt, pollute, and poison the entire atmosphere in that section of Stockton and specially that portion that belongs to plaintiff, and thereby render the residences unfit for occupancy, unhealthy, uncomfortable, and useless as homes, and that plaintiff's premises have been greatly depreciated in value and specially damaged during the period aforesaid in the further sum of $1,600." The prayer is that the works be declared a public nuisance and be ordered removed and abated, and that defendant be enjoined from using its premises for the manufacture, sale, or storage of gas and for special damages.

1. The complaint is really based upon two separate causes of action, but they are embraced in one count. The first relates to the damage done to plaintiff's realty, including the water, and the other refers to the pollution of the atmosphere by reason of the noxious, offensive, and poisonous odors and other disagreeable substances. This consideration seems to have escaped the attention of counsel, and the necessity for observing it will be seen as we consider the points raised by the demurrer. It is contended by respondent that the complaint discloses a public nuisance, and that no clear case of special damages is shown so as to entitle the plaintiff to maintain the action. The law is well settled that a private person, to have any standing in an action of this character, must show that he has suffered, not only special injury, but of a different kind from that of the public, and not simply a difference in degree. Sections 3480, 3493, Civ. Code; Jarvis v. Santa Clara Val. R. R. Co., 52 Cal. 438; Bigley v. Nunan, 53 Cal. 403; McCloskey v. Kreling, 76 Cal. 512, 18 Pac. 433; Siskiyou Lumber & Mercantile Co. v. Rostel, 121 Cal. 511, 53 Pac. 1118; Reynolds v. Presidio R. R. Co., 81 Pac. 1118, 1 Cal. App. 229. But it is obvious from an inspection of the complaint that this criticism applies to the pollution of the atmosphere and not to the injury done to the soil and the water. The former is suffered in common by a large part of the community, as expressly appears by the allegation: "And the same corrupts, pollutes, and poisons the entire atmosphere in that section of said city of Stockton." The following qualification: "And especially that portion that belongs to plaintiff and that by reason thereof the plaintiff's premises have been injured and depreciated in value"—may indicate an injury different in degree from that of the public, but it is of no importance in the attempt to state the special damage required by the statute and the decisions. This is apparent from the cases already cited. Hence, if this were the only charge made against defendant, it is clear that a general demurrer to the complaint would lie. But the other injury of which complaint is made is not shared by the public at all. This appears from the location of plaintiff's premises, and also by explicit averment. That this portion of the complaint in reference to the pollution of the soil and water states a cause of action is clear from the authorities. It is charged in specific language that defendant negligently and carelessly constructed its works, and has operated them in such an inefficient manner as to pollute the water on plaintiff's premises and to injure and poison the soil so that it is rendered unproductive, and the particular loss occasioned is pointed out. In that regard plaintiff has stated every material fact necessary to constitute a cause of action. He has brought himself clearly within the doctrine of the following cases: Tuebner v. Cal. St. R. R. Co., 66 Cal. 171, 4 Pac. 1162; Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51; Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106; Lind v. City of San Luis Obispo, 109 Cal. 341, 42 Pac. 437; Fisher v. Zumwalt, 128 Cal. 495, 61 Pac. 82; Wesson v. Washburn Iron Co., 13 Allen (Mass.) 95, 90 Am. Dec. 181. The complaint, as respects the damage to the soil, shows a clear invasion of plaintiff's property and his property rights. Where the matter in a single count is divisible in its nature, the demurrer should be confined to those parts which are defective, as the same general rule which applies to different counts applies also to the divisible matter in the same count constituting different causes of action. 6 Ency. of Plead. & Prac. p. 303. As the general demurrer here was to the entire complaint, it could not be properly sustained.

2. The question raised by defendant's plea of the statute of limitations must be resolved in favor of plaintiff. Assuming that the statute is sufficiently pleaded without any specification of the particular section thereof, as required by section 458, Code Civ. Proc., which seems to be so held in Brennan v. Ford, 46 Cal. 7, and Williams v. Bergin, 116 Cal. 59,[1] still, as stated in the latter case, "a demurrer upon this ground can be sustained, however, only when it affirmatively appears from the complaint that the plaintiff's cause of action is barred." It is true it appears that defendant's negligence has continued for more than two years, and, assuming that this is the time within which the action must be brought, still the statute would bar recovery only for what occurred prior to the beginning of the two years, and would not apply to the complaint as a whole. This results from the rule supported by the weight of authority that the originator of a nuisance remains liable to successive actions for damages resulting from the maintenance thereof. Dorman v. Ames, 12 Minn. 451 (Gil. 347); Plumer v. Harper, 3 N. H. 88, 14 Am. Dec. 333; Prentiss v. Wood, 132 Mass. 486; Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91; Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656; Eells v. Chesapeake, etc., Ry. Co., 49 W. Va. 65, 38 S. E. 479, 87 Am. St. Rep. 787. Again, it appears that, as far as the damage to the water and land caused by seepage is concerned, the claim is confined to the period "within two years last past."

Appellant also contends that the complaint discloses a public nuisance, and that no lapse of time can legalize it (Civ. Code, § 340; Hoadley v. San Francisco, 50 Cal. 275; People v. Gold Run D. & M. Co., 66 Cal. 152, 4 Pac. 1150; Bowen v. Wendt, 103 Cal. 238, 37 Pac. 149), and that, therefore, an action to abate such a nuisance by an individual who has been specially damaged cannot be barred by the statute of limitations. This argument is based upon the contention that the complaint reveals "a public nuisance amounting to an actual obstruction of public right." Section 3490, Civ. Code, supra. The determination of that question is not necessary to a decision here, and we deem it sufficient to say that the action does not affirmatively appear to be barred. Hence the demurrer on that ground is not tenable.

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[1] 47 Pac. 878.

3. We are not advised upon what ground the demurrer was sustained by the court below, but we assume that it was for uncertainty in the complaint. We proceed to consider the various assignments in that regard. Plaintiff was not required to inform defendant of the time when it made, dug, and constructed the gas works and appurtenances. It is positively alleged that it was long prior to the time of the commencement of this action, and it inferentially appears that it was more than two years before that time. This is a matter peculiarly within the knowledge of defendant, and it cannot be heard to complain that plaintiff has not alleged the fact with sufficient certainty. Besides, it is a consideration rather of inducement, as the action is really based upon the alleged negligence of defendant in the maintenance and operation of its gas works, and the exact date of the construction is not important as far as the complaint is concerned. It seems to us that no greater certainty is required as to the time during which the gases have escaped and permeated the soil. It does clearly appear that this continued for "the two years last past," and the claim for damages in that respect is confined to that period. If defendant desires to have it shown that it has continued so long as to make available the statute of limitations, it can be so presented in the answer. The statute of limitations is an affirmative defense, and the burden is not upon plaintiff to show in his complaint affirmatively that the action is not barred. The suggestions already made will apply to the criticism as to the uncertainty in respect to the time when the water was rendered unfit for use.

The objection "that it does not appear therefrom wherein the damage claimed to have been sustained by plaintiff differs in kind from that of the public" has been sufficiently considered. If this had been confined to the latter portion of the complaint, the contention would have to be upheld, but, as we have seen, it is too broad in its application.

There is nothing in the point that "it does not appear wherein or by what means the existence, maintenance, or operation of defendant's gas works * * * is a menace to the safety or health or comfort or enjoyment of plaintiff or his home," etc. The allegation in reference to noxious, offensive, and poisonous odors, vapors, smoke, soot, cinders, etc., would seem to answer this objection.

The only other assignment is that "it does not appear therefrom when plaintiff was by the acts complained of compelled to or did dig ditches or put down water mains or pipes for the conveyance of water to his dwelling," and when the damages were sustained. This is pleaded as an item of special damage, and the defendant has a right to be informed with reasonable certainty when the expense as an element of damage was incurred. But it seems to us that a fair construction of the complaint leads to the conclusion that this occurred within two years. The expression, "within the aforesaid period," refers to the phrase "within two years last past," with which it is clearly connected. The particularity of the common-law pleading is not required under our practice, and it strikes us as rather a harsh rule that would require greater precision in this matter, especially in view of the fact that the amount claimed for this particular element of damage is so small.

We are constrained to hold that defendant should have been required to answer. The judgment is reversed, and the court below directed to overrule the demurrer, with permission to defendant to answer if so advised.

We concur: CHIPMAN, P. J.; HART, J.

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6 Cal. App. 346

KLEINSORGE v. BURGBACHER.

(Civ. 352.)

(Court of Appeal, Third District, California. Aug. 31, 1907. Rehearing Denied by Supreme Court Oct. 31, 1907.)

1. PUBLIC LANDS—DISPOSAL OF LANDS BY STATES—CALIFORNIA.

Under Pol. Code, § 3500, providing that any false statement in the affidavit on application under section 3495 to purchase school lands shall defeat the right of the applicant to purchase the land or receive any evidence of title thereto, an assignee of a certificate of purchase obtained on an affidavit containing false statements acquires no legal or equitable right by the assignment.

2. SAME.

Pol. Code, § 3500, provides that timber land belonging to the state shall be sold for cash only. Section 3512 provides that full payment must be made within 50 days of approval or location. Section 3513 provides that, if payment is not so made, the land shall revert to the state without suit, and the survey or location is void. Under section 3607 lands belonging to the state are not subject to taxation. Section 3788 provides that, where the land reverts to the state for default in payment, former possessors or their assignees, etc., shall be preferred purchasers for six months. Certificates of purchase were issued on applications to purchase lands; the accompanying affidavits falsely declaring that the lands were not timber land. Applicants paid only 20 per cent. of the price and interest for one year. Three years later the land was sold to the state for delinquent taxes, and the deed subsequently delivered and filed with the surveyor general. Two months after the filing of the deed, defendants, assignees of the original certificate holders, paid the taxes, penalties, etc., and received a receipt therefor. Within four months after such payment, plaintiff offered to file his application to purchase the land, and defendants filed their assignments, receipts for taxes, and applications to purchase their respective portions thereof. *Held*, that the land had reverted to the state, and was not subject to taxes for which it was sold, the certificates of purchase were null and void, defendants were not preferred purchasers, and the land was subject to location at all times, at least after the deed to the state was filed with the surveyor general, and whatever rights the parties had resulted from their filing or attempts to file applications for purchase.

3. SAME—APPLICATIONS TO PURCHASE — CONTEST—JURISDICTION OF COURT.

The jurisdiction exercised by the court to which a contest as to the right to apply for purchase of public lands is referred is special and limited, and is derived from and is restricted to the matters embraced in the order of reference.

4. SAME.

On April 9th defendant K. offered to file an application to purchase a certain tract of land; on April 18th plaintiff offered to file an application to purchase that tract and another. Both parties tendered the necessary money; on April 19th K. and another filed their applications to purchase the respective tracts, together with assignments of certificates of purchase of the original applicants, who had obtained certificates on false affidavits accompanying their applications; and on July 29th plaintiff filed his application to buy both tracts, together with a protest against the original applications and certificates, and set up all the facts as to the falsity of statements, his offer to file application, etc., making all the applications to purchase, affidavits, and documents referred to and on file a part of the protest, and asked a reference of the conflicting claims. The surveyor general ordered that the contest set up be referred for adjudication. *Held*, that the offers to file applications could be considered, since the whole matter was before the court to which it was referred.

5. SAME.

Plaintiff was not confined to mandamus as his only remedy.

6. SAME.

K. was not called on to file a protest against the original application, nor to demand a reference, since the land was open to location at the time he tendered his application, and he had an assignment of the certificate to the parcel he wished to purchase, and there was no application against which he could protest.

7. APPEAL — RIGHT OF REVIEW — APPEALS BETWEEN CO-PARTIES.

Where the claim of one defendant does not conflict with that of another, there is no ground on which an appeal from a judgment for a codefendant can rest.

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by W. E. Kleinsorge against J. G. Burgbacher and Joseph A. Kahny. From a judgment for plaintiff as against Burgbacher and for defendant Kahny, plaintiff and Burgbacher appeal. Affirmed.

W. E. Kleinsorge and Gillis & Tapscott, for appellants. Theo. J. Roche, Sullivan & Sullivan, and Reid & Dozier, for respondent.

CHIPMAN, P. J. Action to determine the right to purchase state school land. The tracts involved are: The west ½ of section 36, township 42 N., range 2 E., Mt. Diablo meridian (hereinafter referred to as "tract A"); west ½ of east ½ of said section (referred to hereinafter as "tract B"); southeast ¼ of section 16, same township and range (hereinafter referred to as "tract C"). Plaintiff claims all the land; defendant Burgbacher claims tracts B and C; defendant Kahny claims tract A. The court awarded the right to purchase tracts B and C to plaintiff, and tract A to defendant Kahny. Plaintiff appeals from the judgment in favor of defendant Kahny awarding him tract A, and defendant Burgbacher appeals from the judgment in favor of plaintiff awarding him tracts B and C.

The pleadings are such as are usual in this class of cases, where parties seek to have determined who are entitled to purchase land from the state. No question arises as to the qualifications of the parties to purchase, or as to the sufficiency of the pleadings, or as to the sufficiency of the applications to purchase filed by the parties to the action. The controversy arises out of the claims made by defendants as assignees of the first applicants for the lands—N. E. Sager and Martha Sager—and also out of defendants' claims as applicants to purchase at a time prior to plaintiff's application. The case was tried upon the stipulation of the parties "that the said action should be submitted for decision upon a certain agreed statement of facts theretofore agreed upon between the parties and the deposition of D. G. Reid, which is admitted to be true." The facts necessary to an understanding of the points of law involved, stated as briefly as may be, are as follows:

In 1892 the Sagers filed their applications to purchase with the surveyor general and certificates of purchase were issued to them. The affidavits accompanying said applications falsely declared that the lands were not timbered lands, when in fact they were and still are timbered lands, and neither of said applicants, within 50 days from the date of the approval of their applications, paid to the treasurer of Siskiyou county the full purchase price for said land, but paid only 20 per cent. of the said purchase price and interest in advance on the balance for one year. In 1897 the Sagers assigned their said certificates of purchase to defendant Kahny, who held the title for the joint benefit of himself and defendant Burgbacher. In 1895 all of this land was sold to the state for delinquent taxes, and, not having been redeemed, a deed was duly executed by the tax collector of said county to the state in July, 1900. This deed was filed with the surveyor general on October 19, 1901. In December, 1901, defendants paid to the treasurer of Siskiyou county the full amount for taxes, penalties, costs, etc., and received from the state controller a receipt therefor. On April 18, 1902, plaintiff offered to file in the office of the surveyor general his application to purchase said lands, which was in due form. He tendered and offered to pay all fees and deposit all the money required by law. He set forth in his papers then offered to be filed all the facts in relation to the applications of the Sagers, and the reasons why they were insufficient, and averred that the certificates of purchase issued to them were null and void. He offered to file in said office a protest in writing against said certificates of purchase, setting forth in said protest all the facts relating to the Sagers' applications and certificates of purchase, and why they were void and of no effect, and averred that a contest had arisen between plaintiff and the Sagers, and demanded that said contest be referred to the superior court of said county for final determination. On April 19, 1902, the surveyor general rejected plaintiff's application to purchase said lands. It does not appear that plaintiff's application was actually filed, nor whether any record was made of it by the surveyor general, nor of his rejection thereof. The agreed statement declares the facts to be as above stated.

On April 19, 1902, defendants filed with the surveyor general the said assignments of the Sager certificates of purchase; also a copy of a judgment adjudging that defendants were owners each of an undivided one-half interest in the said lands; also a certified copy of the certificate showing that they had paid the taxes, penalties, etc., to the state, referred to above. Defendant Kahny on the same day filed his application in due form for tract A, and defendant Burgbacher on the same day filed his application to purchase tracts B and C. On July 29, 1902, plaintiff again tendered and there was filed in the office of the surveyor general his said application above referred to to purchase said lands and made all required payments. On said 29th day of July, 1902, he filed his protest in writing against the Sager applications and certificates of purchase, and prayed that they be declared null and void and also prayed that his said application to purchase be "received and filed as of date of the 18th day of April, 1902." The protest is entitled "In the Matter of the Conflicting Claims of" the Sagers and the parties to this action, and sets forth all the foregoing facts relating to the various applications and proceedings as when he first offered to file, and it is recited in said protest that plaintiff filed his application on April 18, 1902; and it is also recited that defendants' applications and other documents were filed on April 19, 1902, "subsequent to the filing of the application to purchase of said" plaintiff. All applications to purchase, all affidavits in support of said applications, and all documents referred to and now on file in the surveyor general's office are made part of the protest demanding reference to the court. The deposition of Attorney Reid shows that on April 9, 1902, he tendered to the surveyor general the application in due form of defendant Kahny for the land claimed by him, and made tender also of all money required by law; that he was informed by the surveyor general "that it would be necessary, before any filing would be allowed, that the certificate of redemption should be filed, together with the necessary papers showing the transfer of the title acquired by the certificates of purchase then outstanding (the Sager certificates) to Mr. Kahny." Reid was told that the papers would not be received, but that "he could return the papers, with the necessary certificates and other papers, but that he would not receive the application and affidavit." Reid received no writing showing the rejection of the application. Following the instructions of the surveyor general, Reid procured the required documents, and sent them and the application by mail to the surveyor general, posting the package at Redding on the afternoon of April 18, 1902, and these are the papers referred to so far as tendered on April 9th, which were filed on April 19th. On September 10, 1902, the surveyor general made an order referring said contest to said court: "In the Matter of the Conflicting Claims of" plaintiff and defendants "to Purchase a Certain Tract of Land"—describing all the land, and reciting: "On April 19, 1902, an application, No. 3,691, by Jos. A. Kahny for (description tract A) was received and filed in the office of the state surveyor general. * * * On April 19, 1902, an application, No. 3,692 [making similar recital as to Burgbacher application]. * * * On July 9, 1902 [obviously should be July 29, as shown by statement of facts], an application, No. 3,758, by W. E. Kleinsorge for all the above-described land was received and filed in the office of the state surveyor general. Said application was accompanied by a duly verified protest and a written demand that the conflicting claims to purchase said land be referred to the proper court for adjudication. * * * It is therefore ordered and directed that the contest as set forth between the above-named parties be and the same is hereby referred * * * for adjudication."

The court made the following conclusions: (1) That the certificates of purchase issued to the Sagers "are null and void, and passed no right, title, or interest in or to the lands therein described," and the assignments "are null and void, and conveyed no right, title, or interest in the lands." (2) That on April 9, 1902, when defendant Kahny offered to file, and on the 19th day of April, 1902, when he actually did file, upon the same, the following lands were state lands and subject to entry and sale (description tract A) and "is entitled to purchase * * * said lands." (3) That on April 18, 1902, the following lands were state lands and subject to entry and sale (description tracts B and C), and that "plaintiff is entitled to purchase * * * said last-described lands." (4) That defendant Burgbacher "has no right, title, or interest in or to any of the lands described herein, and is entitled to no relief in the action."

1. It is well settled by the decisions that applicants to purchase state lands must state in the applications and the affidavits accompanying the same the facts prescribed by the statute (Pol. Code, § 3495), and must state them truthfully. Miller v. Engle, 3 Cal. App. 325, 85 Pac. 159; McKenzie v. Brandon, 71 Cal. 209, 12 Pac. 428; Harbin v. Burghart,

76 Cal. 119, 18 Pac. 127; Taylor v. Weston, 77 Cal. 534, 20 Pac. 62; Wrinkle v. Wright, 136 Cal. 495, 69 Pac. 148. Section 3500 of the same Code provides that "any false statement contained in the affidavit provided for in section 3495 defeats the right of the applicant to purchase the lands or to receive any evidence of title thereto." Wrinkle v. Wright, supra. The assignee of a certificate of purchase which conferred no right on the holder by reason of his false statements acquires no right, legal or equitable, by the assignment. Taylor v. Weston, supra; Miller v. Donovan, supra. Section 3500 of the Political Code requires that "timber land belonging to the state shall be sold for cash only," and section 3512 requires of the purchaser full payment within 50 days from the date of approval or location, and, "in case payment is not made within 50 days, the lands described in the survey or location revert to the state without suit, and the survey or location is void." Section 3513. Before the taxes were levied on said lands for which they were sold to the state, they had reverted to the state and were not the subject of taxation. Section 3607, Pol. Code; People v. Doe, 36 Cal. 220; Low v. Lewis, 46 Cal. 549; Doyle v. Austin, 47 Cal. 360. It is contended that under section 3788, Pol. Code, defendants became "preferred purchasers for the period of six months after the deeds are filed with the surveyor general," where the land has been sold for delinquent taxes, because they were "former possessors of the lands thus deeded to the state." This section in terms refers to "state lands upon which the full purchase price of one dollar and twenty-five cents per acre has not been paid," which would seem to exclude defendants, for the statute required full cash payment. Then, again, the statute gives the preference to "the former possessors of the land thus deeded to the state," and it is claimed that defendants were never "possessors of the lands." As a still further answer to defendants' claim under this section, and at the same time advanced in support of plaintiff's claim, it is insisted that the taxes for which the lands were sold were illegally imposed for the reason, as above stated, that the land had reverted to the state and title was in the state free from any effect of the Sager certificates of purchase, before the taxes were levied.

The point is thus applied: The deed to the state was filed with the surveyor general October 19, 1901, and the statute gives a preference for six months within which no other persons could make application, and therefore defendants' applications take preference over plaintiff's, because plaintiff's application on April 18, 1902, was premature. Suffice it to say upon these contentions that the Sager certificates of purchase were null and void; that defendants acquired no right or preference by payment of the taxes, penalties, etc., as the assignees of the Sager certificates; that the land was subject to location at all times, at least after the deed to the state was filed with the surveyor general. The Sager certificates of purchase and all claims thereunder must be eliminated from further consideration. Whatever rights accrued to the parties must take their origin either in their offers to file applications to purchase, or in the filing of such applications, and in the subsequent proceedings upon the reference to the superior court by the surveyor general. The vital question in the case, it seems to us, is this: Did the court acquire jurisdiction to treat plaintiff's application and protest as made on April 18, 1902, and the application of defendant Kahny as made on April 9, 1902? It has been frequently held by the Supreme Court that the jurisdiction exercised by the court to which the contest is referred is special and limited, and is derived from and is restricted to the matters embraced in the order of reference. Vance v. Evans, 52 Cal. 93; Byrd v. Reichert, 74 Cal. 579, 582, 16 Pac. 499. See, also, Jacobs v. Walker, 90 Cal. 43, 27 Pac. 48; Perry v. Beaumont, 91 Cal. 31, 27 Pac. 534; McFaul v. Pfankuch, 98 Cal. 400, 33 Pac. 397. In the more recent case of Youle v. Thomas, 146 Cal. 537, 80 Pac. 714, the court said: "The sole object to be achieved by the trial before the superior court is a determination of the question of the rights of the two parties between whom the contest arose in the surveyor general's office to purchase the particular tract of land. * * * It is not a case where the court has before it a certain fund, or a certain piece of property, to determine what shall ultimately be done with it. In such a case the court, having general jurisdiction in equity, would be entitled to entertain the application of any person claiming a right thereto, and could give judgment awarding the property to any one who might be able to show his right. But in a question of the sort here involved there is no such general power. It is a mere method by which the state determines to whom it will sell its lands, and the parties concerned are the parties who have made the respective applications and whose rights have been referred to the court for adjudication." The learned trial court held that Kahny had a right to file his application on April 9th, thus attaining priority over plaintiff's application. It is also held that plaintiff had a right to file his application on April 18th, thus giving priority over defendant Burgbacher's application, and in both cases it treated the right to file as equivalent to an actual filing of the application. In both cases the court held that the Sager certificates of purchase were void and of no effect, and the tax sale equally ineffectual for any purpose, through which no rights were acquired by any person and because of which no impediment was created to the location of the land. The court also held that the surveyor general was in error in refusing to allow Kahny to file on April 9th for the reason assigned by him, and was also in error in rejecting plaintiff's application on April 19th which he tendered on April 18th, because he failed on April 18th to show that the taxes, penalties, etc., had been paid, and probably for the further reason that defendants as assignees of the Sager certificates were preferred purchasers.

It is urged that the findings of the trial court are outside the issues, and that it had no jurisdiction to hear and determine any questions relating to the offers of Kahny and plaintiff to file, and was confined by the order of reference to the dates on which the applications were actually filed, and could only adjudicate questions arising at that time on those applications, regardless of all facts occurring prior thereto. It is true that the court derives its jurisdiction from the order of reference alone; but we think the order here did in fact refer to the court all the proceedings which were had in the surveyor general's office in respect of these lands and the parties applying to purchase the same, whether or not made matter of record at the time. All the facts are agreed to, and were all before the surveyor general when he made the order, and were part of the papers and documents referred by him to the court. The principal question to be determined, and in fact the only question, after eliminating the Sager certificates of purchase and any pretended rights arising thereunder, was a question of priority of application; for it was conceded that the applicants, the parties to the action, were qualified applicants and the land was open to entry, as we have held, at the time Kahny tendered his application, April 9th, for tract A, and when plaintiff tendered his application, April 18th, so far as respects the balance of the land. The main object of the reference was, it seems to us, to have determined whether or not the surveyor general improperly rejected these two applications, and in doing so deprived Kahny and plaintiff of rights to which they were entitled. We cannot agree with appellant Burgbacher that plaintiff was confined to mandamus as his only remedy. What he could have accomplished by it need not be considered; for, as we think, all questions involving the relative rights of the parties were before the court by the order of reference, and the statute gives this remedy, no matter what course might have been taken as to other remedies. Upon the law of the case and under the facts stipulated, it is our opinion that the trial court reached correct conclusions.

Plaintiff contends that Kahny has no standing, because he failed to file a protest against the Sager applications and failed to demand an order of reference. But at the time he tendered his application the land was open to location, the Sager certificates and applications were void, as contended by plaintiff and as we hold, and Kahny was not called upon to demand a reference as to them, and, besides, whatever rights they possessed he had by assignment. Furthermore, there was no other application against which he could protest, and he certainly was not called upon to protest against his own application. We do not understand that defendant Burgbacher claims otherwise than through his application, and, as it does not conflict with Kahny's application, we see no ground on which his appeal against the judgment in favor of Kahny can rest.

We think the judgment of the court was a correct adjudication of all matters referred to it, and the judgment is therefore affirmed.

We concur: HART, J.; BURNETT, J.

6 Cal. App. 342

CITY OF SANTA BARBARA v. DAVIS, City Clerk. (Civ. 463.)

(Court of Appeal, Second District, California. Aug. 31, 1907.)

1. MUNICIPAL CORPORATIONS — IMPROVEMENT BONDS—ISSUANCE—MUNICIPAL ELECTION — RESOLUTION.

St. 1901, p. 27, c. 32, as amended by St. 1907, p. 609, c. 330, authorizing cities to issue improvement bonds, requires a special election therefor, and declares (section 2) that the election ordinance shall recite the objects for which the debt is to be incurred, the estimated cost of the improvements, the amount of the debt, the rate of interest, and that in all particulars not recited in the ordinance the election shall be held as provided by law for municipal elections. *Held*, that so much of a resolution calling a special election to submit the proposition of issuing bonds for a road as provided that the bonds should be of the denomination of $1,250 was surplusage, and did not affect the validity of the election; the resolution being otherwise sufficient.

2. SAME—DENOMINATION OF BONDS—DISCRETION.

Under St. 1901, p. 27, c. 32, as amended by St. 1907, p. 609, c. 330, authorizing the issuance of municipal improvement bonds, and providing (section 5) that such bonds shall be of the denomination fixed by the city council, except that no bond shall be of less denomination than $100, nor of greater denomination than $1,000, the denomination of such bonds is within the city council's discretion within the limits prescribed by the act, which discretion need not be exercised until after the authority to incur the debt and issue the bonds has been conferred by vote of electors.

3. SAME—POWER—EXERCISE—TERMINATION.

A resolution submitting to popular vote a proposition to issue city improvement bonds provided that the bonds should be of the denomination of $1,250 each, which was in violation of St. 1901, p. 28, c. 32, § 5, as amended by St. 1907, p. 610, c. 330, § 2, providing that such bonds shall not be for less than $100 nor in greater denomination than $1,000. After a vote authorizing the issuance of the bonds, an ordinance was passed providing for bonds of $1,250 each. Before any bonds were sold, this ordinance was repealed, and a new ordinance passed, providing for the issuance of double the number of bonds of the denomination of $625, to be paid two in each year instead of one, as provided by the former ordinance. *Held*, that the city council did not exhaust its power to determine the denomination of the bonds by the exercise thereof in the first ordinance, and that the second ordinance was valid.

4. SAME—ORDINANCES—REPEAL.

It is within the power of a city council to repeal any ordinance passed by it, where such repeal does not affect the contractual rights of the city, nor the rights of third parties or taxpayers.

Application for mandamus by the city of Santa Barbara against Alfred Davis, city clerk. Writ granted.

Henley C. Booth, for petitioner. Alfred Davis, in pro. per.

TAGGART, J. This is an application for a writ of mandate to compel the respondent, as city clerk of the city of Santa Barbara, to certify and cause to be published an ordinance of that city, and to sign his name and affix the corporate seal of the city to certain improvement bonds authorized by the said ordinance.

The city of Santa Barbara is organized under a freeholders' charter, which provides that propositions to incur bonded indebtedness shall be submitted to vote in accordance with the general laws of the state. Acting under the provisions of the act entitled "An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations for municipal improvements, and regulating the acquisition, construction or completion thereof," passed in 1901, commonly designated the "Municipal Improvement Act of 1901" (St. 1901, p. 29, c. 32), as the same was amended in 1907 (St. 1907, p. 609, c. 330), the mayor and council of said city, on the 21st day of May, 1907, passed a resolution determining that the public interest and necessity required the construction of a certain public highway known as the "East Boulevard" and that the cost of the construction thereof ($50,000) was too great to be paid out of the ordinary annual income and revenue of said municipality. At a subsequent regular meeting of said council on June 6, 1907, an ordinance (No. 576) of said city was passed and finally adopted and approved, and thereafter duly published, calling a special election, and submitting to the qualified voters of said city the proposition of incurring the indebtedness mentioned in said resolution and issuing the bonds of the city therefor. The ordinance contained in addition to those recitals required by law, among others, the following: "Said bonds shall issue negotiable in form and of the character known as serials, and shall be numbered consecutively from 1 to 40, both numbers inclusive, and shall be of the sum or denomination of $1,250 each * * * one-fortieth of the whole amount of said indebtedness of $50,000—to wit $1,250—shall be paid each and every year," etc. The said election was held, the returns thereof canvassed, and the said proposition declared carried by more than the required two-thirds vote. Thereupon the council of said city by an ordinance (No. 581) regularly passed and approved determined the character, denomination, and other matters in relation to said bonds required by section 5 of said municipal improvement act, in accordance therewith, except the sum or denomination of said bonds was fixed at $1,250—whereas, said act provides that no bonds shall be of a greater denomination than $1,000. Notice of sale of said bonds was published, but none were sold and the sale thereof has been abandoned.

It being called to the attention of the mayor and council of said city that the denomination of said bonds as established by ordinance No. 581 was in excess of the maximum provided by the act, an ordinance of said city (No. 587) was regularly passed, adopted, and approved for the purpose of correcting this, and fixing the denomination (as that term is used in the statute) of said bonds in accordance with the act. By said ordinance No. 587 this was fixed at $625, and the number thereof at 80, and they were made payable two each year. Said ordinance No. 581 was expressly repealed thereby. It is ordinance No. 587 which respondent refuses to certify and publish, and the bonds provided by that ordinance to which he refuses to attach his name and the corporate seal of said city, and in his return to the order to show cause, places his refusal on the ground that, the election having been held pursuant to a notice stating the denomination of said bonds to be $1,250, it is not competent for the city to issue bonds of another denomination. Section 2 of the municipal improvement act contains the provisions therein for the calling of the special election, and, so far as material here, provides: "The ordinance calling such election shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the public improvements, the amount of the principal of the indebtedness to be incurred therefor, and the rate of interest to be paid on said indebtedness, and in all particulars not recited in said ordinance such election shall be held as provided by law for holding municipal elections in such municipality." Section 80 of the charter of the city of Santa Barbara is the section directly affecting the matter here under consideration and the terms of the ordinance and manner of holding the election were in strict compliance with its provisions. Section 5 of the municipal improvement act provides: "The bonds shall be issued in such denomination as the legislative branch of the municipality may determine, except that no bond shall be of a less denomination than one hundred dollars, nor of a greater denomination than one thousand dollars." If the clause upon which respondent's refusal is predicated were eliminated from Ordinance No. 576, it would still contain all that is required by law or the charter to be recited or stated in the notice of election. It is also clear that within the limits prescribed by the act the denomination of the bonds rests in the discretion of the council of the city, and that this discretion need not be exercised until after the authority to incur the indebtedness and issue the bonds has been conferred by vote of the qualified electors at the special election. The presence of the clause in the ordinance being unnecessary and unauthorized, it is clearly surplusage, and does not operate to limit or affect the exercise of the discretion to fix the denomination of the bonds conferred upon the council by section 5 of the act. It cannot be said that the question as to the denomination of the bonds was submitted to the voters at the special election, as this is not made a part of the proposition printed on the ballot, but, had such an attempt been made, it would have been an unauthorized delegation of legislative discretion expressly vested by law in the city council.

Petitioner's brief suggests another question not expressly presented by respondent, as a justification of his refusal to act. Did the city council exhaust its power to determine the denomination of the bonds by its exercise in passing Ordinance No. 581, whereby the sum of $1,250 was determined in accordance with the notice of election? We think not. No bonds were sold under Ordinance No. 581, and it is stipulated that such sale has been abandoned, and No. 581 has been expressly repealed by Ordinance No. 587. No. 581 provides for 40 bonds of $1,250 each, payable one each year, and No. 587 for 80 bonds of $625 each, payable two each year. Otherwise the provisions of the two ordinances are substantially the same. There is no difference that can or will in any manner affect the taxpayer to his disadvantage. Both the questions here presented appear to have been practically determined by the Supreme Court in Derby v. City of Modesto, 104 Cal. 515, 38 Pac. 900, and this case is cited and the same principle declared in Law v. San Francisco, 144 Cal. 393, 77 Pac. 1014. Independent of these decisions, we think it clearly within the power of the council of a city to repeal any ordinance passed by it which does not affect the contractual relation of the city, and we see no reason for an exception because the subject-matter of the ordinance is the determination of the denomination of a municipal bond, unless the attempt at repeal should be delayed until after the rights of third parties or taxpayers might be materially affected thereby. Such is not the case here. Ordinance 587 was regularly passed and is a valid ordinance of the city, and the bonds provided thereby are based upon the election of July 10th, and are valid and duly authorized. Ordinance No. 581 is repealed and of no effect.

It is therefore ordered that the writ of mandate issue as prayed for.

We concur: ALLEN, P. J.; SHAW, J.

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6 Cal. App. 404

DUNCAN v. DUNCAN. (Civ. 364.)

(Court of Appeal, First District, California. Sept. 10, 1907.)

1. Husband and Wife — Wife's Separate Property—Wife's Capacity to Sue.

Under Code Civ. Proc. § 370, subd. 1, providing that, when the action concerns the separate property of the wife, she may sue alone, where a husband sold his wife's separate property, she can sue for and recover the same without joining her husband.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 774–777.]

2. Same—Community Property—Evidence as to Character of Property.

In an action by a wife to recover household property sold by her husband, evidence examined, and *held* sufficient to show that at the date such property was sold by the husband the house in which it was used was the home of plaintiff and her husband, and hence that the household goods were community property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 916.]

3. Same—Sales—Wife's Right to Recover.

Civ. Code, § 172, as amended in 1901, provides that no sale of the furniture and furnishings of the home which is community property shall be made without the written consent of the wife. A husband and wife separated, and thereafter, in 1904, the husband sold household property purchased to furnish their home. Code Civ. Proc. § 370, subd. 3, provides that, when a married woman is living separate and apart from her husband because of his desertion of her, she may sue or be sued alone. There was evidence that the husband deserted the wife. *Held*, that the wife could recover the property sold, since the transfer of the property conveyed no right as against her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 971.]

4. Same — Actions — Capacity of Wife to Sue.

A married woman deserted by her husband may sue alone to recover damages for her personal injuries, although such damages when recovered are community property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 767, 973.]

5. Same — Statutory Provisions—Sales of Community Property.

The amendment of 1901 to Civ. Code, § 172, providing that "no sale, conveyance, or incumbrance of the furniture, furnishings and fitting of the home or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the written consent of the wife," has no application to such property acquired prior to the date of such amendment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 879.]

6. Same—Right of Action by Wife.

In an action for divorce or maintenance, a wife may pursue property transferred by her husband to defeat or defraud her of her right to alimony or a division of the community property; the fraud upon her being the foundation of the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 749–753; vol. 26, Husband and Wife, § 1097.]

7. Fraud—Pleading—Allegations in General.

Whenever a right of action or a defense of an affirmative nature depends upon fraud, it must be pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 37.]

8. Husband and Wife—Action by Wife to Recover Community Property.

An action in claim and delivery cannot be maintained by a wife to recover community property sold by her husband, where such property was acquired prior to the amendment of 1901 to Civ. Code, § 172, which provides that no sale of such property shall be made without the written consent of the wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 879.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Ada R. Duncan against W. C.

Duncan to recover possession of certain goods. Judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Reversed.

Devoto & Richardson, for appellant. H. B. M. Miller, for respondent.

HALL, J. Plaintiff brought this action in the ordinary form of an action in claim and delivery to recover of defendant the possession of certain goods and chattels, or the value thereof, if possession could not be had, and damages for the detention thereof. The goods are alleged in the complaint to be of the value of $1,000 and are set forth in detail. They consist of household furniture, furnishings, and fittings of a dwelling house, the enumeration of which occupies about 14 folios of closely printed matter in the transcript. The answer consists of a denial of the material allegations of the complaint. The trial was before a jury, and resulted in a verdict for the return of the entire property sued for, and, if a return thereof be not made, for the sum of $1,000, the value thereof. Judgment was entered in accordance with the verdict. The case is before this court upon defendant's appeal from an order denying his motion for a new trial.

The plaintiff is the wife of B. B. Duncan, to whom she was married in 1887, but at the time this action was brought she was living separate and apart from him. There is a conflict in the evidence as to whether she had deserted him or he her. On the 7th day of June, 1904, B. B. Duncan, the husband of plaintiff, without her consent or knowledge, sold to his brother, W. C. Duncan, the defendant herein, for the sum of $500, the property sued for, and delivered the same into the possession of defendant, and two days later departed from the state. The evidence shows without conflict that some portion at least of the property sued for was separate property of plaintiff; the same having been given her. As to another portion, there is testimony given by plaintiff that it was purchased and paid for by B. B. Duncan prior to their marriage, but given to her by him. As to another and a considerable portion of the property, the evidence shows without dispute that it was community property, purchased after the marriage of plaintiff and B. B. Duncan, but prior to the amendment to section 172, Civ. Code 1901, providing that "no sale, conveyance or incumbrance of the furniture, furnishings and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the written consent of the wife." Another portion of the property was purchased by B. B. Duncan after said amendment, and used in furnishing a house on Page street in San Francisco, to which B. B. Duncan moved with his and plaintiff's two minor children while she was absent in San Rafael, as she says, upon a visit to her mother.

As we have before said, the verdict was for the return of all the property sued for, or for one thousand dollars, the value thereof; and the question presented by the record is: Do the foregoing facts support a verdict for the recovery of all of said property? As to the property which the evidence shows, or tends to show, was plaintiff's separate property, there can be no question but that she could sue for and recover the same without joining her husband. Section 370, subd. 1, Code Civ. Proc. As to the furniture and furnishings purchased to furnish the Page street house, it was all bought in 1904, and there is evidence to support a finding that it was used to furnish the home of plaintiff and B. B. Duncan. While it is true that plaintiff never actually lived in said house, as her husband moved there from their former home on Polk street, while she was, as she testified, absent on a visit to her mother, where she went April 22d, the evidence was sufficient to justify a finding that the Page street house was on June 7, 1904, the home of plaintiff and her husband. He and the children were actually living there, and he had moved there the furniture and furnishings of their former home on Polk street. This furniture was therefore subject to the provisions of section 172, Civ. Code, as amended in 1901, to the effect that no sale of the furniture and furnishings of the home which is community property shall be made without the written consent of the wife. This provision of the law is intended for the benefit of the wife. It gives her a right in such property which she may protect. If her husband, in violation of this provision of the law, sells the furniture of the home and deserts his wife, there can be no reason why she may not bring her action to recover possession of such furniture. A husband's transfer of such property without the written consent of his wife conveys no right to the property as against her at least. When a married woman is living separate and apart from her husband by reason of his desertion of her, she may sue or be sued alone. Section 370, subd. 3, Code Civ. Proc. Accordingly, it has been uniformly held in this state that a married woman deserted by her husband may sue alone to recover damages for her personal injuries, although such damages, when recovered, are community property. Baldwin v. Second St. Cable R. R. Co., 77 Cal. 390, 19 Pac. 644; Andrews v. Runyon, 65 Cal. 629, 4 Pac. 669; Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56; Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847. We think the principles of these cases apply to a violation, by sale without her consent, of her rights in the community furnishings of the home. But the amendment of 1904 to section 172, Civ. Code, has no application to community property acquired before the enactment of such amendment. The effect of the amendment to the same section in 1891, to the effect that a husband may not transfer community property without the written consent of the wife, came before the court in Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, and it was there held that the amendment had no effect on the right of the husband to dispose of community property acquired prior to the adoption of such amendment. If the amendment of 1891, preventing the husband from making a gift of community property without the wife's consent, has no application to community property acquired before such amendment, it is equally clear that the amendment of 1901, denying his right to sell the furnishings of the home, has no application to such property acquired prior to the date of such amendment. The right of plaintiff to sue for and recover a portion of the property in suit must therefore be considered without reference to the amendment of section 172, Civ. Code, concerning the sale by the husband of community furnishings of the house.

In this connection, it is urged that a husband may not, in contemplation of a suit for divorce or maintenance, sell or transfer either his separate property or the community property with intent to defraud his wife of her rights, or to defeat her in her right for maintenance or a division of the community property. There can be no doubt but that in an action for divorce or maintenance a wife may pursue property transferred by her husband to defeat or defraud her of her right to alimony or a division of the community property. Murray v. Murray, 115 Cal. 266, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97; Lord v. Haugh, 43 Cal. 581. It may be that under some circumstances a suit in equity may be maintained by the wife to restrain a contemplated fraudulent sale, or to avoid a consummated sale intended to defraud her of her rights in the community property. Greiner v. Greiner, 58 Cal. 115; Spreckels v. Spreckels, supra, concurring opinion of Chief Justice. But the right to bring any such action is predicated upon the fraud of the husband and his grantee. It is the fraud upon her that gives her the right to maintain any such suit. The fraud lies at the foundation of her right. Whenever a right of action or a defense of an affirmative nature depends upon fraud it must be pleaded. Wetherly v. Straus, 93 Cal. 283, 28 Pac. 1045; Burris v. Adams, 96 Cal. 664, 31 Pac. 565. This was not done in this case, but, as before stated, the complaint is in the ordinary form of an action in claim and delivery. We have been cited to no authority that holds that such an action may be maintained by a wife to recover community property sold by her husband. Such an action to recover community property acquired prior to the amendment to section 172, Civ. Code 1901, cannot be maintained. Greiner v. Greiner, 58 Cal. 115.

For these reasons, we think the verdict is not sustained by the evidence, and the motion for a new trial should have been granted.

The order denying the motion for a new trial is reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

(6 Cal. App. 408)

SAN FRANCISCO COMMERCIAL AGENCY v. HOWARD H. HOGAN CO. (Civ. 373.)

(Court of Appeal, First District, California. Sept. 10, 1907.)

APPEAL—RECORD—QUESTIONS FOR REVIEW—RULINGS ON EVIDENCE—BILL OF EXCEPTIONS.

Alleged error in excluding a charred sheet from the ledger of plaintiff's assignor could not be reviewed on appeal, where no attempt was made in the bill of exceptions to state the contents of the sheet, except that it was defendant's account, under the rule that, where a writing is excluded, so much thereof as is necessary to show that error was committed must be set forth in the bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2905–2909.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the San Francisco Commercial Agency against the Howard H. Hogan Company. From a judgment in favor of plaintiff for less than the relief demanded, and from an order denying plaintiff's motion for a new trial, it appeals. Affirmed.

G. H. Perry, for appellant. Peck & Boynton, for respondent.

HALL, J. This is an action to recover the sum of $530.97 for merchandise sold and delivered by plaintiff's assignor to defendant. Defendant admitted the sum of $200 to be unpaid, and for this sum plaintiff obtained judgment. The appeal is by plaintiff, and the only matter urged for a reversal of the judgment and order denying plaintiff's motion for a new trial is the action of the court in refusing to admit in evidence on behalf of plaintiff a charred sheet from the ledger kept by plaintiff's assignor.

No attempt is made in the bill of exceptions to state the contents of the sheet, other than it was the account of defendant. Where written evidence is offered and refused, the contents of the writing, or so much thereof as is necessary to show that error has been committed, should be set forth in the bill of exceptions. In the absence of any such statement, the court cannot determine that the lower court erred in rejecting such offered evidence, or that the appellant was injured thereby. Dwinelle v. Henriquez, 1 Cal. 387; Bornheimer v. Baldwin, 42 Cal. 27; Dyer v. Leach, 91 Cal. 191, 27 Pac. 598, 25 Am. St. Rep. 171; Kurtz v. Forquer, 94 Cal. 91, 29 Pac. 413.

For this reason, the judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

6 Cal. App. 336

PEOPLE v. WILLIAMSON. (Cr. 49.)

(Court of Appeal, Second District, California. August 31, 1907.)

1. Criminal Law — Instructions — Duty to Instruct—Statutory Provisions.

Under Pen. Code, § 1127, providing that in charging the jury the court must state to them all matters of law necessary for their information, and section 1093, providing that the court must charge on any point pertinent to the issue if requested by either party, refusal to give an instruction which correctly states the law applicable to the facts testified to by defendant is reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1806.]

2. Homicide — Justification — Apprehension of Danger.

If defendant was assaulted by deceased in her lodging house with intent to commit rape, and he afterward led her to believe that he intended to make another similar assault, she had the right to arm herself with a pistol and go to his room to demand that he leave the house, and would have the right to exhibit the weapon for the purpose of preventing such apprehended assault, and if, in so doing, the pistol was accidentally discharged, and deceased killed thereby, defendant should be acquitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 189.]

3. Same.

In determining whether or not the weapon was intentionally discharged, the jury should take into consideration all the circumstances surrounding the difficulty and leading up to it, if they were proven, and the condition of defendant's mind at the time, if brought about by the wrongful acts of deceased.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 189.]

4. Same — Province of Court and Jury — Questions of Law—Defenses.

Where defendant testified that deceased had committed a criminal assault upon her in her lodging house, and that his conduct led her to believe that he intended to repeat it at the earliest opportunity, whether or not defendant had a right to order him from her house and reasonably enforce such exclusion was a question of law dependent upon the facts.

5. Criminal Law—Instructions—Presumptions.

For the purpose of determining whether an instruction requested by defendant in a criminal case should be given, the testimony of defendant must be taken as entirely true.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1984.]

6. Same—Province of Court and Jury.

Where defendant testified that deceased had made a criminal assault upon her in her lodging house, and by his conduct had led her to believe that he intended to repeat it at his earliest opportunity, it was error to instruct that if the jury believed from the evidence that defendant had a right to order deceased out of the room, etc., she had the right to take a revolver to protect herself, since it inferred that the jury were the judges of the law as to defendant's right to order deceased out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1697.]

7. Same—Requested Instructions—Instructions Already Given.

A requested instruction that if defendant was criminally assaulted in her lodging house by deceased, and he subsequently led her to believe that he intended to repeat the assault, and if she went to decedent's room to order him to leave, she had a right to take and exhibit a pistol to prevent the apprehended assault, and if, while so doing, it was accidently discharged, killing deceased, defendant should be acquitted, and that in determining whether the weapon was accidently discharged the jury should consider all the circumstances leading up to the difficulty and the condition of defendant's mind, if brought about by the wrongful acts of deceased, is not covered by one that, where the evidence fails to show any motive on the part of defendant to commit the crime, this was a circumstance tending to show the innocence of the defendant which the jury ought to consider, since the one was asked on the ground that the shot was fired accidently, while that given presupposed that it was fired intentionally.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

8. Same.

Such an instruction was not sufficiently covered by an instruction that, if the shot was accidental, they must acquit, since the object and purpose of defendant in arming herself was a material element, and her right to so arm herself was involved, and the jury might decide that she had no right to procure and exhibit the weapon, and that, having it in her possession unlawfully, it must have been with intent to commit the crime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

9. Homicide — Evidence — Admissibility — Previous Acts of Deceased — Corroboration of Defendant.

Where a material element in support of a defendant's theory of defense was that deceased had criminally assaulted her, and that he had subsequently led her to believe that he intended to repeat the offense, and she had testified to having shown a witness the bruises resulting from the assault, testimony of that witness was admissible to show that he had seen the bruises, etc., and that subsequently and a few days before the shooting he saw deceased following defendant through the house, making indecent and insulting proposals.

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

M. H. Williamson was convicted of homicide, and appeals. Reversed and remanded.

Jud R. Rush and Davis, Rush & Willis, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Appeal by defendant from a judgment of conviction and from an order denying a new trial.

The bill of exceptions discloses that one Parry was shot and killed on July 17, 1905, in room 27 of a lodging house in the city of Los Angeles operated by defendant; that the shot which occasioned the death came from a pistol then held in the hands of defendant. About these matters there is no controversy. The theory of the defendant, which was supported by evidence tending to establish the truth thereof, was that deceased had, on the 4th of July preceding his death, made an assault upon defendant with intent to commit a rape; that in the struggle which ensued her neck and wrists were bruised and injured; that on the next morning he left defendant's rooming house, but on the following Tuesday returned, and, in the absence of defendant, again secured a room in the lodging house; that several days afterward defendant learned that he was again an occupant of the room, and on Monday morning, the 17th, defendant encountered him in a hall of the house; that the deceased again made improper and threatening advances, when defendant ordered him to leave the house at once; that deceased refused to go and called defendant a vile name; that she gave him 10 minutes to leave the house and went downstairs and secured a revolver; that armed with this revolver defendant went to a window leading into the room of deceased, and, leaning over the window into the room, showed him the pistol and again ordered him to leave; that he promised to do so, when defendant, who was standing on her toes in order that she might lean through the window, sought to regain her equilibrium, and in the effort the pistol was accidentally discharged, producing the death.

Upon the trial in due time, defendant requested the court to give to the jury the following instruction, numbered 7: "I instruct you that if you find from the evidence that the defendant at the time of the difficulty was the lessee of the house wherein the difficulty occurred, and was conducting it as a rooming and lodging house, and that the deceased had shortly theretofore at the said house assaulted the defendant and attempted to rape her, and at the time of the difficulty he made an indecent proposal to her to have sexual intercourse with him, or attempted to have sexual intercourse with her against her will, or by his conduct led her, as a reasonable woman, to believe that he then and there intended to force her to have sexual intercourse with him against her will and consent, that she had a perfect legal right to command him to leave her home and to demand of him that he leave at once. The defendant would not be compelled to shelter within her home the deceased if he had attempted to commit a felony upon her, and by his conduct led her as a reasonable person to believe that he intended to do so at the first opportunity that presented itself. I further instruct you that under such circumstances the defendant would not only have the right to go to the room of the deceased and demand of him that he leave her house, but that if the conduct of the deceased led her to apprehend, and she did as a reasonable woman apprehend, that he would at such time commit a felonious assault upon her, she had a perfect right to arm herself with a pistol or other deadly weapon to protect her life and person against such assault, and to take it with her when she went to his room. And defendant would have the right under such circumstances to exhibit said weapon for the purpose of preventing such apprehended assault. And if you find that the defendant did, under such circumstances, go to the room of the deceased for the purpose of demanding that he leave her house, and that she took the pistol with her to protect herself and her person from such apprehended assault, and while so doing the weapon was accidentally and unintentionally discharged, whereby the deceased was killed, you must acquit the defendant. And in determining whether or not the weapon was intentionally discharged by the defendant you must take into consideration all the circumstances surrounding the difficulty and the circumstances that led up to the difficulty if such have been proven, and the condition of the defendant's mind at the time, if the same was brought about by the wrongful acts or conduct of deceased as aforesaid." This charge the trial court refused to give, and the judge indorsed upon such written instruction presented and requested this notation: "In place of this instruction is No. 12 drawn by court and given." Instruction 12, referred to, is as follows: "If you believe from the evidence that the defendant had the right to order the deceased out of room 27 at the time of the shooting, then, if she had reason to apprehend an assault from deceased, she would have the right to take the revolver with her for the purpose of defending herself, and if while so doing the weapon was accidentally and unintentionally discharged, whereby the deceased was killed, you should acquit the defendant."

Under sections 1127 and 1093 of the Penal Code, it is the duty of the court to state to the jury all matters of law necessary for their information, and the court must charge on any point pertinent to the issue if requested by either party. "Every instruction which correctly declares the law applicable to the case which it supposes, if the case can be rationally inferred from the testimony, should be given." People v. Taylor, 36 Cal. 267. The refusal to give this instruction constituted reversible error. People v. Fice, 97 Cal. 459, 32 Pac. 531; People v. Hecker, 109 Cal. 460, 42 Pac. 311 (30 L. R. A. 403). "However incredible the testimony of the defendant, he was undoubtedly entitled to an instruction based upon the hypothesis that his testimony was entirely true." People v. Keefer, 65 Cal. 232, 3 Pac. 819. Whether or not defendant had a right to order deceased from her house, and reasonably enforce such exclusion, was a question of law dependent upon the facts found by the jury. Assuming, as the trial court must when requested to give an instruction, that the testimony of defendant was entirely true, the plain duty of the court was to have given the instruction requested, and to have informed the jury of the defendant's legal rights should the jury find the facts claimed by defendant to be true. It was error for the court to instruct the jury, as it inferentially did by instruction 12, that the jury were judges of the law in that they were to determine from the evidence whether or not the defendant had the right to order the deceased out of the room at the time of the shooting. Nor does charge No. 6 given by the court, which was, in effect, that, where the evidence fails to show any motive on the part of defendant to commit the crime, this is a circumstance tending to show the innocence of the defendant which the jury ought to consider, cover the ground stated by the instruction refused. Instruction 6 as given presupposes that the shot was fired voluntarily and a crime had been committed, while instruction No. 7 is asked upon the ground that the shot was an accidental one and no crime was in fact committed, and no intent formed to commit the crime, and no act done not within the plain legal rights of defendant. It is insisted by the Attorney General that instruction 9, which was, in effect, that if the jury found that the shot was accidental it must acquit, was sufficient to cover all that was material in instruction 7 refused. With this we do not agree. The object and purpose of the defendant in procuring a weapon before the final call upon deceased in an effort to compel his vacation of the room was a material matter in the determination of the question of the accidental or designed character of the shot fired. Her right so to arm herself was involved. It may be that the jury being called upon to determine the question of law came to the conclusion that she had no right, in any event, to procure and exhibit a weapon, and that, having the weapon in her possession unlawfully, the conclusion must follow that she thus armed herself with an intent to commit a crime, and it was thus influenced in determining as it did that the shot fired was not by accident.

In our opinion, the court erred in other particulars. The defendant was permitted to testify, without objection, that, after the first assault upon her, she showed her wrists and arms to Mr. Leppertt that he might see the bruises. Mr. Leppertt was offered as a witness by defendant, and upon direct examination was asked: "Q. I will ask you, Mr. Leppertt, if within one week before the shooting you saw this defendant, Miss Williamson, with her wrists very much swollen and discolored, and her face and neck bruised and swollen, going about the house there?" This question was objected to, and the objection sustained. Again, the witness Leppertt was asked: "Q. I will ask you if shortly before the shooting you saw this man, not the very same day, but within a very few days before, Saunders, following this defendant through the hallways and through the rooms when she was about her work, addressing to her indecent and insulting proposals?" This question was also objected to, and the objection sustained. We think both questions were material and competent. The defendant testified, and it was one of the principal matters in support of her theory of defense, that a criminal assault had been made upon her, and her neck, arms, and wrists had been bruised. It was proper for the jury to know whether she had cause to fear bodily injury when again ordering deceased from her house, and this first question asked Leppertt was in corroboration of defendant's statement about the assault theretofore testified to by her, and which she claimed to be the grounds for apprehending injury. The defendant had testified to facts showing not only the first attempt to commit a crime, but subsequent improper overtures and actions indicating an intent to commit another assault. This question to Leppertt in relation to the man's conduct shortly before the shooting was corroborative in its nature, and defendant had the right to corroborate her statements by the testimony of others with knowledge of the same facts. The exclusion of this testimony could not be otherwise than prejudicial.

For all the reasons above assigned, the judgment and order denying a new trial are reversed, and cause remanded for further proceedings.

We concur: SHAW, J.; TAGGART, J.

6 Cal. App. 410

WALTERS v. MITCHELL et al. (Civ. 359.)

(Court of Appeal, First District, California. Sept. 11, 1907. Rehearing Denied by Supreme Court Nov. 7, 1907.)

1. DEEDS — DESIGNATION OF GRANTEE — MISTAKE—CORRECTION.

Where a deed misnamed the grantee, the mistake could not be corrected by a subsequent deed executed by the grantor to a person alleged to have been the grantee intended in the original deed, and reciting that the subsequent deed was made to correct error in the grantee's name in such original deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 59.]

2. REFORMATION OF INSTRUMENTS — DEEDS — EFFECT OF DECREE.

Where a deed was alleged to have misnamed the grantee, a suit thereafter brought by a subsequent grantee of the land, together with the person alleged to have been the grantee intended in the deed, against the grantor's administrator, to correct the mistake, which was not a proceeding in rem, and in which a decree was entered reforming the deed, was ineffective to correct the mistake.

3. VENDOR AND PURCHASER—MARKETABLE TITLE.

A purchaser is entitled to a title fairly deducible of record and free from reasonable doubt or litigation, and is not required to accept a title depending on matters resting in parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 238-248.]

4. SAME—MISNAMING OF GRANTEE.

A title was not marketable where error in the name of a grantee in the vendor's chain of title could be proved by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 244, 248.]

5. SAME—ENCROACHMENTS.

A purchaser was not bound to take title to property, where the eaves and projections of a house on an adjoining lot extended a few inches over the lot in question, though the owner of such house had stated that he would remove the projections at any time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 255-258.]

6. Same—Action for Earnest Money—Tender of Deed.

Where vendors claimed that earnest money sued for was forfeited, the burden was on them to show that they tendered a deed which would convey the property and possession of the whole thereof, free from projections of adjoining property, to the vendee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 1012.]

7. Attorney and Client—Authority of Attorney.

Where an attorney was employed by plaintiff to give his opinion and judgment on the title to certain property in controversy, plaintiff was not bound by the attorney's opinion as to the marketability of the title, nor by his agreement with the owner of the adjoining lot, whose house projected over the property in controversy, that the projections might remain for a year, in consideration of $5 paid to the attorney.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 141.]

8. Vendor and Purchaser—Tender of Purchase Money—Earnest Money—Recovery.

Where a purchaser had pointed out fatal defects in the vendors' title, and notified them that he would perform and pay the balance of the price on receiving a perfect title, according to the terms of the agreement, but the vendors failed to cure such defects until after the time therefor had expired, the purchaser was not bound to tender the purchase money and demand a deed before he could sue to recover earnest money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 995–999.]

9. Evidence—Materiality—Opinion.

On an issue as to whether title to certain land contracted to be conveyed to plaintiff was marketable, evidence as to whether an attorney, who had previously examined the title for another, would pass the same notwithstanding a specified defect, was immaterial and objectionable as calling for the witness' opinion.

10. Appeal—Evidence—Harmless Error.

Where, on an issue as to whether a deed alleged to have been made to a misnamed grantee had been corrected by a subsequent deed from the same grantor, defendant's counsel admitted that the second deed was insufficient to correct the mistake, and introduced in evidence the report of an attorney on the title, which pointed out that the title was vested in the grantee in the original deed, or in the second deed, or in both, defendant was not prejudiced by an erroneous ruling permitting such attorney to testify that he would not pass a title containing such defect.

11. Vendor and Purchaser—Earnest Money—Action—Findings.

Where a complaint by a purchaser to recover earnest money alleged that the vendor did not hold the legal title to a portion of the property, but that the title was in another, and the court found that the vendor was not the owner, but that the "record title" was in a certain person, it was immaterial that the court failed to find in whom the legal title rested.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by J. Frank Walters against George M. Mitchell and others. From a judgment for plaintiff, defendant Mitchell appeals. Affirmed.

E. W. McGraw, for appellant. H. M. Anthony, for respondent.

COOPER, P. J. This action was brought to recover $500, the amount of a deposit made by plaintiff with defendants, Baldwin and McCaw, real estate agents, on a contract for the purchase of a certain lot belonging to defendant Mitchell. Plaintiff recovered judgment, from which defendant Mitchell appeals on the judgment roll and a bill of exceptions.

The $500 was paid March 26, 1904, and was acknowledged by a writing, which described the lot as being situate on the northeasterly corner of Spruce and Clay streets, fronting 40 feet and 2 inches on Spruce street, by a depth of 107 feet and 6 inches on the northerly line of Clay street. The contract provided that plaintiff should have 30 days in which to examine the title, and in case of any valid objections Mitchell should have 60 days additional time in which to perfect the title. Time was made of the essence of the contract, and, in case of such objections, if the title should not be perfected within the 60 days, the said deposit was to be returned to plaintiff. Plaintiff pointed out two objections, and claimed, on the trial, that each of said objections was valid, and that the defendants had not corrected them or perfected the title. The court found for plaintiff as to each objection, and we are of opinion that the findings are correct and sustained by the evidence.

The first objection was as to 47 feet on the west end of the lot fronting on Spruce street, the entire width of the lot, and being nearly one-half thereof. As to this portion of the lot, it appears that, in the chain of title to Mitchell, a conveyance was made by Robert Faessler, who then owned the property, to George F. Terschuren, dated April 10, 1899, which was duly acknowledged and recorded. This deed passed the title out of the grantor to the grantee, and if the true name of the grantee was George F. Terschuren the title passed to and rested in George F. Terschuren. There is no conveyance of record from George F. Terschuren to Mitchell, or to any of his grantors, and the title is still of record in the name of George F. Terschuren. On May 10, 1899, another conveyance was made by Robert Faessler to Gerhard F. Terschuren, which was duly acknowledged and placed on record. The latter deed contained the recital: "This deed is made to correct a deed to George F. Terschuren dated April 10th, 1899, recorded May 4th, 1899, to correct error in grantee's name." It is evident that after the title passed out of Robert Faessler to George F. Terschuren no subsequent deed of Faessler could convey anything, or convey to any different grantee. If the true name of the grantee was George F. Terschuren, the title passed to said George F., and, if the true name was not George, but Gerhard, and the name George was inserted by mistake, instead of Gerhard, Faessler could not correct the mistake. This is conceded by appellants, but they claim that they took proceedings which perfected the title as to this objection. After plaintiff had objected to the title on the grounds just stated, and within the 60 days, the appellants undertook to correct it in the following manner: Defendant Mitchell, together with Gerhard F. Terschuren, as coplaintiffs, brought an action in the superior court of the city and county of San Francisco on the 14th day of June, 1904, against one Hynes, the administrator of the estate of Robert Faessler, deceased. The complaint in said cause set forth the making of the deed by Faessler in his lifetime to George F. Terschuren, that it was made to George by mistake, and that the true name of the grantee was Gerhard instead of George, and that there was no such person as George F. Terschuren. Hynes, as administrator, filed an answer denying the allegations of the complaint. On June 20, 1904, a decree was made and entered in the said superior court, finding the facts to be as alleged in the complaint, and adjudging that the deed made by Robert Faessler to George F. Terschuren was made by mistake, and that the deed be reformed by inserting the name Gerhard, instead of George, and that the deed as so reformed should be a conveyance as if made by Robert Faessler to Gerhard F. Terschuren.

It is contended by appellants that the deed so procured cured the defect in the title, but we do not think so. The suit was evidently a friendly attempt, without contest, to perfect the title of Mitchell. It was not a proceeding in rem. George F. Terschuren was not made a party, and therefore the suit did not affect him. If he had been made a party, and the proceeding had been in rem, and due publication of summons made after failure to find him, there would be force in appellant's contention; but it is plain that, if Faessler in his lifetime could not correct the first conveyance made by him, his administrator could not do so. Nor did the decree of the court aid the matter in the least. It was only conclusive upon Hynes as administrator, but he never claimed the property as administrator. His intestate never claimed it after he made the deed conveying it. The fact that in any litigation concerning the title parol evidence would be admissible to show that the grantee George F. Terschuren was identically the same person as Gerhard F. Terschuren does not as to plaintiff change the result. The plaintiff had the right to a title fairly deducible of record, free from reasonable doubt or litigation. He was not required to accept a title depending upon matters which rest in parol. Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851, and cases cited. Counsel for appellant very properly and candidly admit the rule "that the fact that error in name could be proven by parol in any litigation concerning the property would not make the title marketable under the decisions of this court."

The second objection to the title was that the owner of the lot on the north of the premises agreed to be conveyed maintained projections of his house and overhanging eaves which affected the possession of the property to be conveyed. The court found such to be the fact, and the evidence supports the finding. In fact, it is conceded in appellant's brief that the eaves and other projections of the house on the lot north "overlapped the lot in question a few inches." It is claimed, however, that the evidence shows that the owner of the lot on the north made no claim to the right to maintain such projections and eaves, but stated that he would remove them at any time. But plaintiff was not bound by any parol promises as to the possession of the property. As defendants claimed that the $500 was forfeited, it was incumbent upon them to show that they tendered a deed which would convey the property and the possession of it to plaintiff. Plaintiff had the right to the possession of all of it before the purchase price could be demanded of him.

It is claimed that the title was made satisfactory to plaintiff's attorney by the judgment obtained in the suit against Hynes, the administrator of the estate of Faessler, and by the promise that the obstructions and eaves of the house on the north would be removed, and that the attorney for plaintiff agreed with the owner of the lot and building on the north that, in consideration of the sum of $5, the receipt of which was acknowledged, the obstructions and eaves might remain for one year. The testimony shows that the plaintiff employed the attorney to examine the abstract and pass upon the title. Plaintiff was not bound by the advice of the attorney, nor by the agreement as to the obstructions. The attorney testified that he was employed to give his opinion and judgment upon the title, and for no other purpose, and that he was not authorized to waive any objections to the title. It would be a strange doctrine which would compel the plaintiff to take a defective title, in the face of the agreement to give him a good one, simply because the attorney whom he employed gave an erroneous opinion as to the title. Plaintiff was not bound by the opinion, and surely the vendor was in no position to profit by it. On the contrary, the plaintiff had the right to employ as many attorneys as he saw fit, and to have the advice of each and every one of them, and the question would still be as to whether or not the title tendered was a marketable title within the meaning of the law.

We have examined the complaint as to the contention that it fails to state a cause of action because it does not state that the plaintiff tendered the purchase money and demanded a deed. It does allege that plaintiff pointed out and stated to defendants the defects in the title, and "at the same time notified defendants that he would perform the said agreement on his part, and pay the balance of the purchase price according to the terms of said agreement, upon receiving a perfect title according to the terms of said agreement." It is further alleged that the defendant Mitchell failed to cure the alleged defects in the title, or to perform the agreement on his part. There was no demurrer to the complaint. There does not appear to have been any objection to the evidence on the ground that the complaint failed to state a cause of action. It is sufficient to say that, in view of this record, we think the complaint sufficient. The time in which to perfect the title had expired. The title had not been perfected. In such case a tender of the money by the plaintiff would have been a useless proceeding.

F. S. Brittain, an attorney, was called as a witness by the defendants, and testified that at the time of the transaction he was one of the attorneys for the Hibernia Bank, and as such examined the title with a view to a loan by the bank upon the property. He was asked in cross-examination by plaintiff's attorney the following question: "Q. A deed runs to George F. Terschuren, and later on there is a deed that runs to Gerhard F. Terschuren for that identical property, and in the bottom of the deed it says: 'This deed is made to correct a deed to George F. Terschuren, dated April 10, 1899, recorded May 4, 1899, to correct error in grantee's name.'" Then the following took place, as shown by the record: "Mr. McGraw: We will admit that was not sufficient to correct the error. Witness: I had advised Mr. Walters with regard to this particular case. I dictated the objection that is expressed in the report from Tobin & Tobin. Q. Would you pass title on the purchase of land that had such a defect? (Defendant objected to the question as immaterial, incompetent, and irrelevant. Objection was overruled, to which ruling defendant duly excepted.) Witness: No." The question was immaterial, and called for the opinion of the witness, but it is apparent that it was harmless. The answer was certainly no more injurious than the admission of defendant's attorney that the second deed "was not sufficient to correct the error." Not only this, but defendant's counsel had placed in evidence the report of Brittain upon the title, which pointed out that the title was "vested in George F. Terschuren, or in Gerhard F. Terschuren, or in both."

It is urged that there is no finding upon the issue made by the pleadings to the effect that Gerhard F. Terschuren was at all times and still is the owner of the westerly 47 feet of the lot agreed to be conveyed. The complaint alleged that the defendant Mitchell did not hold the legal title to said portion, but that the title was in Gerhard F. Terschuren. The court found that the defendant Mitchell was not the owner and did not hold the legal title to said portion of said lot, but that the record title was in George F. Terschuren. The material issue was as to whether or not the title was in defendant Mitchell. The court found that it was not. It was wholly immaterial whether it was outstanding in the name of Gerhard or George Terschuren. It was not in defendant Mitchell, and that is sufficient.

The court found as to all the material issues, and the findings support the judgment.

The judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

6 Cal. App. 379

FINKBOHNER v. GLENS FALLS INS. CO. OF GLENS FALLS, N. Y. (Civ. 313.)

(Court of Appeal, Third District, California. Sept. 7, 1907.)

1. Insurance—Policies—Construction.

The rule that a policy is to be construed liberally in favor of insured, and strictly against the insurer, cannot be invoked to change the nature of the contract, but only to resolve uncertainty or ambiguity in favor of the party likely to be misinformed or imposed on.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 292–295.]

2. Same—Policy—Conditions—Substantial Compliance.

Insured cannot recover on a policy unless he has at least substantially complied with its conditions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 700–702.]

3. Same—"Interest" of Insured.

The term "interest," as used in a provision of a fire policy, declaring that a change of insured's interest, title, or possession of the subject of the insurance, without the insurer's consent, shall work a forfeiture of the policy, is not limited to a change in the legal title, but extends to both legal and equitable rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 794–825.]

4. Vendor and Purchaser — Contract of Sale—Effect—Rights of Vendor.

Where an owner of land contracted in writing to sell the same and placed the purchaser in possession, after payment of a part of the price, the vendor agreeing to convey the legal title on full payment being made, he became a trustee of the legal title for the vendee, who was the equitable owner of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 376.]

5. Insurance—Change of Interest—Executory Contract of Sale.

Where insured contracted to sell the property to another, and the vendee, after paying part of the price, was placed in possession, insured's interest, before the balance of the price was payable under the contract or a deed given, was changed under the doctrine of equitable conversion from realty to personalty, and, having been effected without the consent of the insurer, constituted a breach of a condition prohibiting a change in insured's interest, title, or possession of the subject of the insurance without the insurer's consent, though there was no actual increase of risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 799–803, 823.]

Appeal from Superior Court, San Joaquin County; W. B. Nutter, Judge.

Action by Charles Finkbohner against the Glens Falls Insurance Company of Glens Falls, N. Y. Judgment for plaintiff, and defendant appeals from an order denying its motion for a new trial. Reversed.

T. C. Van Ness and Nicol & Orr, for appellant. R. C. Minor, for respondent.

BURNETT, J. In consequence of the destruction by fire of a frame dwelling belonging to plaintiff, and which was insured on June 14, 1903, for three years by appellant, this action was brought on the insurance policy for the sum of $600. Plaintiff had judgment, and defendant appealed from the order denying its motion for a new trial.

The main controversy hinges upon the effect to be given to this clause in the policy: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto shall be void * * * if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise."

April 6, 1905, more than two months prior to the fire, without any indorsement being made on said policy or addition thereto, and without the knowledge or consent of appellant, the respondent entered into a written agreement with M. D. Eaton and W. D. Buckley, the nature of which the following clause will show: "The said party of the first part (Charles Finkbohner), in consideration of the covenants and agreements on the part of the said parties of the second part herein contained, agrees to sell and convey unto the said parties of the second part and said second parties agree to buy [describing the property including the land upon which said dwelling house stood]—for the sum of eight thousand one hundred and twenty-two and $^{80}/_{100}$ dollars, and the said parties of the second part agree to pay the said sum * * * as follows, to wit: $1,200.00 on the execution of this agreement and the balance * * * on or before November 1, 1905. It being understood that the party of the first part will accept a mortgage made by Zack Martin for $3,213.00 at six per cent. net, payable on or before three years from date of execution, secured by 32.13 acres of land, being parts of lots 25, 26 and 27, as cash for $3,213.00 in said last-named payment. It is mutually understood and agreed that the parties of the second part are to have immediate possession of said land and all income therefrom." Then follow the formal covenant to execute a deed on the payment of the money and the stipulation that the agreement shall bind heirs, etc., and that time is of the essence of the contract. On the same day the said Eaton and Buckley entered into a similar contract affecting a part of said property and including said dwelling house, with the said Zack Martin, who agreed to pay for said property the sum of $6,104.70. Twelve hundred dollars were paid on the execution of the agreement. Sixteen hundred and odd dollars were to be paid on or before November 1. 1905, and the balance was to be secured by a mortgage referred to in the aforesaid agreement between respondent and Eaton and Buckley. Finkbohner indorsed his approval on said contract, and Martin, as provided therein, went into immediate possession of said premises, and was occupying said dwelling house at the time of the fire, which occurred June 23, 1905. The deferred payments had not then been made, as they were not due, and the legal title to the premises was still in respondent.

In the construction of insurance policies great favor is shown to the insured. The rule generally recognized is to construe the covenants strictly against the insurer and liberally in favor of the insured. We need not stop to philosophize as to the reason for this rule. It is sufficient to say that it has been generally indorsed by the higher courts, but, of course, it is not sufficiently indulgent towards the insured as to ignore or nullify his express and unequivocal agreement. It cannot be invoked to change the nature of the contract, but only to resolve an uncertainty or ambiguity in favor of the party who is likely to be misinformed or imposed upon. The law, while tender of the rights of the insured, will hold him to a substantial compliance with the terms of his policy, as it will the parties to any other contract. Any other rule would be opposed to the interests of the honest policy holder, as well as subversive of the rights of the insurer, and it could not be countenanced by a court of justice. In the case at bar, did the agreement to convey the property, together with the entry into possession by Martin in pursuance of that agreement, constitute such a change in the title or interest or possession of respondent as to render the policy void?

The identical question has not been involved in any case decided by our Supreme Court, although said court has indulged in some observations indicating, as we shall presently see, that such condition would avoid the policy. In other jurisdictions the case has been fairly presented and determined. In Grunauer v. Westchester Fire Ins. Co., 72 N. J. Law, 289, 62 Atl. 418, 3 L. R. A. (N. S.) 107, a recent case decided by the Court of Errors and Appeals of New Jersey, it is said: "It is not open to question that, under the admitted facts, a change, at least, in the possession and right of possession of the insured in the premises had taken place. The period of interest in the insured embraced in the condition is incontestably from the beginning to the expiration of the policy. That such conditions are reasonable and valid, even though they tend to create forfeiture of the policy, cannot be denied. * * * Undoubtedly such contract creates the relation of trustee and cestui que trust between vendor and vendee. It produces in equity a complete transition of the vendor's holdings from real to personal, and gives the vendee the equitable ownership. After such contract, the vendor's interest is no longer real estate, and the unpaid purchase money is personalty and goes to the vendor's personal representative in case of his death. Thereafter the assured could have but a diminished incentive in the preservation of the property from injury, and such result was the very object intended by the insurer to be guarded against by the inserted condition. Although the vendor still retains the legal title to the land agreed to be sold and conveyed, he thereafter holds it only as a trustee for the vendee who becomes the equitable and beneficial owner." In Brighton Beach Racing Association v. Home Ins. Co., 47 Misc. Rep. 177, 93 N. Y. Supp. 654, under a similar contract to convey, the court said: "It is plain that there was a change in interest. There was in fact a change of title. The possession given under the contract of sale made the purchaser the equitable owner in fee. * * * Although the contract said he was to occupy 'as tenant of the party of the first part without any pay or rent thereof,' it is manifest that the contract gave him more than the interest and rights of a tenant." Again, in William Skinner & Sons, etc., v. Houghton, 92 Md. 68, 48 Atl. 85, 84 Am. St. Rep. 485, the Court of Appeals of Maryland held to the same doctrine, saying: "Can it be doubted that there was a change in the interest in this property? As long as the insured has made no change in his estate in the property, a company may be perfectly satisfied to continue the insurance; but if he makes such a change as to divest himself of all interest in the property, excepting a vendor's lien for the purchase money, and has a responsible party bound for the payment of that, he does not have the same motive for the protection of the property that he had before." To the same effect is Cottingham v. Fireman's Fund Ins. Co. (a Kentucky case), reported in 90 Ky. 439, 14 S. W. 417, 9 L. R. A. 627. In Gibb et al. v. Fire Ins. Co. of the County of Philadelphia, 59 Minn. 267, 61 N. W. 137, 50 Am. St. Rep. 405, the Supreme Court of Minnesota takes a similar view, and holds that "the word 'interest' is broader than the word 'title,' and includes both legal and equitable rights."

No case has been cited by respondent where the vendee entered into possession under such a contract of sale and a fire occurred under similar circumstances as we have here in which it has been held that the policy was not forfeited. In Grable, Trustee, etc., v. German Ins. Co. of Freeport, 32 Neb. 645, 49 N. W. 713, the Supreme Court of Nebraska held that the policy was not forfeited, but in that case there was no change of possession of the property. Walradt v. Phœnix Ins. Co. of Hartford, 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. Rep. 752, and Herman v. Katz, 101 Tenn. 118, 47 S. W. 86, 41 L. R. A. 700, involved the question of the effect of the possession of the personal property by the sheriff under a writ of execution. It was held that there was no change in the title or interest, but simply of possession without any increase of hazard. McClelland v. Greenwich Ins. Co., 107 La. 124, 31 South. 691, was a similar case, relating to the effect of a levy of a writ of attachment on personal property. In Lane v. Marine Mutual Fire Ins. Co., 12 Me. 44, 28 Am. Dec. 150, it appears there was a parol lease of the store and goods, but a resumption of possession by the insured before the fire. It was held that there was no violation of the covenant against alienation so as to render the policy void. In Pelton v. Westchester Ins. Co., 77 N. Y. 605, the party under contract to purchase had entered into possession of the property. He had it insured, stating that the property was his. A loss occurred, and the company defended upon the ground that the interest of the insured had not been fully stated, but it was held that the defense could not be maintained, as the insured was the equitable owner, and this was sufficient to satisfy the requirement of the policy. Respondent also cites Joyce on Insurance, § 2284, to the effect that "the fact that the insured has made a contract to sell the insured property does not of itself constitute an alienation within the meaning of the policy. The sale must be actually consummated, and there must be such a transfer as to divest the insured of his title." But in the same section the following doctrine is also approved: "If the owner of insured premises makes an executory agreement to convey the premises, and the vendee under such an agreement takes possession and pays a part of the purchase money, this is a breach of the condition avoiding the policy in case any change takes place in the interest of the insured."

The decision in Smith v. Phœnix Ins. Co., 91 Cal. 323, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191, is grounded upon the proposition that the possession of the tenant was by virtue of the lease, and not as the equitable owner. As said by the court: "The real and only question in the case is whether the contract of sale embraced in the lease, or superadded to it, wrought a change in the title to the insured premises within the meaning of the policy, or imparted to the possession of Stewart a character materially different from the possession of a tenant." It was justly held that Stewart's possession was simply that of a tenant. No other conclusion could have been reached in view of the express terms of the instrument demising the property to Stewart for the term of five years at a fixed rent payable monthly, with the provision that "said party of the second part may at any time during said term of five years purchase said hotel," etc. In reference to the latter clause, the court said: "In considering the question before us, we may lay out of view the stipulation giving Stewart the privilege of purchasing, for clearly he was not thereby bound to take the property and pay for it, even if it remained whole and intact." It was further held that the possession of the property by Stewart was with the implied consent of the insurer. The difference between that case and the one at bar is so marked that the said opinion of the Supreme Court furnishes us little assistance. It contains, however, some observations—in a sense probably obiter—that indicate a view of the question here in harmony with what we have already expressed. For instance, in reviewing the cases from other jurisdictions, it is said: "For the purpose of this decision, it is sufficient to say that no case has been cited, and we have discovered none, in which the vendee has been held bound to pay the purchase price where a valuable part of the property has been destroyed before the day fixed for payment and conveyance, unless he has taken possession under the contract of sale or has the right to such possession under the contract before the occurrence of the loss."

In the later case of Mackintosh v. Agricultural Fire Ins. Co., 89 Pac. 102, our Supreme Court bases its decision against the insurance company upon the ground, as stated in the syllabus, that "there is not a change of interest or of possession in the insured property, which under a fire policy works a forfeiture, where a contract for purchase thereof is given, which amounts to a mere option, with right of possession for experimental purposes, subject to free access and management by the owner." In the opinion, though, written by Mr. Justice Shaw, we find this language: "The change of interest referred to in the policy, in view of the well-known rule of construction applied to insurance policies requiring them to be construed most strongly against the insurer, refers to some change of interest which would make the loss in case of destruction fall upon the buyer, so that by such change the original policy holder would lose his interest in maintaining the property and protecting it from fire. It does not refer to a mere right which another party may acquire which does not change the risk in case of loss, nor give the third party more than a mere option to purchase the property. This rule regarding the change of risk might be different if it were not for the qualified character of the possession which was given to Baker under the arrangement between the parties."

A different clause of an insurance policy was under review in the case of Goorberg v. Western Assurance Co. (Cal.) 89 Pac. 130. It is there said by the court, speaking through Mr. Justice Sloss: "The purpose of the warranties and conditions is to protect the insurer from liability on risks which he would have been unwilling to take for the stipulated premium or perhaps for any premium. * * * The risk is greater, then, where a man insures a house which is on land not belonging to him than it would be if he owned the land." In that case the judgment was reversed because of misrepresentation by the insured as to the ownership of the land, but the reason for the ruling applies equally to the condition where, after the policy is issued, there is a change of ownership without the consent of the insurer. A moment's reflection will show that the very contingency sought to be avoided is present in the case at bar. It is manifest that the risk was increased without the consent of the insurer for the obvious reason that whatever loss might be occasioned by the fire would fall upon Martin, and not upon Finkbohner. Hence the inducement or temptation for the latter to be indifferent concerning the care of the property. Where a party enters into possession of property under an agreement to purchase, and while in possession, without any fault of the vendor, the property is destroyed by fire, it could hardly be maintained that the vendee would be relieved of the liability for the purchase price. The rule is stated in section 1406 of Pomeroy's Equity Jurisprudence as follows: "The effect of an executory contract for the sale of land, in working an equitable conversion and in clothing the purchaser with an equitable estate in the land, and the vendor with an equitable ownership of the purchase price, has already been described. As soon as the contract is finally concluded, although it is wholly executory in form, these rights and estates become fixed and vested. It follows, therefore, that the purchaser, being the equitable owner, is entitled to all the benefits and assumes all the risks of ownership."

It is of no importance that the learned trial judge found that there was no increase of the risk from the change of possession. It is obvious that such a finding is material only where possession is held by a tenant of the insured. Assuming as a matter of fact that Martin is just as careful and conscientious as Finkbohner and that the danger of fire was actually not increased in consequence of Martin's possession of the property, yet the law applies a general standard to all similar cases and constrains us to hold that the insured, having lost his pecuniary interest in the protection of the property, the risk was thereby increased, and under the express terms of the policy the insurer is relieved of liability. To hold otherwise would be for us to declare that the parties are not to be bound by the terms of their agreement. This is not within the province of a judicial tribunal. The insured should have secured the consent of the insurer to the change of title, as provided in the policy. He made no attempt to do so, and we are powerless to relieve him of the consequences of his neglect.

The order denying the motion for a new trial is reversed.

We concur: CHIPMAN, P. J.; HART, J.

6 Cal. App. 402

GALVIN v. MUTUAL SAVINGS BANK et al.

(Civ. 368.)

(Court of Appeal, First District, California. Sept. 10, 1907. Rehearing Denied Oct. 8, 1907.)

1. Executors and Administrators—Necessity for Administration—Next of Kin—Rights of Assignee.

Where intestate died leaving a widow and certain next of kin, and personal property which the widow took possession of and thereafter claimed to own, an assignee of one of the next of kin, though there were no creditors, could not recover from the widow and her depositary, in the absence of administration, the amount of such intestate's estate which his assignor might be entitled to have distributed to her through administration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 3, 10.]

2. Costs—Damages—Frivolous Appeal.

Where an assignee of one of the next of kin of intestate sought to recover from intestate's widow and her depositary the share which the assignor would have been entitled to receive by process of administration, without any administration on the estate, an appeal from an order sustaining a demurrer to the complaint was frivolous, and entitled the respondents to damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 983.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by E. M. Galvin against the Mutual Savings Bank and another. From a judgment for defendants, plaintiff appeals. Affirmed.

E. M. Galvin, in pro. per. Robert P. Troy, for respondent Gagan. Frank J. Sullivan, for respondent Mutual Savings Bank.

COOPER, P. J. The court below sustained the defendants' demurrer to the third amended complaint, without leave to amend, and judgment was entered for defendants. This appeal is from the judgment.

The complaint alleges that one Thomas Gagan died intestate, leaving surviving him as his only heirs Bridget Gagan, his widow, a brother whose Christian name is unknown, and Minnie Gagan, the daughter of a deceased brother; that at the time of his death deceased was possessed of $5,500, his separate property, which the widow wrongfully took and deposited with the defendant bank, and now claims as her own; that there are no creditors of the estate of Thomas Gagan; that Minnie Gagan as heir at law became entitled to $737.50 of the said estate, and that she duly assigned "said sum of money to this plaintiff, who is now the owner thereof." Judgment is prayed for said sum, with costs.

The demurrer was properly sustained. It is evident that, without any administration being had, the court, in order to give plaintiff the relief demanded, would have had to determine the questions of the death of deceased, the amount of his estate, the heirs and the part that each would be entitled to, and the fact that there were no creditors. The judgment would not then be binding upon any heir not a party to it, nor upon any one who might afterwards claim to be a creditor. The widow might claim a family allowance, and that would have to be determined. It might become necessary to have the estate appraised, and the court would have to appoint appraisers. The Code very wisely provides a process for the administration in the probate court of the estates of deceased persons, whereby the existence of creditors or heirs may be conclusively established. A method is provided for giving notice, which is binding upon all, so that all creditors may be paid, the family provided for, and the title properly transmitted by distribution. We have never known of an estate being legally settled in any other manner. In fact, the question has been passed upon, and should not again be presented here. In re Pina, 112 Cal. 14, 44 Pac. 332; Estate of Strong, 119 Cal. 663, 51 Pac. 1078.

The judgment is affirmed, with $100 damages to respondents for a frivolous appeal.

We concur: HALL, J.; KERRIGAN, J.

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6 Cal. App. 369

MEYER et al. v. LOVDAL. (Civ. 356.)

(Court of Appeal, Third District, California. Sept. 5, 1907.)

1. Partnership—Publication of Notice.

Civ. Code, § 2466, provides that a partnership doing business under a name not showing the names of the partners must file with the county clerk a certificate stating the names of the partners, and publish the same as therein prescribed. Section 2468 provides that such certificate must be signed by the partners and acknowledged. *Held*, that the publication of the certificate and a statement showing that it was acknowledged, giving the date, was sufficient without publication of the full acknowledgment.

2. Appeal—Review — Discretion of Lower Court — Reception of Evidence — Admission of Note.

Under Code Civ. Proc. § 1982, providing that the party producing a writing as genuine, which has been altered or appears to have been altered after its execution in a material particular, must account for the appearance or alteration, the trial judge must determine, when the offer is made, whether the alteration is such as to call for explanation, and if he admits it, and nothing appears in the record to show that his judgment was improper or unjustified, his determination is conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3850.]

3. Same.

Through the words "thirty days" in the note sued on, fixing the time of maturity after date, a pen was drawn, and directly thereunder the words "six months" written in the same handwriting as the other written parts of the note. *Held*, that it being the duty of the trial judge, under Code Civ. Proc. § 1982, to determine whether the alteration was such as to call for an explanation, and, there being uncontradicted evidence that the change was made on request of defendant, the ruling admitting the note was conclusive on appeal.

4. **Bills and Notes—Action on Note—Evidence—Admissibility.**

In an action on a note, it was not error to exclude evidence by the maker as to whether he did anything as to stopping payment, whether he notified the banks that the note was fraudulent and had notices published in any of the daily papers, as to the manner in which the note was procured, where there was no offer to show that any of these steps came to plaintiffs' notice, or that it could reasonably be presumed that they were known to plaintiffs.

5. **Same—Presumptions and Burden of Proof—Good Faith and Payment of Value.**

Where fraud in the inception of a note is shown, the burden is on indorsee to show that he is an innocent holder, but the burden is discharged where he shows that he purchased for value in the usual course of business, unless the note was taken under circumstances creating a presumption that he knew the facts impeaching its validity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1675–1687.]

6. **Same—Sufficiency of Evidence.**

Evidence, in an action on a note, *held* not to raise the presumption that indorsees knew the facts impeaching the validity of the note.

7. **Trial—Direction of Verdict.**

Where, had a case gone to the jury, and a verdict been given defendant, it would have been the duty of the court to set the same aside, it was proper to direct a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 381–395.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Daniel Meyer and others against O. A. Lovdal. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

S. Solon Hall and Chauncey H. Dunn, for appellant. Samuel Rosenheim and Grove L. Johnson, for respondents.

CHIPMAN, P. J. Action on a promissory note alleged by defendant to have been fraudulently obtained from him by the payee. Plaintiffs claim to be the purchasers thereof in good faith before maturity and for value. The court took the case from the jury and directed a verdict for plaintiffs for the amount of principal and interest. Defendant appeals from the judgment and from the order denying his motion for a new trial. Plaintiffs constitute a copartnership doing a banking business in San Francisco under the name and style of Daniel Meyer.

1. It is urged that plaintiffs did not comply with the law as declared in sections 2466 and 2468 of the Civil Code, under which persons doing business by a designation that does not disclose the names of all the partners interested therein are required to file with the clerk of the county a certain certificate as in said sections pointed out and cause it to be acknowledged and published. The certificate of the copartnership was introduced without objection and showed due acknowledgment when filed. The affidavit of publication was next offered and showed publication of the certificate for the required period and the following statement appended thereto: "Duly acknowledged on the 20th day of October, 1891, before Louis Meininger, a notary public, in and for the city and county of San Francisco. Indorsed: Filed October 20, 1891. Wm. J. Blattner, Clerk, by John H. Harney, Deputy Clerk." This affidavit of publication was also filed in the office of the clerk of said city and county. The objection to the affidavit was that the statute requires the certificate to be acknowledged, and that when acknowledged it becomes part of the certificate and is filed with the certificate; that the publication was insufficient because the full acknowledgment was not published with the certificate, and the certificate was therefore irrelevant, immaterial, and incompetent. The court overruled the objection. Section 2466, Civ. Code, provides that partners doing business under a designation as in this case "must file with the clerk * * * a certificate stating the names in full of all the members of such partnership and their places of residence, and publish the same for once a week, for four successive weeks in a newspaper published," etc. Section 2468 provides: "The certificate filed with the clerk, as provided in section twenty-four hundred and sixty-six, must be signed by the partners and acknowledged before some officer. * * * The certificate must be filed and the publication designated in that section must be made. * * * Persons doing business as partners contrary to the provisions of this article shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name * * * until they have first filed the certificate and made the publication herein required." The claim of appellant is that the certificate is not complete until signed and acknowledged by all the partners; that the acknowledgment is a necessary part of the certificate and also a necessary part of the publication. Section 2466 says that the certificate therein mentioned must be published, but this section does not require any acknowledgment to complete the certificate. Section 2468 provides that the certificate referred to in section 2466 must be signed by the partners, and acknowledged before some officer authorized to take the acknowledgment of conveyances of real property, and it also provides that the certificate must be filed and the publication designated in section 2466 must be made. It is not entirely clear whether, reading the two sections together, the Legislature meant to require the publication of the certificate as acknowledged (section 2468) or as designated in section 2466. It seems to us, however, that the purpose of the statute is fully met by the publication of the certificate and a statement, as was done here, showing that it was acknowledged before such an officer as the statute refers to and was filed, giving

the date. The purpose of the acknowledgment was probably to authenticate the genuineness of the signatures. The principal facts of which the certificate was intended to give publicity were the designation of the partnership, the full names of the partners, and their residences. The acknowledgment adds nothing to the facts required to be shown by the certificate, and we think a reasonable construction of the two sections justifies us in holding that the publication was sufficient. It was held in Fabian v. Callahan, 56 Cal. 159, that no particular form of acknowledgment is required by the Code.

2. It is urged that the court erred in receiving in evidence the note over defendant's objection. The note was signed by defendant and made payable to F. V. Allen or order, and was dated "Sacramento, Feb. 15th, 1904," and reads: "Thirty days after date without grace I promise to pay," etc. The words "thirty days" show that a pen was drawn through them, and directly thereunder the words "six months" written. It is indorsed as follows: "Arbuckle, Cala. Feb. 18th, 1904. I hereby assign the within note to C. S. Allen for 4,000. F. V. Allen. For value received I hereby sell, transfer and assign the within note to A. Lindsley. C. S. Allen." Then follow the following indorsements: "A. Lindsley, F. W. Voogt, Marshal A. Frank." The only objection argued in the brief at this point is that plaintiff should have explained the alteration as to the maturity of the note before offering it, and that it was error to admit it without such explanation. In many states it is held that an apparent alteration is presumed, in the absence of any explanation, to have been made simultaneously with or before the delivery of the instrument, and hence no explanation is required. In other states it has been held that there is no presumption either way; and in still others that the presumption is that the alteration was made after delivery. See cases collected in 1 Ency. Ev. p. 810 et seq. In this state we have a statute on the subject as follows: "The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration." The section then points out how he may do this, and when done "he may give the writing in evidence, but not otherwise." Code Civ. Proc. § 1982. In the present case it is alleged in the answer that the alteration was made after delivery, and that plaintiff took the note after its maturity, i. e., more than 30 days after its execution. The alteration then was material to the question in dispute. We find no case in our reports, and none is cited, where the meaning of this section, in the particular now under consideration, is clearly stated. When the instrument is offered, without explanation as to an apparent alteration, how is it to be known whether or not it "appears to have been altered after its execution", unless this may be determined, in the first instance, by an inspection of the instrument itself and the alteration shown therein? The trial judge must, it seems to us, determine when the offer is made whether the alterations are such as, in his judgment, call for explanation. If he admits the instrument, and nothing appears in the record to show that the judgment exercised by the trial judge was improper or not justified, it is the duty of the appellate court to accept his conclusion. We must assume that he had the instrument before him and scrutinized its appearance in order to determine whether it was altered after its execution, and, unless the record brought up for review shows that he acted without warrant, his determination is conclusive upon us. We have nothing before us but a photographic copy of the note, and we can discover nothing from it that would suggest unauthorized action by the trial judge. The erasure shows that it was made with a pen, and the words "six months" appear to be in the same handwriting as the other written parts of the note. It clearly appeared from the undisputed testimony later along in the trial that the change from thirty days to six months as the date of maturity of the note was made at defendant's request and before he signed it, and that as thus changed it was delivered to the payee.

3. Defendant, as a witness on his own behalf, was asked whether he did "anything in reference to stopping payment of the note"; also, whether he "notified the banks of Sacramento that the note was fraudulent and void"; also, whether he "had notices published in any of the daily papers in Sacramento with reference to the manner in which this note was procured." The court sustained objections to the questions. It was not shown, or attempted or offered to be shown, that any of these steps came to plaintiffs' notice, or that it could reasonably be presumed that they were known to plaintiffs. The ruling was not erroneous.

4. At the close of the evidence, on motion of plaintiffs, the court instructed the jury as follows: "Inasmuch as there is no evidence that the plaintiffs had any knowledge or notice of any want of consideration or fraud in the inception of the note sued upon, and the evidence is uncontradicted that the plaintiffs purchased said note for value before maturity, the plaintiffs are entitled to judgment herein, and you are instructed to return a verdict for the plaintiffs for the face of the note * * * with interest. * * *" It is contended that the court erred in thus instructing the jury. It appears from the uncontradicted evidence that the note was given at its date in discharge

of a debt incurred in a game of poker played between the maker, Lovdal, and the payee, F. V. Allen; that the note was partly printed; that the written portion, except the signature, was filled in by one Albert Lindsley, the only person present at the game except the two players; that it was first written payable 30 days after date, but at the request of Lovdal, who wanted longer credit, the change of time in the maturity of the note was made by Lindsley before the note was signed by Lovdal. The subsequent history of the note is immaterial except as to plaintiffs' connection with it.

It is contended by defendant that, it having been shown that the note was fraudulent, the burden was on plaintiffs to show that they purchased the note before maturity in good faith, for value, in the usual course of business, and under circumstances which created no presumption that they knew the facts that impeach its validity, citing Jordan v. Grover, 99 Cal. 194, 33 Pac. 889, and Eames v. Crosier, 101 Cal. 260, 35 Pac. 873. The true rule, as we conceive it, is found in the second of these cases, and also in Sinkler v. Siljan, 136 Cal. 356, 68 Pac. 1024. See, also, Bell v. Pleasant, 145 Cal. 410, 78 Pac. 957, 104 Am. St. Rep. 61. In Eames v. Crosier the note was indorsed in blank and delivered by the payee, Bandholt, and again delivered to one Runels, who, before maturity thereof, assigned and delivered the same to one Talmage, and the latter afterwards sold and delivered the note to plaintiff, Eames, as we understand the facts, after its maturity. The trial court found that Talmage "purchased and received and paid for the note in good faith without notice," and this finding was challenged as not supported by the evidence. It was admitted that both Talmage and plaintiff acquired the note for value, but it was claimed that proof on the part of defendants that the note was procured from defendants through fraud cast upon plaintiff the burden of showing that the plaintiff or Talmage purchased without notice of the equities set up in the answer. The doctrine, upon the facts, is thus stated: "Upon proof of fraud in the inception of the note, the burden is cast upon the indorsee to show that he is an innocent holder. This the latter may do by showing that he purchased the note before maturity, or from an innocent indorsee for value, in the usual course of business. When this is done, unless the evidence shows that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show, if he would defeat the plaintiff in his action, that the latter took the instrument with notice of the defendant's equities." Again, speaking of plaintiff's burden, it is said: "This burden is discharged, and a prima facie case is made in his favor, when he shows that he purchased for value in the usual course of business." Mr. Daniel thus states the rule: "He (the indorsee) makes out a prima facie case by proving that the instrument was indorsed to him for value before maturity. Nothing else appearing, a presumption arises that he purchased the note in good faith, without notice of fraud, because it is not likely that he would give full value for a note which he believed to be fraudulent, taking the hazard upon himself, and because it would be difficult to prove good faith in any better way. * * * Unless there were circumstances which seemed to bring home to him notice of the fraud or illegality imputed, the requirement of further proof than the giving of fair value seems unreasonably harsh and exacting." 1 Daniel, Negotiable Instruments (4th Ed.) § 819. The circumstances attending the purchase must be something more than "such as to invite inquiry on the part of the purchaser." Sinkler v. Siljan, supra. They must, as was said in Eames v. Crosier, supra, show "that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity." Otherwise the burden is upon the defendant to show that plaintiff "took the instrument with notice of the defendant's equities." It was said in Collins v. Gilbert, 94 U. S. 753, 24 L. Ed. 170, that to defeat the rights of a bona fide holder of a promissory note claimed to have been procured by fraud, it must be shown, either directly or by circumstances, that he had notice of such infirmity. "Proof of such facts and circumstances as would have put a reasonable man upon inquiry in relation thereto is not sufficient to constitute a defense to a suit by the holder." In Bell v. Pleasant, supra, it was said, in the opinion by Mr. Justice Shaw: "The indorsement carries the legal title to the note and vests it in the indorsee, and, if it is shown by him that he bought for a valuable consideration before maturity, his legal title cannot be divested nor his right to recover defeated, without the proof which shows his purchase to have been fraudulent, namely, that he had notice of the fact of consideration or of the fraud, or other defense of the maker."

It appeared, without conflict, that plaintiffs purchased the note in due course and paid its face value, including accrued interest to date of purchase, and under circumstances entirely devoid of semblance of knowledge or notice of the infirmity in the note at its inception. See sections 3122, 3123, 3124, Civ. Code. We do not feel called upon to state these circumstances in detail. Aside from what appears on the face of the note, there were no circumstances that would give rise to any presumption of knowledge or notice to plaintiffs that the note had its origin in a gambling game. The change of the date of its maturity as appearing on the note was fully explained without conflict, and it appeared that the note was purchased for the firm by one of the partners on the credit of Voogt and Frank, two of the indorsers, as a favor to Frank, rather than for any profit, and it was purchased but a short time before maturity, when only a small amount of interest would accrue on it before maturity. Both Voogt and Frank were known to the firm, and had borrowed money from it, and were regarded by the firm as men of considerable means and as entirely responsible for the amount involved. Defendant recounts many independent circumstances from which he claims that sufficient appeared to require the case to go to the jury, and that the court had no right to take their consideration away from the jury. It would needlessly prolong this opinion to note these circumstances and show wherein they fail to present facts material in determining whether plaintiffs successfully met the burden cast upon them by the law. The plaintiffs, in our opinion, went further in their explanation of good faith in the transaction than they were required to go, under the rule above stated, and that, at the close of the evidence, there was no material controverted fact to go to the jury of which it can be said that it gave rise to a presumption that plaintiffs knew the facts impeaching the validity of the note; nor were the facts such as would have justified a reasonable inference by the jury that plaintiffs had any such knowledge. Had the case gone to the jury, and a verdict been given the defendant, it would have been the duty of the court to set the verdict aside. This being so, as we view the evidence, it was not error for the court to direct the verdict. See cases cited in 1 Spelling's New Trial, § 329.

No other alleged errors are noticed in defendant's brief.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

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6 Cal. App. 387

GURNSEY v. ANTELOPE CREEK & RED BLUFF WATER CO. (Civ. 335.)

(Court of Appeal, Third District, California. Sept. 7, 1907.)

1. Appeal—Findings of Court—Sufficiency of Evidence.

There being substantial evidence of every element of adverse use of a water right, the finding by the lower court of such adverse use is controlling on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935–3937.]

2. Waters and Water Courses—Prescriptive Rights—Evidence—Sufficiency.

Evidence, in an action to compel defendant to rejoin plaintiff's service pipe and restrain it from interfering with plaintiff's use of water, *held* to support a finding that defendant had knowledge of the character and extent of plaintiff's use of the water, or that it was put on inquiry and might have known if it had exercised ordinary care.

3. Adverse Possession—Visible Character of Possession.

No particular act or series of acts is necessary that possession may be notorious, but any visible act clearly demonstrating an intention to claim ownership and possession is sufficient to establish claim of alverse possession, and such claim may be made out by visible acts, without any assertions by word of mouth.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 125.]

4. Same—Notorious Possession—Knowledge of Owner.

Where the use is not secret, but open, visible, and notorious, the presumption of knowledge follows.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 131.]

5. Same.

The same presumptions as to adverse possession apply to corporations as to private persons.

6. Waters and Water Courses—Prescriptive Rights—Presumptions and Burden of Proof.

The burden is on one claiming the right to use water by prescription to establish such right, but is discharged by showing continuous occupancy and use of the water, as though he were the owner, for more than five years, whereupon it devolves on the other party to show that the use was permissive or without his knowledge.

7. Same.

Where a right is granted to take water for certain purposes, and grantee uses the water as thereby permitted, and also in a manner or for a purpose which is an enlargement of or an addition to the use granted, he may nevertheless acquire the right to such other use by prescription, as if there had been no express grant to take for any purpose.

8. Same—Proceedings to Determine Rights—Findings—Sufficiency to Support Judgment.

In an action to compel defendant to rejoin plaintiff's service pipe and restrain it from interfering with plaintiff's use of water, plaintiff established a prescriptive right to the use of the water for stock purposes, and it was so found, but there was no evidence or finding that he acquired any such right to use the water for household or domestic purposes or for irrigation. There was a finding that the one under whom plaintiff claimed and his grantees openly and notoriously used the water for household and domestic purposes and for irrigation, but there was no finding by what authority or under what claim the water was used, and assuming that, in connection with another finding, it appeared inferentially that the one under whom plaintiff claimed was entitled to the use of water for such purposes, there was no finding that the water right was appurtenant to the land, nor of any conveyance of such right. *Held*, that a judgment that plaintiff was entitled, in addition to water for stock purposes, to take water for household and domestic purposes and for irrigation, was unwarranted, and would be modified by limiting the right to take to that necessary for stock purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 156, 157.]

Appeal from Superior Court, Tehama County; J. F. Ellison, Judge.

Action by W. H. Gurnsey against the Antelope Creek & Red Bluff Water Company to compel defendant to rejoin plaintiff's service pipe and to restrain defendant from interfering with plaintiff's use of the water. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Modified and affirmed.

J. J. Wells (Elliott McAllister, of counsel), for appellant. P. H. Coffman, for respondent.

BURNETT, J. The controversy relates to a water right claimed by respondent.

In 1877, one James Wilson entered into a written contract with the Antelope Water Company, the predecessor in interest of appellant, containing the following provision: "That, whereas, the said party of the second part is about to bring the waters of Antelope creek in the said county and state into the town of Red Bluff for the purpose of supplying the inhabitants thereof with water, and desires to cross the lands of the party of the first part, and in consideration of that privilege proposes to allow him one-half inch pipe of water to be attached to said pipes at any place he may designate, and the water taken by said half-inch pipe to be used only for the necessary household purposes and the irrigation of a small garden and vegetable patch, * * * and the said party of the first part having accepted the said proposition and consented to the laying of the said pipes as aforesaid, in consideration of the premises, does grant, give and convey to the said party of the second part the right and privilege of laying down the said water pipe across his lands." The water pipe was laid across said lands, and it has been maintained and used ever since. Wilson, in 1878, began using the water at his house, which was south of the county road, and later he purchased land on the north of the road, and about 1885 continued the pipe to said north side and began using it there. Both points were on an extension of the one tap at the main pipe line. On the north side the water has been used continuously ever since 1885 for the watering of stock. On the south side the water was used for a time for household purposes, irrigation, and the watering of stock. Plaintiff purchased the Wilson land in 1893 and then tore down the buildings on the south side of the road, and since then the water there has been used exclusively for stock. September 1, 1904, the appellant removed respondent's half-inch connection from the main pipe line, and the suit was brought for an injunction to compel its restitution and to restrain appellant from interfering with respondent's use of the water.

The main contention is over the question whether the evidence supports the following finding of the court: "That for about 11 years last past, and up to September 1, 1904, the plaintiff attached to the said water main a one-half inch water pipe, on the said lands; and, for and during the said 11 years, by and through the said half-inch water pipe, the plaintiff has openly, notoriously, and peaceably and adversely to the defendant and to the whole world, claiming all the time to be the owner of the right to take and use, and has continuously taken and used the water flowing in the said water mains and pipes for the purpose of watering live stock and domestic animals on the said lands and premises, * * * and the plaintiff is now and was on the 1st day of September, 1904, the owner of the right to take and use the water in the said water mains, through a half-inch pipe attached thereto, for the purpose of watering live stock and domestic animals on the said lands and premises."

There is no conflict in the evidence. The parties disagree, however, as to whether that evidence justifies the conclusion that the use of the water for stock for so many years by plaintiff and his predecessors has been adverse so as to clothe plaintiff with a title by prescription. Appellant takes the position that, since it was not shown that it had actual knowledge of the enlarged use of the water, such use must be deemed to be permissive only and not under a claim of right. On the other hand, it is respondent's contention that, whatever may be the meaning of the said written agreement of 1877 by reason of the manner in which the water has been used for so many years, his right to a sufficient flow for stock purposes is as unquestionable as though resting in express grant. If there is any substantial evidence of every element of adverse use, the finding of the court below is controlling. Thomas v. England, 71 Cal. 456, 12 Pac. 491; Humphreys v. Blasingame, 104 Cal. 40, 37 Pac. 804; Abbott v. Pond, 142 Cal. 394, 76 Pac. 60; Franz v. Mendonca, 146 Cal. 640, 80 Pac. 1078.

The important facts disclosed by the evidence are as follows: Wilson, when owner of the property, used the water for stock in the corrals and barn near the road on the south side and in troughs on the north side about 75 feet from the road. The fields on the north and south sides of the road are, and at all the time in controversy have been, so connected as to allow stock to pass readily from one to the other when the gates are open. After Gurnsey removed the house, barn, and corrals, he used a trough and hydrant on the south side right against the fence for watering stock and on the north side at the end of a one-half inch service pipe about 75 feet from the road. All kinds of live stock were running and pasturing in these fields and watering at these points for about 20 years. The respective owners of the property turned the water off and on and used it as they pleased. The water overflowed the trough on the north side of the road and formed a pond or "wallow" for the hogs. This could be seen by every one who passed along the road or up or down the water mains. At the trough on the south side of the road, Gurnsey maintained a "float" to check the flow of water when the trough was filled. Sometimes people interfered with this, and water would overflow the trough and run down the road.

We think, from the foregoing facts, the court was justified in reaching the conclusion either that the defendant had knowledge of the character and extent of plaintiff's use of the water, or that it was put upon inquiry, and might have known, if it had exercised ordinary care. Indeed, there is positive testimony of plaintiff that "the employés of the water company passed up and down those lines of water mains at different times for the purpose of examining and caring for them. They have done that ever since I have owned the property." The grade of their employment is not disclosed, but it is quite improbable that there were not included therein those who by reason of the rank of their position must be held to represent the company in the premises. It is incredible that the water could have been used openly and continuously as it was, in view of the highway, for 20 years, without the knowledge of appellant. This was undoubtedly the view taken by the trial court. Direct evidence of knowledge on the part of defendant was not required. The circumstances were sufficient to justify the finding of the court. No particular act or series of acts is necessary to be done in order that the possession may be notorious, but any visible act which clearly demonstrates an intention to claim ownership and possession will be sufficient to establish claim of adverse possession. Ford v. Wilson, 35 Miss. 490, 72 Am. Dec. 137; Royall v. Lisle, 15 Ga. 545, 60 Am. Dec. 712; Langworthy v. Myers, 4 Iowa, 18. Such claim may be made out by visible acts, without any assertions by word of mouth. Barnes v. Light, 116 N. Y. 34, 22 N. E. 441. When the use is not secret or clandestine, but open, visible, and notorious, the presumption of knowledge follows. Thompson v. Pioche, 44 Cal. 508; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Montecito Valley Co. v. Santa Barbara, 144 Cal. 597, 77 Pac. 1113. The same presumptions apply to corporations as to private persons. Pixley v. W. P. R. R. Co., 33 Cal. 183, 91 Am. Dec. 623.

In Goodwin v. Scheerer, 106 Cal. 695, 40 Pac. 19, the Supreme Court says: "The possession of land is itself prima facie evidence of ownership. * * * If the plaintiff shows that such possession has been continued for a period long enough to bar an action for the recovery, he establishes a title by prescription. Civ. Code, § 1007. Upon such proof the burden is thrown upon the defendant to show that his right to retain the possession has not been overcome." The same principle applies here. The burden is in the first instance upon plaintiff to prove his title by prescription. After showing the continuous occupancy and use of the water as though he were the owner, for more than five years, he establishes a prima facie case. It then devolves upon defendant to show that the use was permissive or without the knowledge of said defendant. In the case at bar, no evidence whatever was offered by defendant as to knowledge or the character of the use. The conclusion of the court is correct, whether it be regarded as a presumption from long continued and notorious possession, or we accept the theory that the circumstances were such as to put defendant upon inquiry, or that the evidence was sufficient to establish the fact of knowledge. It is true that there is no specific finding as to knowledge, but we understand that is not necessary, but it is implied in the language in the finding, "openly, notoriously, and peaceably, and adversely to the defendant and to the whole world, claiming all the time to be the owner."

It makes no difference if we assume that the use of the water on the north side of the road or for watering stock is an enlargement of or an addition to the use granted by the said instrument of August 13, 1877. The same result will follow. In Robinson v. Thornton, 102 Cal. 682, 34 Pac. 122, it is said: "The grantee does not by his entry assume any obligation towards his grantor, nor is there any relation of trust or confidence between them, which is forfeited by his repudiation of the title under which he entered or by his acquisition of another outstanding title. By entering under the title he assumes it to be prima facie good, but he is not estopped thereby from showing in any controversy another and independent title in himself." See, also, Woodward v. Faris, 109 Cal. 12, 41 Pac. 781.

In Wheatley v. Chrisman, 24 Pa. 298, 64 Am. Dec. 657, a question similar to the one before us was considered. It is there said: "The principal stress of the argument before us by the counsel of either side was on the question whether a person to whom an easement like this has been granted by a deed for a specific purpose may use it for 21 years for a different purpose, and then claim a right by prescription to the whole extent of the user. * * * When an easement is granted for one purpose, and the grantee exercises the right mentioned in the deed, and another right also, he is not less secure against all interruptions of either than he would have been if no express grant at all had been shown. It is as easy to presume another grant for watering horses, superadded to that of watering meadows, as it would have been, in the absence of any deed, to presume there was a grant for both together."

We think there is sufficient evidence to show that the use of the water for watering stock was open, notorious, continuous, and under a claim of right for more than five years; but the judgment is more comprehensive than the findings of the court, and it is necessary to modify it. The judgment decrees that the plaintiff "is the owner of the right to continuously and uninterruptedly take from the water mains and pipes of the defendant * * * the water therein, by and through a one-half inch water pipe attached to the said main water pipe on said lands, and to continuously and uninterruptedly use the said water * * * for watering live stock on all the lands above described, and for household and domestic purposes, and for the irrigation of a small garden and vegetable patch on all the said lands, except the east half of the southeast quarter of said section 15." Plaintiff established a prescriptive right to the use of the water for stock purposes, and it is so found, but there is no evidence and no finding that he acquired any such right to use the water for household or domestic purposes or for irrigation. There is a finding "that the said James Wilson, on or about the year 1878, did attach to the said mains a half-inch water pipe; and thereafter and down to the year 1893, to the time the said plaintiff became the owner of the said lands and premises, the said James Wilson and his grantees did openly, continuously, and uninterruptedly take and use the water on the said lands and premises from and through the said water mains and pipe for live stock, household, and domestic purposes, and for the irrigation of a small garden and vegetable patch." But there is no finding by what authority or under what claim the water was used for household and domestic purposes and for irrigation. The finding does not contain all the elements of adverse use; and assuming that, in connection with finding No. 4, it appears inferentially that Wilson was entitled to the use of the water for such purposes, there is nothing to connect the plaintiff with such right. There is a finding that plaintiff succeeded Wilson in the ownership of the lands and premises, but there is no finding that the water right was appurtenant to the land nor of any conveyance by Wilson of any such right, assuming that said right was transferable. The answer raised the issue that the right created by the said agreement of August 13, 1877, was permissive and personal to Wilson. In the absence of any finding as to this, the judgment is broader than is warranted.

There was some evidence of waste of water on plaintiff's premises. This, of course, should not be allowed. Nor should plaintiff permit the water to flow when not necessary for the purposes mentioned in the judgment. In the rainy season there is an abundant supply in the slough for plaintiff's uses, and he should avail himself of it. It is not necessary, however, to modify the injunction in these respects, as suggested by appellant, as we understand from the language used that appellant is not restrained from preventing waste.

The words "and for household and domestic purposes and for the irrigation of a small garden and vegetable patch on all the said lands except the east half of the southeast quarter of said section 15," found in folio 91 of the transcript, and the words "household and domestic purposes and for irrigation," found in folio 93 of the transcript, and the words "household and domestic purposes and for irrigation," found in folio 95 of the transcript," are stricken from the judgment, and, as thus modified, the judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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6 Cal. App. 420

STIERLEN v. STIERLEN et al. (Civ. 375.)

(Court of Appeal, First District, California
Sept. 13, 1907. Rehearing Denied
Nov. 11, 1907.)

MARRIAGE—ANNULMENT—TIME TO SUE.

Under Civ. Code, § 61, declaring that a marriage contracted by one during the life of a former husband or wife shall be void; section 82, enumerating the causes for the annulment of a marriage, including the ground that a party thereto has a husband or wife; and section 83, fixing the time for suing for the annulment of a marriage and providing that a suit therefor because a party thereto has a husband or wife may be brought by either party during the life of the other or by the former husband or wife—either party to a void marriage or the former husband or wife of a party thereto may sue to annul it during its existence.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Emma Stierlen against George Stierlen and another. From a judgment for defendants, plaintiff appeals. Reversed.

Nathan C. Coghlan, for appellant. Milton S. Eisner, for respondents.

COOPER, P. J. Plaintiff declined to amend her complaint after defendants' demurrer had been sustained, and judgment was entered against her. She prosecutes this appeal from the judgment.

It is alleged in the complaint that plaintiff and defendant George Stierlen intermarried in February, 1886, and ever since have been and now are husband and wife; that in November, 1896, defendant George Stierlen, representing himself to be an unmarried man, procured a marriage license authorizing him to marry one Rosa Scott, and was, after procuring such license, married to said Rosa Scott, who has since been known as Mrs. George Stierlen, and who is one of the defendants; that since said marriage in the month of November, 1896, the defendants have cohabited together as man and wife, and now are living together as man and wife. Judgment is prayed that the said marriage of defendants be declared void and annulled. It is stated in the briefs that the court sustained the demurrer upon the ground that the cause of action as stated in the complaint appears upon the face thereof to be barred by section 343 of the Code of Civil Procedure, which provides that an action for relief not thereinbefore provided for must be commenced within four years after the cause of action shall have accrued. The question, then, is as to whether or not the cause of action was barred by the provisions of said section of the Code.

In the Civil Code, in chapter 2 of article 1, under the head of "Nullity," we find sections 82 and 83, which are as follows:

"Sec. 82. Causes for Annulling Marriages. A marriage may be annulled for any of the following causes, existing at the time of the marriage:

"1. That the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent, and such marriage was contracted without the consent of his or her parents or guardian, or person having charge of him or her; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife.

"2. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force.

"3. That either party was of unsound mind, unless such party after coming to reason, freely cohabit with the other as husband or wife.

"4. That the consent of either party was obtained by fraud, unless such party afterward, with full knowledge of the facts constituting the fraud freely cohabited with the other as husband or wife.

"5. That the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife.

"6. That either party was, at the time of marriage, physically incapable of entering into the marriage state, and such incapacity continues, and appears to be incurable.

"Sec. 83. Actions Therefor, When to be Commenced. An action to obtain a decree of nullity of marriage for causes mentioned in the preceding section, must be commenced within the periods and by the parties as follows:

"1. For causes mentioned in subdivision 1: by the party to the marriage who was under the age of legal consent, within four years after arriving at the age of consent; or by a parent, guardian or other person having charge of such nonaged male or female, at any time before such married minor has arrived at the age of legal consent.

"2. For causes mentioned in subdivision 2: by either party during the life of the other, or by such former husband or wife.

"3. For causes mentioned in subdivision 3: by the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party.

"4. For causes mentioned in subdivision 4: by the party injured, within four years after the discovery of the facts constituting the fraud.

"5. For causes mentioned in subdivision 5: by the injured party, within four years after the marriage.

"6. For causes mentioned in subdivision: by the injured party, within four years after the marriage."

It is evident that the above sections were intended to cover the grounds for which a marriage may be annulled, the parties who may bring such actions, and the time within which each must be brought. We must look at the whole of the provisions of the sections in order to arrive at a correct solution of the question involved in this case. It will be noted that for any of the causes mentioned in subdivisions 1, 4, 5, and 6—that is, when the party was under the age of legal consent, or when the consent was obtained by fraud or force, or when either party was at the time of the marriage incapable of entering into the marriage state, and such incapacity continues or is incurable—the period is four years, with the provision in regard to subdivision 4 that the four years shall begin to run from the discovery of the facts constituting the fraud. The period of four years is applied to all cases in which the marriage is not void but voidable. We can see much reason for the provisions of the Code that in cases where the marriage is only voidable the parties should be required to bring suit, and show that it was so, within a fixed and definite time, or forever be precluded from doing so. But subdivisions 2 and 3 deal with marriages which are illegal and void from the beginning. If either party was of unsound mind, the marriage as to such party is void, for the reason that, having no mind capable of consenting, he cannot enter into the contract of marriage. It is therefore provided that an action to annul the marriage may be brought by the party injured, or by a relative or guardian of the party of unsound mind "at any time before the death of either party." The party of unsound mind was not competent to enter into such marriage relation. So in regard to subdivision 2. A party who is already married, and who has a husband or wife living, cannot legally contract another marriage. The marriage attempted in such case is void, and made so by the Code. Civ. Code, § 61. Although void, it may cause trouble or annoyance, either as to property rights, the legitimacy of children, or the peace of mind of the injured party. It is, therefore, plain that either husband or wife, parties to the subsequent illegal marriage, may maintain an action during their joint lives to have the marriage annulled.

Section 83 lays down the rule as to when such action must be commenced, and states that such actions must be commenced within the periods named. The only period named for commencing an action to annul an illegal marriage because one of the parties was already married is during the joint lives of the parties to such illegal marriage. If either should die, such marriage is no longer in existence, and there is nothing to annul. The section further make provision that such void marriages may be annulled at the instance of the former husband or wife. It can only be annulled while both parties to the void marriage are living. The right is given to either party to such void marriage to bring an action to annul it at any time during their joint lives, and the right is equally given to the former husband or wife to bring such action while such illegal status exists and for precisely the same time. If the section read that such action might be brought "by either party during their joint lives," it would mean the same as "by either party during the life of the other." If it read "by either party, or by such former husband or wife, during the joint lives of the parties to the void marriage," there could be no question about it. Its meaning would be plain. We think, notwithstanding the wording and arrangement of the subdivision, that such is its meaning. It was intended that either party to the void marriage, or the former husband or wife, might maintain the action, and that it might be commenced during the entire time the void marriage was in existence. Such is the fair, common-sense meaning of the section. It must be liberally construed, with a view to effect its objects and to promote justice.

The judgment is reversed.

We concur: HALL, J.; KERRIGAN, J.

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6 Cal. App. 431

ANAHEIM ODD FELLOWS' HALL ASS'N v. MITCHELL et al. (Civ. 360.)

(Court of Appeal, Second District, California. Sept. 16, 1907.)

1. VENUE—PERSONAL ACTION—RECOVERY FOR USE OF PARTY WALL.

An action to recover a personal judgment for one-half of the cost of a party wall erected by plaintiff and used by defendant falls within Code Civ. Proc. § 395, providing that actions, excepting for the recovery of land, etc., shall be tried in the county in which defendants or some of them reside, and not within section 392, providing for the trial of actions for the recovery of land, or an interest therein, etc., in the county where the land lies.

2. SAME—MOTION FOR CHANGE—NONJOINDER OF UNNECESSARY PARTY—EFFECT.

Where, in an action against a husband and his wife to recover a personal judgment against her, he had no interest in the subject-matter, and no cause of action was stated against him, he being joined only because of being her husband, that he did not join her in moving for a change of venue to the county of their residence cannot affect her right to a change.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 101.]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by the Anaheim Odd Fellows' Hall Association against Mrs. N. H. Mitchell and another. From an order denying a motion for a change of venue, defendants appeal. Reversed, with directions to grant motion.

Willis S. Mitchell, for appellants. F. C. Spencer, for respondent.

SHAW, J. This is an action instituted in the superior court of Orange county to recover a personal judgment for $600 against the appellant Mrs. N. H. Mitchell for one-half the cost of a party wall erected by respondent under an agreement whereby said appellant covenanted to pay respondent one-half the cost of such part of the wall as she might thereafter use. It is charged that she made use of the wall in constructing a building upon her lot adjoining that of the respondent, and that one-half the cost of the wall so used by her was $600. She refused to pay same on demand; hence this action to recover the sum alleged to be due.

At the commencement of the action said appellant resided in Los Angeles county. She interposed a demurrer to the complaint, and, pursuant to notice thereof, moved the court to change the place of trial to the county of her residence, accompanying the same with a proper demand therefor in writing and affidavit of merits, which, among other facts, averred that she was at the time of the commencement of the action a resident of Los Angeles county. No counter affidavits were filed. Upon this record the court denied the motion. We think the learned judge erred in his ruling. Respondent files no points and authorities in support of the order made, and, from an examination of the record, we are unable to perceive any ground which would justify the denial of the motion. The action does not fall within the provisions of section 392, Code Civ. Proc. It does not affect the real property upon which the wall is located, or any estate or interest therein. While the complaint prays for general relief, and alleges facts which would have been sufficient to obtain an order preventing the use of the wall until payment was made as provided in the contract (which action would have been purely local in character), it also shows that plaintiff permitted the defendant to use the structure as a wall of her building without requiring the preliminary payment, thereby waiving any cause of action other than for a money judgment, as well as the right to trial in the local court. "It is only when real estate alone is the subject-matter of the action that the provisions of section 392 can be invoked against a defendant who resides in a county different from that in which the land is situated." Smith v. Smith, 88 Cal. 572, 26 Pac. 356. Being clearly a personal action, wherein a money judgment is sought, appellant was entitled to a trial thereof in the county wherein she resided at the time of the commencement of the action. Section 395, Code Civ. Proc.

No judgment was asked for against N. H. Mitchell, who was made a codefendant for the sole alleged reason that he was the husband of the defendant making the motion. He had no interest in the subject-matter of the litigation, and could not be affected thereby, for the reason that no cause of action was stated against him. Under these circumstances, the fact that he did not join in the demand and motion could not deprive the real defendant of her right to have the place of trial changed as demanded. Read v. San Diego Union Co., 133 Cal. xx, 65 Pac. 567; Sayward v. Houghton, 82 Cal. 628, 23 Pac. 120.

The order appealed from is reversed, with directions to the court below to grant appellant's said motion.

We concur: ALLEN, P. J.; TAGGART, J.

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6 Cal. App. 395

MILLER et al. v. FIREMAN'S FUND INS. CO. OF SAN FRANCISCO. (Civ. 347.)

(Court of Appeal, Third District, California. Sept. 7, 1907. Rehearing Denied by Supreme Court Nov. 4, 1907.)

1. APPEAL — REVIEW — CONFLICTING TESTIMONY.

A verdict on conflicting evidence is binding on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935-3937.]

2. INSURANCE—PROOF OF LOSS—FALSE STATEMENTS.

The statement, in a proof of loss, that certain property was destroyed, and that there was no mortgage on the insured property at the time of the fire, avoids the policy only in case it is willfully false, and not if it was merely negligently made, under the provision of the policy that it shall be void if insured has concealed or misrepresented any material fact concerning the insurance or the subject thereof, or if the interest of insured be not fully stated therein, or in case of any fraud or false swearing by insured touching any matter relating to the insurance or the subject thereof, whether before or after a loss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1364.]

3. SAME — WILLFUL FALSITY — QUESTION FOR JURY.

Whether a false statement in a proof of loss under a fire policy was knowingly and intentionally made, and so avoids the policy, is a question for the jury, the presumption of mistake to be indulged in if such a state of facts is presented as leaves a reasonable presumption thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1747.]

4. TRIAL—INSTRUCTIONS—EXCEPTIONS.

A general exception, though sufficient as to instructions given at the request of the other party, is not so as to those given by the court of its own motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 689.]

5. SAME—EFFECT OF INSTRUCTIONS.

The clause of an instruction that under certain circumstances the verdict should be for plaintiff does not require the jury to find for the full amount claimed.

6. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Any error in an instruction as to defendant in an action on a fire policy having waived its right to have the loss determined by arbitration, if it denied its liability solely on the ground of misrepresentation, is harmless; defendant having refused to arbitrate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4219.]

7. INSURANCE—ACTION ON POLICY — TRIAL — MISLEADING INSTRUCTIONS.

An instruction, in an action on a fire policy, that a discrepancy between the statements of plaintiff in his proof of loss and the actual loss proven, if the jury find that there is any discrepancy which can reasonably be accounted for on the score of opinion, or judgment honestly given, will not make the policy void, is not open to the construction of excusing any other discrepancy not the result of an honest mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1781.]

8. TRIAL — INSTRUCTIONS — SPECIAL ISSUES — CHANGE OF FORM.

Code Civ. Proc. § 625, providing that the court must, on request in writing, direct the jury to find a special verdict on all or any of the issues, does not require it to submit issues in the language proposed, so as to make it error to change a requested issue, in an action on a fire policy, whether plaintiff furnished "satisfactory proofs of loss" to one whether he furnished "such proofs of loss as were required by said policy."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 668-670.]

Appeal from Superior Court, Glenn County; William M. Finch, Judge.

Action by H. T. Miller and another against the Fireman's Fund Insurance Company of San Francisco. Judgment for plaintiffs. Defendant appeals. Affirmed.

Frank Freeman and Charles L. Donohue, for appellant. Ben F. Geis, for respondents.

BURNETT, J. This is an action on a fire insurance policy. The cause was tried before a jury. A large number of special issues was found in favor of plaintiffs' contention, and the general verdict was for said plaintiffs in the sum of $2,586.35, the amount covered by the policy being $3,265. Judgment was entered accordingly, from which and from the order denying a motion for a new trial the appeal has been taken.

The main reliance of appellant is upon the defense set out in the answer, to the effect that the insured, H. T. Miller, at the time he made his application for the policy, "willfully and fraudulently, and with a false and fraudulent purpose and with the intention of thereby securing more insurance on said property than he should have had and for the purpose of deceiving defendant," represented the property to be of much greater value than it was, and also that the proof of loss was willfully false, in that it contained a statement of property that was not destroyed, particularly 9,200 feet of 2-inch flooring and 20,000 shingles, and it also contained the statement that at the time of said fire there was no mortgage on the said above described property, while, in fact, at the time of said fire there was a mortgage on said property held by plaintiff J. Johansen.

In regard to the first contention, it is sufficient to say that there was evidence that the property was as valuable as appellant claims it was represented by the insured sufficient to support the finding of the jury, and, again, it appears in the testimony that the agent of the insurance company was familiar with the property and made out the application for respondent Miller, fixing the insurable value of said property, and the company afterwards requested said respondent to have the amount of the insurance increased. Hence it might be plausibly contended that appellant is in no position to question the said value. Granting that there was evidence to the contrary, it does not present a question of law. The verdict of the jury upon a conflict of evidence is binding upon us.

As to the proof of loss, it is admitted by respondents that the statement was erroneous as to the mortgage and also as to the two-inch flooring. If willfully false, it would avoid the policy. It is so provided in the following clause of the policy: "This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof or if the interest of the insured in the property be not fully stated therein or in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof whether before or after a loss." Citation of authorities is hardly needed upon such a proposition. Reference may be had, however, if desired, to the following cases cited by appellant for further discussion of the question: Claflin v. Com. Ins. Co., 110 U. S. 81, 3 Sup. Ct. 507, 28 L. Ed. 76; Rovinsky v. Northern Assur. Co. (Me.) 60 Atl. 1025; Lewis et al. v. Council Bluffs Ins. Co., 63 Iowa, 193, 18 N. W. 888. But it is well established that the untrue statement in order to avoid the policy must have been knowingly and intentionally made by the insured, with knowledge of its falsity and with the intention of defrauding the company. Clark v. Phœnix Ins. Co., 36 Cal. 168; Helbing v. Svea Ins. Co., 54 Cal. 156, 35 Am. Rep. 72; Greiss v. State, etc., Co., 98 Cal. 241, 33 Pac. 195; West Coast Lumber Co. v. State Ins. Co., 98 Cal. 502, 33 Pac. 258. Again, whether a false statement was so made is a question of fact for the jury. Home Ins. Co. of New York v. Mendenhall, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374. If such a state of facts is presented as leaves a reasonable presumption of mistake or misapprehension on the part of the person swearing to the proofs of loss, such presumption should be indulged in preference to that of willful false swearing. West Coast Lumber Co. v. State Ins. Co., supra. A mere discrepancy does not create a presumption as a matter of law that the insured contemplated fraud when his statements were made. Helbing v. Svea Ins. Co., supra. Here the jury found that the statement concerning the flooring and also concerning the mortgage was not willfully or intentionally made by Miller, and that he did not represent to adjuster Farnsworth, who prepared the statement of loss, that the building contained the flooring, or that there was no mortgage on the premises. Turning to the testimony of Miller, we find his explanation of the transaction, which must have been accepted as credible by the jury, and we cannot find otherwise. We do not deem it advisable to detail the testimony, but, giving full credit to Miller, the mistakes in the statement of loss are chargeable to Farnsworth, and not to said respondent. The latter says he verified the statement without reading it over or having it read to him; Farnsworth being in a great hurry to get away. There is no apparent reason why the insured should make a false statement about the mortgage. The policy was made payable to the mortgagee and the mortgage was a matter of record, and was known to the agent of the company who secured the insurance. It would seem that a man of average intelligence under such circumstances would not willfully swear that there was no mortgage on the premises. And, as to the other misstatements, it is more reasonable to hold that they were honest mistakes than to impute perjury to the insured. But, at any rate, the jury's finding is sufficiently supported by the evidence.

Again, complaint is made of the following instruction given by the court of its own motion: "If you find from the evidence that the proofs of loss signed and sworn to on the 3d day of October, 1904, and introduced in evidence, were made out and prepared by E. P. Farnsworth in the capacity of adjuster, duly appointed and authorized by defendant insurance company to ascertain and adjust the loss occasioned by the fire alleged in the complaint, and you further find that, at the time plaintiff Miller signed and swore to said proofs of loss and delivered them to said insurance company, he had not read or heard read the contents of said proofs of loss, and did not know the contents thereof, then I instruct you that any misstatements therein contained, of which Miller was ignorant, do not work a forfeiture of said policy of insurance or deprive the plaintiffs of the right of recovery thereunder." The only objection and exception made to this instruction appear as follows: "Counsel for defendant: If your honor please, before giving the instructions, I desire to object to any instructions given on part of the plaintiff in the action and also to any given by the court itself. The Court: It may be understood that the exception on each side may cover, of course, the same thing as the objection." The exception is hardly specific enough under the authority of Cavallaro v. Texas, etc., Ry. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94, and Williams v. Casebeer, 126 Cal. 86, 58 Pac. 380. In the former case it is said: "The theory of the ruling is that exceptions to the charge of a court to the jury ought to point out specifically the portions excepted to, and be made at the time of the trial, in order that the judge may have an opportunity, before the jury retires, to correct any error he may have inadvertently fallen into in drawing up the charge in the hurry and perplexities of the trial." In that case the exception was as follows: "We desire, if your honor please, to save an exception to each, every, and all of the instructions given by the court of its own motion." A general exception is sufficient as to the instructions given at the request of the parties, but, as seen, a different rule prevails as to those given by the court of its own motion. But it is manifest that the instruction is not erroneous. It was based upon evidence introduced by plaintiffs, and it was in harmony with the cases already cited requiring the misstatements to be willful in order to work a forfeiture. The question of negligence is not involved. The law favors the insured to the extent of excusing a careless statement if it does not proceed from a fraudulent and willful intent. Besides, the insurance company could not claim exemption from liability on account of the negligence of plaintiff Miller in making his proof of loss, because no damage was done thereby to defendant, as the mistakes were rectified at the trial.

The criticism of instruction 10 given at the request of plaintiffs is inapt. The clause, "Your verdict should be for the plaintiffs," does not require the jury to find for the full amount claimed. Besides, it is made clear by the succeeding portion of the instruction.

Instruction 11, requested by plaintiffs, may be a little obscure, but we agree with respondent that the reasonable construction is that, if defendant denied its liability solely by reason "of misrepresentation, fraud or false swearing on the part of the insured," it waived its right to have the loss determined by arbitration. Again, as pointed out by respondent, the company refused to arbitrate. Hence, if the instruction was erroneous the error was harmless.

The particular clause in instruction No. 21 made the subject of criticism by appellant seems clear and sound. It directs the jury that "a discrepancy between his statements in his proof of loss and the actual loss proven at the trial, if you find there is any discrepancy which can reasonably be accounted for on the score of opinion, or judgment honestly given, will not make the policy void." It applies, of course, to every such discrepancy, and could not be understood as excusing any other discrepancy not the result of an honest mistake.

Complaint is made, also, that the court did not submit certain special issues to the jury in the language proposed by defendant. The contention is that the court has no discretion in the matter under section 625 of the Code of Civil Procedure. This position involves an absurdity. If the issue proposed should be irrelevant, ambiguous or unintelligible, or a repetition of another issue, it could hardly be maintained that the court could not exclude it. Plyler v. Pacific Portland Cement Co. (Cal.) 87 Pac. 395. We think the modifications made by the court were proper. Thirty-four questions of fact were submitted to the jury, and they seem to have covered all the issues that were raised by the pleadings. The most important change made by the court was as follows: The defendant requested this: "Did the said plaintiff Miller make and deliver to the defendant company satisfactory proofs of loss?" The court submitted it with the words "such proofs of loss as were required by said policy of insurance" substituted for "satisfactory proofs of loss." What was required by the policy is all that the company had a right to demand, and the law compels the defendant to be satisfied with this.

Some 82 exceptions were taken to the rulings of the court on the admissibility of evidence during the progress of the trial. To notice them specifically would prolong this opinion to an unreasonable extent and would be of no particular value to the profession. We have examined these rulings. As to be expected of any trial judge under the same circumstances, some errors were committed, but we are of the opinion that defendant suffered no prejudice thereby.

We deem it not improper to say that counsel have displayed in their briefs great industry and ability, and have thereby afforded great satisfaction, as well as assistance, to the court.

The judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

152 Cal. 224
WHEELER v. HERBERT et al. (S. F. 4,820.)

(Supreme Court of California. Oct. 25, 1907. Rehearing Denied Nov. 21, 1907.)

1. INJUNCTION—SCOPE OF REMEDY—STATUTES—APPLICATION.

Civ. Code, § 3423, provides that an injunction shall not be granted (subdivision 4) to prevent the execution of a public statute by public officers for public benefit, and (subdivision 6) to prevent the exercise of a public or private office in a lawful manner by the person in possession. *Held*, that such provisions refer solely to injunctions against the execution of valid statutes and the exercise of offices having a legal existence, and do not prevent an injunction to restrain the carrying into effect of St. 1907, p. 260, c. 214, providing for a change of the boundary line between certain counties after an election to be held by commissioners, because of the alleged unconstitutionality of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 155, 156.]

2. STATUTES—SPECIAL AND LOCAL LAWS—COUNTIES—BOUNDARY LINES.

Const. art. 11, § 3, as amended in 1894, providing that the Legislature by general and uniform laws may provide for the formation of new coluunties, does not prevent the passage of local or special acts changing county boundary lines; such change not being regarded as the creation of a new county.

3. SAME—MUNICIPAL CORPORATIONS.

Where a city is only subject to general laws, it cannot by special laws be enlarged or diminished in size.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 98.]

4. SAME—CONSTITUTIONAL PROVISIONS.

Const. art. 11, § 6, providing that municipal corporations shall not be created by special laws, but that the Legislature by general laws shall provide for the incorporation, organization, and classification of cities in proportion to population, forbids the creation of any part of a city, as well as an entire city, by special laws.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 98–100.]

5. SAME—CONSTITUTIONAL PROVISIONS—CONSTRUCTION.

Const. art. 11, § 3, provides that the Legislature by general and uniform laws may provide for the formation of new counties, and a separate clause declares that, when a county is enlarged or created from territory of another county, it shall be liable for a just proportion of the debts of such county. *Held*, that the latter clause did not widen the scope of the first clause so as to create an implied prohibition against a change of county boundary lines by special act, which power had been previously vested in the Legislature.

6. SAME—ELECTIONS.

Const. art. 4, § 25, subds. 11, 28, prohibit special laws for conducting elections except on the organization of new counties or for creating offices and fixing their powers and duties in counties, townships, and election or school districts. *Held*, that the elections referred to were those held to choose civil officers of the state or its local political subdivisions, and that the offices were civil offices provided by law for local government, and did not include an election provided for by St. 1907, p. 260, c. 214, for the determination of the question whether a change of a boundary line between certain counties should or should not be made, and providing for the appointment of commissioners to hold such election.

7. SAME.

As the Legislature has power by special law to change the boundaries of counties directly, or to make the change contingent on the happening of a particular event, it has power to provide the method by which the event is to be determined.

8. COUNTIES—CHANGE OF BOUNDARIES—SPECIAL ELECTIONS—QUALIFICATION OF VOTERS.

Const. art. 2, § 1, prescribing the qualifications of electors, referred only to electors entitled to vote at ordinary elections, local and general, held in the course of the usual functions of civil government, and did not prevent the Legislature from prescribing different qualifications for electors entitled to vote on a change of boundary lines between two counties, authorized by St. 1907, p. 260, c. 214.

9. COUNTIES — BOUNDARIES — CHANGE — SUBMISSION.

The Legislature has power to provide that the taking effect of a change of boundary line between two counties should be submitted to the vote of the taxpayers, or the heads of families in the territory, or to any other arbitrarily selected body of persons.

10. CONSTITUTIONAL LAW—DISTRIBUTION OF GOVERNMENTAL POWERS—GENERAL LAW—APPLICABILITY—DETERMINATION BY LEGISLATURE—REVIEW.

Under Const. art. 4, § 25, subd. 33, forbidding a special law where a general law may be made applicable, it is the duty of the Legislature in the first instance to determine whether a general law may be made applicable to the particular case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 130.]

11. SAME.

St. 1907, p. 260, c. 214, a special law for the change of the boundary line between two counties, was not in violation of Const. art. 4, § 33, forbidding a special law in all cases where a general law can be made applicable, under the rule that courts will not interfere with the judgment of the Legislature on the question whether a general law may be made applicable, unless it clearly appears beyond reasonable doubt that the legislative determination was contrary to fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 130, 131.]

12. SAME—SPECIAL PRIVILEGES—UNIFORMITY.

St. 1907, p. 260, c. 214, provided for a change in the boundary line between two counties after the affirmative vote of 60 per cent. of all the electors of the state who should have resided in the territory for 90 days. *Held*, that such act, in so far as it prescribed the qualifications of electors at such election, operated uniformly as to all citizens of the class to which it applied, and that the act was therefore not in violation of Const. art. 1, § 21, prohibiting special privileges granted to any citizen or class of citizens not granted on the same terms to all citizens.

13. SAME—CLASSIFICATION.

St. 1907, p. 260, c. 214, providing for an election for a change of a county boundary line at which all electors of the state who had resided in the territory for 90 days should be entitled to vote, contained a proper classification of voters.

14. SAME—DELEGATION OF LEGISLATIVE POWERS—POPULAR VOTE—COUNTIES—CHANGE OF BOUNDARIES.

St. 1907, p. 260, c. 214, providing for a change of the boundary line between certain counties, was not objectionable because it made the change dependent on the affirmative vote of 60 per cent. of the electors of the state who had resided in the territory affected by the change for 90 days prior to the election; the Legislature being authorized to pass laws which should be executed only in the event a majority of a certain class should declare in its favor.

15. SAME—DELEGATION OF POWER—ELECTION OFFICERS.

Const. art. 11, § 13, forbidding a delegation of power to any special commission to control, supervise, and interfere with county money or property, or to perform any municipal functions, did not prevent the Legislature from providing for the appointment of a commission under St. 1907, p. 260, c. 214, to conduct an election to determine whether the boundary line between certain counties should be changed; the functions of such commission being nonmunicipal.

16. STATUTES—SUBJECT.

St. 1907, p. 260, c. 214, providing for a change of boundary line between certain counties, embraced but one general subject, viz., the change of such boundary line; all other provisions being mere matter of detail and method of procedure to accomplish such object.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 125.]

17. SAME—TITLE.

St. 1907, p. 260, c. 214, the subject of which was a change of boundary line between certain counties, was sufficiently expressed in its title, to wit, "An act to change, establish and permanently locate the boundary lines of the county of Kings and a portion of the south boundary line of the county of Fresno, and to provide for the submission of such change, establishment and location of such boundary lines to the qualified electors of the territory to be affected by the change."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 125, 126, 171.]

18. CONSTITUTIONAL LAW—CONSTRUCTION IN FAVOR OF VALIDITY—COUNTY BOUNDARIES—CHANGE.

Const. art. 4, § 6, provides for the division of the state into legislative districts according to population, as determined by the United States census, and declares that in the formation of such districts no county or city and county shall be divided unless it contains sufficient population within itself to form two or more districts, nor shall a part of any county be united with any other county in forming any district. *Held*, that St. 1907, p. 260, c. 214, providing for a change of the boundary line between Kings and Fresno counties, which were in different legislative districts, was not in violation of such section, as it should be construed as not changing the boundary lines of such districts with reference to the altered territory, but to leave the changed territory in its original districts until the succeeding decennial apportionment, under the rule that a statute will not be declared unconstitutional if there is a reasonable mode of reconciliation with the Constitution possible.

19. CONSTITUTIONAL LAW—CONSTRUCTION.

In construing the Constitution, the various provisions must be harmonized so that some effect may be given to every part, if it is reasonably possible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 9, 11.]

20. STATES — APPORTIONMENT — CONSTITUTIONAL PROVISIONS.

The power to adjust legislative districts, and to form new counties and change county lines, is vested in the Legislature by Const. art. 4, § 1, which is a general grant of legislative power; the special provisions relating to such powers in other parts of the Constitution being considered as limitations on the general grant.

21. SAME—TIME.

Under Const. art. 4, § 6, providing for the division of the state into legislative districts according to the federal census in the year 1880, and every 10 years thereafter, the power to form legislative districts having been exercised in 1901, the districts could not be again adjusted until 1911, either directly or by change of county boundary lines.

22. COUNTIES — CHANGE OF BOUNDARIES — ELECTION—TIME.

St. 1907, p. 260, c. 214, provided for a change of county lines on the affirmative vote of 60 per cent. of the electors in the affected territory at an election held by commissioners provided for within 60 days after their first meeting. *Held*, that the time for such election was directory only, and, the commissioners having been restrained from holding such election until after such time expired, they were entitled to proceed to hold it within 60 days after the transmission of a remittitur from the Supreme Court in the suit in which their right was sustained.

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Suit by L. B. Wheeler against J. W. Herbert and others. From a decree in favor of complainant, defendants appeal. Reversed, with directions to dismiss.

Hannah & Miller and Chas. G. Lamberson, for appellants. A. M. Drew, J. R. Webb, Frank Short, and Ernest Klette, for respondent.

SHAW, J. The Legislature, by the act of March 14, 1907 (St. 1907, p. 260, c. 214), provided that upon the happening of a certain contingency, specified in the act, the boundary line between the county of Fresno and the county of Kings should be changed. It was declared that thereupon the line of the fourth standard parallel, south, as fixed by the United States survey, should be the line between the two counties, and that the territory lying south of that line, and formerly included in Fresno county, should thereupon and thereafter be attached to and be a part of Kings county. The event, upon the happening of which this change was to take place, was that at an election to be held for that purpose in the territory to be transferred to Kings county, at which all electors of the state who should have then resided in that territory for 90 days should have the privilege of voting, 60 per cent. of the votes cast should be in favor of the proposed change. The election was to be held under direction of five special commissioners to be appointed by the Governor. The Governor appointed the defendants as commissioners to call and hold the election and certify the result. They were proceeding, under the act, to divide the territory into election precincts and to call the election, when the present action was begun to restrain them from so doing. The plaintiff is a resident, citizen, and taxpayer in the territory in question. He alleges that he will be injured in his property rights if the act is carried out, by being subjected to increased taxes and by being harassed and annoyed by conflicting claims of the public officers of the respective counties, each claiming authority to assess his property and to subject him to jury duty and other civic duties, and that the law is unconstitutional and void. The defendants demurred to the complaint on the ground that the facts stated did not constitute a cause of action. The demurrer was overruled, the defendants refused to answer, and thereupon judgment was entered enjoining defendants from further proceeding under the act. The defendants appeal from the judgment. In support of the appeal the appellants contend, in the first place, that a suit for injunction will not lie to prevent the execution of the statute, and, secondly, that the act is valid. The respondent claims that it is contrary to a number of the provisions of the state Constitution.

1. The contention that injunction is not the proper remedy is founded on the provisions of subdivisions 4 and 6 of section 3423 of the Civil Code, which declare that an injunction cannot be granted: "(4) To prevent the execution of a public statute, by the officers of the law for the public benefit. * * * (6) To prevent the exercise of a public or private office in a lawful manner by the person in possession." The proposition begs the question. It necessarily assumes that the statute has validity and creates public offices, the incumbents of which are authorized to perform the acts complained of. The suit, on the contrary, rests entirely upon the theory that the statute is utterly void, has no force or legal existence, and, consequently, that it creates no offices and that there is no lawful action by them. If the plaintiff's theory is correct, there is no public statute to be executed, and no public or private office to be exercised, and only a colorable but baseless claim to that effect. If he is entitled to prevail at all, therefore, the above provisions have no application to his case. They refer solely to injunctions against the execution of valid statutes and the exercise of offices having a legal existence. A suit for injunction in behalf of one specially interested, to prevent the attempted execution of a void statute and the exercise of an office claimed to have been created thereby, but in fact and in law nonexistent, is a proper remedy to obtain the relief required. Livermore v. Waite, 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312; Conner v. Gray (Miss.) 41 South. 188.

2. As to the constitutionality of the statute, the first proposition is that it is a special and local law, and that, under the provisions of section 3, art. 11, of the Constitution, as amended in 1894, no county can be enlarged except in pursuance of a general law. The opening clause of the section declares that "the Legislature, by general and uniform laws, may provide for the formation of new counties." This clause constitutes the entire amendment of 1894, which consisted of merely adding this clause at the beginning of the section without changing the remainder. Prior to that time the Legislature, under the section as it then existed, had full power to create a new county at any time by either a special or a general law, provided it contained a population of 5,000 inhabitants and the boundary thereof was not within five miles of the county seat of any other county. It was a power which had been frequently exercised, and under it the new counties of Orange, Glenn, Riverside, Madera, and Kings were formed. St. 1889, p. 123, c. 110; St. 1891, p. 98, c. 94; St. 1893, pp. 158, 168, 176, cc. 142, 143, 150; People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66; Los Angeles Co. v. Orange Co., 97 Cal. 329, 32 Pac. 316; People v. Glenn Co., 100 Cal. 424, 35 Pac. 302, 38 Am. St. Rep. 305; Tulare Co. v. Kings Co., 117 Cal. 197, 49 Pac. 8; 11 Cyc. 349. The amendment in question was proposed by the Legislature of 1893. It was at that session that the special laws were enacted creating the counties of Riverside, Madera, and Kings. It is commonly understood that the annoyance to the members, the time occupied in the passage of these acts, and the scandalous reports arising therefrom, were the moving causes which induced the Legislature to propose the amendment. So far as we are advised, the practice of changing county lines by special laws was not considered as among the evils to be cured thereby. There was therefore no necessity, in framing the amendment, to choose language broad enough to include the changing of boundaries as well as the formation of new counties in the implied prohibition, and there is nothing in the conditions sought to be remedied which justify us in holding that by the use of the phrase "formation of new counties" in the amendment there was an intention to include the changing of county lines. A change of the boundaries between two or more counties, leaving all of them existing as corporate entities representing political subdivisions of the state, as before, with their corporate organization unchanged and undisturbed, is in no reasonable sense, so far, at least, as this constitutional provision is concerned, equivalent to the formation of a new county or new counties. It does not change, renew, or affect the political or corporate organizations of the counties concerned, but merely enlarges or decreases the territorial area of counties already existing. It brings no new county into existence, but recognizes the continuous existence of the old ones. The meaning of the words above quoted should not be enlarged beyond their natural signification. We have no decision of this state on this question, but the authorities of other states confirm this conclusion. In Crawford Co. v. Marion Co., 16 Ohio, 468, the court says: "The identity of a county does not depend upon its territorial boundaries, but its political organization. * * * A change of boundaries is not the erection of a new county. If its political organizations continues, its identity is preserved, its existence dates from the act erecting it, and not the act which may change its boundary." In Frost v. Pfeiffer, 26 Colo. 338, 58 Pac. 147, it is declared that "creating a new county, and taking territory from one and adding it to another already in existence, are entirely

distinct and separate acts—accomplish different objects, the results of which are entirely dissimilar."

We do not regard the case of People v. Ontario, 148 Cal. 629, 84 Pac. 205, as contrary to this conclusion. It related to the addition of outlying territory to a city. The opinion refers to the portion of section 6, art. 11, of the Constitution, providing that "corporations for municipal purposes shall not be created by special laws, but the Legislature, by general laws, shall provide for the incorporation, organization, and classification in proportion to population of cities and towns." This provision, it is said, "includes not only the creation of new municipal corporations, but also the matter of adding new territory to an existing corporation and the exclusion of territory embraced in such a corporation from further connection therewith." There was no discussion of the reasons why this is so, but we think sufficient reason is apparent for distinguishing that case from this. An examination of the whole section shows that it necessarily has the meaning ascribed to it in the opinion quoted, for it further provides that all cities "heretofore or hereafter organized * * * shall be subject to and controlled by general laws." A city subject only to general laws cannot, by special laws, be enlarged or diminished in size, because, if it could be so affected, it might by that means be entirely destroyed or dissolved. Furthermore, the provision that corporations for municipal purposes shall not be created by special laws forbids the creation of any part of a city, as well as an entire city, by special laws, and as the addition of territory to a city is the creation of a city, in part, it falls within the inhibition and cannot be accomplished by special acts. The addition of territory to a city erects that territory into a part of a municipality, and to that extent it is the incorporation and organization into a city of that which before did not have that character. It is not a mere transfer of territory from one political subdivision to another of the same character, but is a complete change in the political status of the new territory. It was because of these considerations that the general statement above quoted was made. It is not so with the change of county lines. The areas affected by that process are parts of counties before the change. They are not erected into counties at that time, but merely transferred from one county to another. The several counties of the state embrace the entire area thereof, and an adjustment of the boundaries whereby territory formerly in one county becomes part of another is not the formation or creation of a new county in any sense.

It is claimed that the last clause of section 3, providing that if a county is "enlarged or created" from territory of another county it shall be liable for a just proportion of the debts of such county, evinces an intention to include enlargements and changes of boundaries within the provisions of the section. This clause is entirely independent of the preceding part of the section, so far as the question now under discussion is concerned. It does not widen the scope of the implied limitation contained in the first clause, constituting the amendment of 1894, so as to create an implied prohibition against a change of county lines by special act. Such power was vested in the Legislature before the amendment of 1894 and had been frequently exercised by it. The amendment did not change the effect of the section in this respect.

3. The claim that the law conflicts with subdivisions 11, 28, and 33 of section 25 of article 4 and section 1 of article 2 of the Constitution is also untenable. These provisions were included in the Constitution of 1879 and have been in force ever since. During that time several changes have been made in the boundaries of the counties of the state, but these provisions of the Constitution have never been regarded as invalidating the acts making the change. Subdivisions 11 and 28 prohibit special laws for conducting elections, "except on the organization of new counties," or for creating offices and fixing their powers and duties in counties, townships, and election or school districts. The elections referred to in these subdivisions are the ordinary elections held to choose civil officers of the state or of its local political subdivisions. The election authorized by this act is not of that character. It is merely a means provided for the determination of the event upon which the change of boundaries provided in the act is, or is not, to be made. Certain persons, described in the act, all of whom are electors in the affected territory, but who do not include all of the electors thereof, are to declare their minds respecting the change, and, if a majority favor it, the change is made; otherwise not. As the Legislature has power by special laws to change the boundaries directly, and has also the power to make the change contingent upon the happening of such an event, it must follow that it has power to provide the method by which the event is to be determined. The fact that the elections are to be conducted in the same manner as ordinary elections has no bearing on the question. The Legislature had full power to adopt that or any other mode of deciding as to the event upon which the law was to become effective or ineffective. The same reasons apply to the matter of the creation of offices and fixing their powers and duties. The prohibition refers to the civil offices to be provided by law for the local government, and it has no application to such temporary offices and officers as may be necessary to carry out the legislative scheme for a change of boundaries. Having power to make the change by special act in any reasonable

mode, it must have power to provide in the law for all the special agents necessary to carry out the scheme adopted and to invest them with the necessary power for that purpose. For like reasons it is clear that the law does not transgress section 1 of article 2 by prescribing different qualifications for the electors who are to be allowed to vote at the election provided for than those prescribed in that section. The provisions of that section refer to the qualification of electors entitling them to vote at the ordinary elections, local and general, held in the course of the usual functions of civil government. The Legislature, if it saw fit, might have provided that the question of the taking effect of the change should be submitted to the vote of the taxpayers or of the heads of the families in the territory, or to any other arbitrarily selected body of persons, and the act would have been valid.

Subdivision 33 forbids a special law in all cases where a general law can be made applicable. The Legislature must, in the first instance, determine whether or not a general law can be made applicable in the particular case. The courts will not interfere with its judgment on the subject, unless it clearly and beyond reasonable doubt appears that it adjudged contrary to the fact. People v. Mullender, 132 Cal. 221, 64 Pac. 299; People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66. It does not so appear. A change of county lines under a general law would require concurrent and consistent action by the legislative authority, or by the people, in at least two counties or in some portion thereof, or the creation of a commission or board, to which might be delegated power to entertain a proceeding for that purpose. The court cannot declare that either plan would be so feasible and so conducive to the best interests of the state that a general law would be proper. Since the adoption of the amendment of 1894 a general law has been enacted purporting to provide for the formation of new counties, and consequently it now appears that a general law can be made applicable to that subject. The Legislature had, however, prior to that amendment, frequently decided that a general law was not applicable and had created new counties by special law. These laws were held not to be contrary to this subdivision, and the legislative judgment that a special law was necessary was held conclusive upon the courts. It is equally conclusive in the matter of changing county lines. People v. McFadden, supra; Los Angeles Co. v. Orange Co., supra; People v. Glenn Co., supra; Tulare Co. v. Kings Co., supra.

4. We se no force in the proposition that the act grants special privileges to electors who have resided for 90 days preceding the election in the territory to be transferred to Kings county which are not granted to other electors of that territory or to other electors of Fresno county, and that, for that reason, it violates section 21 of article 1. Such right or privilege is not of the class of privileges referred to in that section. Ex parte Gerino, 143 Cal. 415, 77 Pac. 166, 66 L. R. A. 249. But if it were conceded that such privilege does fall within the scope of the section, the law does not violate its provisions. It forbids the grant of a privilege to any citizen or class of citizens, unless it is granted, upon the same terms, to all citizens. A law applying uniformly to all citizens of a particular class does not violate this section, if the class is one founded upon some natural, intrinsic, or constitutional distinction differentiating its members from the general body from which the class is selected. Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Bruch v. Colombet, 104 Cal. 351, 38 Pac. 45; Krause v. Durbrow, 127 Cal. 684, 60 Pac. 438. The citizens of the territory to be transferred are directly affected by the act, and therefore have a greater interest in the matter than other citizens of the same county. Those who have resided therein for 90 days have had longer experience and are, in general, a more permanent class than those who have been residents for a shorter period, and they are therefore better qualified to act wisely. This class is therefore sufficiently distinguished from other citizens of the state or county, and their selection as a class to whose judgment the change should be submitted is fully justified. That it is competent for the Legislature to pass a law which shall be executed only in the event that a majority of a certain class of persons shall declare in favor of it is a principle too well settled to require discussion. People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66; Blanding v. Burr, 13 Cal. 357; Hobart v. Board, 17 Cal. 31; People v. Nally, 49 Cal. 481; Robinson v. Bidwell, 22 Cal. 379.

5. It is scarcely necessary to discuss section 13, article 11, forbidding the delegation of power to any special commission to control, supervise, or interfere with county money or property, or to perform any municipal functions. In each of the special acts heretofore passed creating new counties some special commission of the character here provided has been constituted to carry out the purposes of the act, and such commissions have been upheld as legal and valid bodies. The commission provided in this act does not control, supervise, or interfere with county money or property, but merely provides for the holding and certification of an election upon the result of which the execution of the act shall depend. They are but the instruments whereby the event upon which the law depends is to be ascertained. Their functions are not municipal in character. People v. Ontario, 148 Cal. 631, 84 Pac. 205.

6. The act embraces but one general subject, namely, the change of the boundary line between Kings county and Fresno county. All else is but matter of detail and method of

procedure provided for the accomplishment of the object intended. The title sufficiently expresses the subject.

7. The last proposition which we deem it necessary to discuss, and the one which presents the greatest difficulty, is that the act violates certain parts of section 6 of article 4 of the Constitution, relating to senatorial and assembly districts. The material parts of this section are as follows: "For the purpose of choosing members of the Legislature, the state shall be divided into forty senatorial and eighty assembly districts, as nearly equal in population as may be, and composed of contiguous territory, to be called senatorial and assembly districts. * * * In the formation of such districts, no county, or city and county, shall be divided, unless it contain sufficient population within itself to form two or more districts; nor shall a part of any county, or of any city and county, be united with any other county, or city and county, in forming any district. The census taken under the direction of the Congress of the United States, in the year one thousand eight hundred and eighty, and every ten years thereafter, shall be the basis of fixing and adjusting the legislative districts; and the Legislature shall, at its first session after each census, adjust such districts and reapportion the representation so as to preserve them as nearly equal in population as may be." In pursuance of this section, the Legislature, in 1901, divided the state into legislative districts. The county of Fresno was thereby constituted the Twenty-Sixth senatorial district, Kings county was declared to be the Sixty-Second assembly district, and the territory now attempted to be transferred from Fresno county to Kings county, together with other parts of Fresno county adjacent thereto, were declared to constitute the Sixtieth assembly district. St. 1901, pp. 537, 545, c. 164. Thus it appears that, if the proposed change of boundaries takes place, either of several things may ensue, all of which, it is claimed, are, in effect, prohibited by this section of the Constitution: All that part of Fresno county proposed to be made a part of Kings county will become a part of the Sixty-Second assembly district and also a part of the Thirty-Second senatorial district to which Kings county belongs, or, in the other alternative, a part of Kings county will be united with Fresno county in forming the Twenty-Sixth senatorial district, and with a part of Fresno county in forming the Sixtieth assembly district. In the first alternative, there will be a reapportionment of legislative districts at a time when, as it is claimed, the Legislature is without power to act in that behalf. In the second alternative, a part of Fresno county will be united with a part of Kings county to form the Sixtieth assembly district and the Twenty-Sixth senatorial district, which is contrary to the express prohibition of the section quoted, if that prohibition is applicable to a change of county lines during the period between one apportionment and the succeeding one.

We think the true rule deducible from reason and authority is that the legislative districts are not changed by the change in county lines, but that they will remain, as fixed by the general apportionment act of 1901, until they are again fixed by the succeeding act in 1911, and that the prohibition against uniting parts of different counties in forming any district limits the power of the Legislature in framing the general law for the decennial apportionment, but does not affect its power, included in the general grant of legislative power contained in section 1 of article 4, to alter county boundaries from time to time as it may deem best. As a good statement of the principles to be observed in the consideration of a question of this character, we quote the following from State v. Stevens, 112 Wis. 170, 88 N. W. 49: "The rule of all courts is that a statute will be declared unconstitutional only when it is shown beyond reasonable doubt that it conflicts with the fundamental law. It is equally true that the courts will seek every reasonable mode of reconciliation of the statute with the Constitution, and it is only when reconciliation has been found impossible that it will be declared void." To the same effect, see Ex parte Spencer, 149 Cal. 396, 86 Pac. 896; Deyoe v. Superior Court, 140 Cal. 490, 74 Pac. 28, 98 Am. St. Rep. 73; Cohen v. Wright, 22 Cal. 308; People v. Westchester Co., 147 N. Y. 1, 41 N. E. 563, 30 L. R. A. 74. Another rule to be observed in construing the Constitution itself is that its various provisions are to be harmonized so that some effect may be given to every part, if it is reasonably possible. Marye v. Hart, 76 Cal. 293, 18 Pac. 325; Cohen v. Wright, 22 Cal. 314; French v. Teschemaker, 24 Cal. 539.

The creation of a new county would have a like effect upon the legislative districts concerned as a change of boundaries, and if the provisions of section 6, art. 4, have any effect at all upon the power of the Legislature to change county boundaries, they have the same effect upon the power to create new counties, even by a general law under the present amendment. The power to adjust the legislative districts and the power to form new counties and change county lines are all vested in the Legislature by the general grant of legislative power. Article 4, § 1. The special provisions relating to these powers, found in other parts of the Constitution, must therefore be considered as limitations upon the general grant. The amendment of 1894, aforesaid, relating to the formation of new counties, though couched in the language of a grant, is in fact a limitation, for, prior to its adoption, the Legislature had full power over the subject and could act by special law. The provisions of section 6, art. 4, being construed as limitations, and being mandatory and prohibitory, it follows from their terms, and from the application of the maxim, "Expressio unius est exclusio alterius," that the legislative power to form legislative districts can be exercised but once during the period between one United States census and the succeeding one, and that, having been thus exercised in 1901, the districts cannot be again adjusted until the session of 1911. The general rule in regard to constitutional limitations of this character is that that which cannot be done directly cannot be done by indirection. This is a case to which the rule should be applied, since great abuses might follow a too frequent exercise of the power. The consequence is that, if a change of county lines, or the formation of a new county, must have the effect of making a corresponding change of legislative districts, the Legislature would be without power to make a change of either character, except at the time of the decennial adjustment of legislative districts. If this be so, it would practically destroy the power to form new counties, or change county lines, either by general or special laws. If attempted by either mode, the change could not take effect except at the moment the succeeding legislative district act became a law, and then only in the event that the new districts corresponded to the impending change in the counties or county boundaries. But, as these changes would not be in force when the apportionment act was in process of passage, and as one Legislature cannot bind a succeeding one, and still less can an inchoate proceeding to form a new county bind the Legislature, the district bill might not be made to conform to the changes proposed in the counties, and thus it would be in the power of the Legislature, in passing the legislative district law, to render nugatory the previous special law changing boundaries and previous proceedings under general laws attempting to form new counties. A construction leading to such absurd results and to such extraordinary difficulties in the exercise of one of the ordinary legislative powers should not be adopted unless absolutely necessary. The terms of section 6 do not make it necessary. The limitations therein contained were intended to constitute limitations solely upon the power to form legislative districts and apply only to the very act by which the power is to be exercised. It is "in the formation of such districts" and "in forming any district" that counties may not be divided nor parts of two counties united. Neither the making of new counties, nor the change of county lines, is the subject of these limitations, and they are not directly forbidden thereby. Their purpose is solely to prescribe the manner in which the legislative districts are to be formed. The mandate is that "the state" shall be divided into legislative districts, not that the several counties shall be so divided. The division is not to be made by counties, but according to population, and county lines are used only for convenience and to promote harmonious action by the voters. The reasonable conclusion is that a change in county lines, or the formation of new counties, does not affect the legislative districts, but leaves them to be changed at the next decennial adjustment, and that the division into districts has no effect upon any change, or proposed change, in the counties or in their boundaries. The result is that, when a new county is formed, or a change made in the boundaries, there must be, temporarily, a part of two counties embraced in one legislative district. This is a necessary consequence of the fact that the power to make new counties and change boundaries is given without limitation in that respect, and by the same instrument which contains the limitation upon the power to form legislative districts. It is plain that it could not have been the intention, by the limitation upon the method of forming legislative districts, to destroy or prevent the exercise of the power to change boundary lines or form new counties. The only escape from the dilemma is to hold that the provision as to legislative districts is, temporarily, and as to the districts affected, in abeyance because of the exercise of another power of equal importance and potency. See People v. Pendegast, 96 Cal. 294, 31 Pac. 103. If the change is made as the act provides, the old senatorial and assembly districts will remain with the same boundaries as before. After the change, the officers of Kings county concerned in the elections therein will be required to perform the necessary duties for the election of members of the Legislature, and to make their ballots, certificates, and returns correspond with the new conditions. There may be some difficulty encountered in doing this, but they do not appear to be insuperable. If they should prove so, the fault will lie with the Legislature which made the change in boundaries without providing the necessary modifications in the manner of conducting and returning the elections in those districts so as to preserve the right of its citizens to participate therein. But we do not anticipate such difficulty. The parts of the election law which may prove inconsistent with the rights of a citizen must give way, and its substantial provisions for the holding and return of the election must be followed.

The weight of authority in other states is in favor of these conclusions. In State ex rel. Evans v. Dudley, 1 Ohio St. 446, where the constitutional provisions were similar, the court said: "The truth is, the power to make new counties and change county lines has always existed under both Constitutions; under that now in force, it is true, subject to very important safeguards. Its exercise under either, since the apportionment made by the convention, might work the inconvenience of dividing a county into different senatorial districts, but could not in any manner deprive the inhabitants of their right of representation and suffrage in electing the members of that body, or work any change in the boundaries of the districts. This inconvenlence should constitute a very strong argument against the exercise of the power, unless in case of strong necessity, but cannot in the least detract from the power itself." The act here in question does not purport to make any change in the legislative districts. In Michigan the constitutional provisions were similar to ours. A law changing county boundaries was held void in People v. Holihan, 29 Mich. 116, chiefly because the act was construed to have the effect of changing the boundaries of the districts to conform to the new county lines, and that, as that was forbidden by the Constitution, the whole law fell with it. Subsequently, in Bay Co. v. Bullock, 51 Mich. 544, 16 N. W. 896, in considering another law creating a new county out of a part of a legislative district, but silent as to any change in the boundaries of the district, the law was declared valid, but the legislative district, it was said, remained unchanged, and the constitutional objection was thereby obviated. People v. Holihan was virtually overruled. In Massachusetts, at one time, the towns were given the right to a maximum number of representatives in the Legislature, and could, at the town meeting, choose whether to be represented or not and fix the number of representatives, within the maximum, to be elected. It was said that by the Constitution this representation was a right pertaining to the town as a political body or corporation, to be exercised by its inhabitants in town meeting, and that a law attempting to abolish the town of Charlestown and to annex its territory to Boston, without providing any means by which it could exercise this right, was invalid, because it deprived the inhabitants of their privilege of selecting representatives as a town. Warren v. Mayor, 68 Mass. 84, 101. Afterward, the mode of apportioning representation in the Legislature was changed to the district method, with restrictions similar to ours. Charlestown was then annexed to Boston; the act being silent as to legislative districts. It was held that the districts remained unaffected; that the right to representation under the new plan did not pertain to the town, as such, but to the district; and that the Legislature had power to abolish the town and make it a part of the city of Boston, provided the districts were not changed by the act. Stone v. Charlestown, 114 Mass. 226. The following cases, decided upon constitutional provisions such as we have on the subject, hold that a change of boundaries, or the formation of new counties, at a time when the legislative districts cannot be changed, is valid for all other purposes, but that the legislative districts are unaffected thereby, and remain the same until the next general apportionment, and have the right to their representation in the Legislature the same as before the changes were made: State Stevens, 112 Wis. 170, 88 N. W. 48; Bay Co. v. Bullock, supra; Smith v. Saginaw, 81 Mich. 123, 45 N. W. 964; Stone v. Charleston, supra; Wade v. Richmond, 18 Grat. (Va.) 608; Commissioners v. Ballard, 69 N. C. 18; People v. Westchester Co., 147 N. Y. 1, 41 N. E. 563, 30 L. R. A. 74; Opinion of Justices, 60 Mass. 578. Particular attention is directed to the able discussion of the subject in State v. Stevens, supra. In the New York case, it is true, the section of the Constitution, as to assembly districts, provided that: "Nothing in this section shall prevent the division at any time of counties and towns and the erection of new towns and counties by the Legislature"—a provision which, so far as assembly districts were concerned, allowed a change of county lines, notwithstanding the other provisions to the effect that no such district should be composed of parts of two counties. This provision was evidently inserted to evade the force of the decision in Lanning v. Carpenter, 20 N. Y. 447, holding such changes invalid because of the constitutional inhibition. Some weight seems to have been given to this exception in the discussion in People v. Westchester, supra. But no such provision was contained in the sections relating to senatorial and judicial districts, and these sections also contain limitations which would have made the law void if the effect here contended for by the respondent had been given to them. Nevertheless, the law was held valid, and the legislative and judicial districts were held to remain unaffected by the change in the county line. The decision practically overrules Lanning v. Carpenter, which is the case on which the respondent here places his chief reliance.

We are of the opinion that the act is valid, and that the court should not have enjoined the execution of it by the persons appointed for that purpose. It is proper to add that we regard the provision in the act requiring the commissioners to order and hold the contemplated election within 60 days after their first meeting as directory only, and that, as they were prevented from so doing by the injunction in this case, it will be lawful for them to proceed to perform that duty within 60 days after the going down of the remittitur herein.

The judgment is reversed, with directions to the court below to dismiss the action.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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6 Cal. App. 424

JOHNSON v. HELBING. (Civ. 377.)

(Court of Appeal, First District, California. Sept. 13, 1907.)

1. MASTER AND SERVANT—INJURIES TO THIRD PERSON—INDEPENDENT CONTRACTOR.

Plaintiff, while walking along a street in front of a building which defendant was erecting, was struck by a stone negligently left in an insecure position by servants of a stone company, which was doing the stonework under a contract, providing that the same should be done according to plans and specifications, reserving to defendant or his agent only the right to oversee the work to determine whether it did conform to the contract. *Held*, that the stone company was an independent contractor, for the negligence of whose servants defendant was not responsible, notwithstanding such reservation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1241–1258.]

2. SAME.

The fact that defendant was himself a builder, and was doing the woodwork on the building, was immaterial, and did not affect the independence of the contractor for the stonework.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1241–1258.]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Lee Johnson, by his guardian ad litem, against William Helbing. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

J. S. Reid, for appellant. Thomas E. Curran and Francis Dunn, for respondent.

HALL, J. Plaintiff recovered a judgment for damages for personal injuries, against defendant, who in due time appealed from the judgment and the order of the court denying his motion for a new trial.

Appellant urges that the evidence did not show any negligence on the part of the defendant, but that, on the contrary, the evidence introduced proved that the work that the plaintiff claimed was responsible for his injuries was done by an independent contractor, to wit, by the McPhee Stone Company and its servants, and not by the defendant or by any of his servants.

Plaintiff introduced evidence to the effect that, while he was standing near the outer edge of the sidewalk on the south side of Bush street in front of a building then in process of erection, a stone fell from the face of the wall, and striking him broke his leg. The accident occurred upon a Sunday succeeding a holiday, and upon neither day was any work done upon the building. The stone that fell was a building stone about 20 inches long, 10 inches wide, and 6 inches thick. The evidence showed that the front wall, from which the stone fell, was at the time of the accident about 9 feet in height. One witness testified that on the day preceding the accident, while passing in front of the building in question, he noticed the edge of a stone sticking out. Plaintiff then proved by defendant: That he was the owner of the land upon which the building in question (which was called the "Edgemere") was being constructed at the time plaintiff was injured. "That he let out the work of excavating and grading the lot to another for a fixed sum of money. That he had also let a contract to one F. C. C. Anderson for the performance of all brickwork on the building for a fixed sum of money. That he had also entered into an oral agreement with the McPhee Stone Company, whereby it agreed to furnish all the materials and labor necessary to do all the stonework in and about the building for $800. That all of said contracts required the parties who entered into them with the defendant to furnish all the materials necessary and to do all of the work in accordance with the plans and specifications which had been prepared for the erection of the building by the defendant. That all of the work required to be done by said contracts was done by said persons and only pursuant to and in accordance with such contracts. That he himself was a contractor and builder by occupation. That he employed men to do, and they did, the woodwork and interior finishing of the building. That at the time of the accident some of the woodwork had already been done—that is to say, the first floor joists had already been laid—but none of the defendant's workmen were then employed in or about the front of the building, and none of his materials or appliances were there located or in any wise connected. That the outer walls of the building were constructed of brick. That the front wall, to the height of one story, was to be faced with rough hewn stone. That the stones of the facing were anchored to the brick behind. and, for this reason, the brick and stone portions were built simultaneously and carried up together. * * * That he was present at the building every day. That he watched the progress of all the work, and saw that it was done according to his plans and specifications and contract. That he did not direct the McPhee Stone Company's workmen in their work, and did not interfere with them in any way, and there had been no occasion to interfere with them, because all their work was done in a first-class workmanlike manner and according to contract."

The only suggestion of negligence in the case upon the part of any one connected with the building is that some one of the stone masons left the stone that fell in an insecure position. From the uncontradicted evidence above set forth introduced by plaintiff, we think that the McPhee Stone Company was an independent contractor, for whose negligence defendant, the owner of the building, was not responsible. Under a very similar state of facts, it was held, in Green v. Soule, 145 Cal. 96, 78 Pac. 337, that as a matter of law a subcontractor, who had contracted to furnish the materials and perform all the labor for plastering the building in accordance with the plans and specifications prepared therefor for a specified sum of money, was an independent contractor, for whose negligence the original contractor was not responsible. In Green v. Soule, the defendant Soule was the contractor with the owner for all the work save the plumbing, and sublet the plastering to a plasterer. In the case at bar defendant is the owner, and was himself doing the woodwork, but let the stonework, to a company engaged in that kind of work. In both cases the work was to be done for a fixed sum and according to plans and specifications that had been prepared and that were not introduced in evidence. "An independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for. The fact that the work is to be done under the supervision of an architect, or that the employer has the right to make alterations, deviations, additions, and omissions from the contract does not change the relation from that of an independent contractor to that of a mere servant." Green v. Soule, supra. Under the evidence in this case, defendant, as owner, had no control over the manner of doing the stonework, except, of course, to see that it complied with plans and specifications. "A reservation by the employer of the right, by himself or his agent, to supervise the work for the purpose merely of determining whether it is done in conformity to the contract, does not affect the independence of the relation. 16 Am. & Eng. Ency. of Law, 188; Frassi v. McDonald, 122 Cal. 402, 55 Pac. 139. The fact that defendant was himself a builder and doing the woodwork on his building does not affect the independence of the contractor for the stonework.

In Richmond v. Sitterding, 101 Va. 354, 43 S. E. 562, 65 L. R. A. 445, 99 Am. St. Rep. 879, defendant, a contractor and builder, was erecting for himself four buildings on a lot owned by him, and let a contract to a firm of brick masons for the brickwork. It was held that the brick masons were independent contractors, for whose negligence the owner was not liable.

If it be conceded that the evidence in the case shows negligence on the part of the stone masons, which caused the injury to plaintiff, the evidence fails to show that such stone masons were servants or employés of defendant, for the reason that the stonework had been let to the McPhee Stone Company as independent contractors. For their negligence defendant was not responsible. Louthan v. Hewes, 138 Cal. 116, 70 Pac. 1065; Bennett v. Truebody, 66 Cal. 509, 6 Pac. 329, 56 Am. St. Rep. 117; Stewart v. Cal. Imp. Co., 131 Cal. 125, 63 Pac. 177, 724, 52 L. R. A. 205; Green v. Soule, supra.

For the reasons above stated the motion for a nonsuit should have been granted, and the evidence is not sufficient to support the verdict.

The order and judgment are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

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6 Cal. App. 429

MORRIS et ux. v. BEKINS VAN & STORAGE CO. (Civ. 366.)

(Court of Appeal, First District, California. Sept. 16, 1907.)

1. TRIAL—FINDINGS—MISPRISION.

A complaint alleged that defendant received plaintiff's goods on April 16, 1906, and agreed to transport them from San Francisco to Oakland. The court found that the time agreed on for the delivery of the goods was April 16, "1907." The complaint for loss of the goods was filed July 25, 1906, and judgment was rendered therefor on April 9, 1907. *Held*, in the absence of any claim that the action was prematurely brought or anything in the record to support the finding that the property was not to be delivered until April, 1907, the date would be regarded as a clerical misprision.

2. SAME—IMMATERIAL FINDINGS.

Where, in an action against a carrier for loss of goods, the court found that defendant so negligently conducted itself that the goods were destroyed by fire April 19, 1906, and suit was brought and judgment recovered April 9, 1907, a finding that it was agreed that the goods should be delivered by the carrier April 16, "1907," was immaterial.

3. SAME—FORM—BLANKS.

Where a finding of the value of goods sued for recited that such value at the time of delivery to defendant "was the sum of $———," such finding could only be construed to mean that the goods had no value.

4. SAME—FINDINGS—JUDGMENT.

Where, in a suit for the loss of goods, the court found that all the allegations of the complaint were true, one of which was that the value of the goods was $1,000, such finding was sufficient to support a judgment for $786.45, though the court otherwise found that the value of the goods at the time they were delivered to defendant was the sum of $———.

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by H. C. Morris and his wife against the Bekins Van & Storage Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Edwin L. Forster, for appellant. Gibson & Wollner, for respondents.

KERRIGAN, J. This is an action brought to recover the value of certain personal property alleged to have been lost by reason of the negligence of the defendant as a common carrier. After a trial by the court sitting without a jury, a judgment was entered in favor of plaintiffs. This appeal is from the judgment upon the judgment roll alone.

1. The complaint shows that the appellant received the goods in question April 16, 1906, and agreed to transport them from San Francisco to Oakland. The trial court found that the time agreed upon for the delivery of the goods was April 16, 1907. The cause was tried March 30, 1907, 17 days prior to the date upon which it is found that appellant was to deliver the goods. Appellant contends that, according to this finding, it was not in default either at the commencement of the action or at the time of the trial, and that consequently the judgment against it is unauthorized. The complaint was filed July 25,

1906, the cause was tried November 26, 1906, and judgment was entered April 9, 1907. There is no claim that the action was prematurely brought, nor is there anything in the record which supports the finding that the property was to be delivered in April, 1907. On the contrary, an allegation of the answer shows that delivery of the property was to be made April 17 or 18, 1906, and the finding immediately following the one in question, referring to the date of April 16, 1907, speaks of it as "the said 16th day of April, 1906." We think the finding in question was intended to read April 16, 1906. It is apparent that the figures "1907" are a clerical misprision. Again, the court found that appellant did not deliver the said personal property to respondents according to its agreement, but that appellant "so negligently conducted and misbehaved in regard to the same in its calling as a carrier" that the said personal property was wholly destroyed by fire April 19, 1906. This finding renders the one in question immaterial. Assuming that the property was to remain in the possession of the appellant until April 16, 1907, nevertheless, immediately upon its loss through the negligence of appellant, respondents had a right of action against appellant for damages for its value.

2. The court also found "that the value of said personal property at the time of its delivery to defendant was the sum of $———." Appellant contends that this is a finding that the property was of no value, and that the conclusion of the court that the plaintiffs were entitled to judgment "for the sum of $786.45 damages, the value of said personal property," has no support in the findings. So far as this particular finding is concerned, the criticism is well founded; but the court elsewhere found that all the allegations of the complaint were true, and in the complaint there is an allegation that the value of the property is $1,000.

It is unnecessary to discuss the only other point made in the briefs, for the reason that it is disposed of by the position we have taken on the first point discussed in this opinion.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

6 Cal. App. 469

O'NEILL et al. v. QUARNSTROM. (Civ. 374.)

(Court of Appeal, Second District, California. Sept. 24, 1907.)

1. Trial — Trial by Court — Findings of Fact—Sufficiency.

To sustain a plea of the statute of limitations, the court need not find in direct language that the action is barred, where facts are found which show that it is barred; the rule being that a finding of probative facts from which the ultimate fact necessarily results, is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 927, 959.]

2. Limitation of Actions—Liabilities Created by Law—Stockholders' Liability.

The liability of a stockholder for his proportion of a corporate debt is a "liability created by law," within Code Civ. Proc. § 359, requiring an action to enforce such a liability to be brought within three years after the liability was created.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 155.]

3. Corporations—Stockholders' Liability.

Code Civ. Proc. § 359, limiting the time for bringing an action to enforce a stockholder's liability to three years after the liability was created, begins to run against the liability as soon as the debt is contracted, and the giving of a note as evidence of the debt at a later date by the corporation does not operate to extend the time within which an action may be brought against the stockholder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1088.]

4. Same.

The liability of a stockholder of a corporation on a note executed by the corporation is created, within Code Civ. Proc. § 359, requiring an action to enforce a stockholder's liability to be brought within three years after the liability was created, on the execution of such note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1088.]

5. Same.

Plaintiffs, with others, executed notes, and the money borrowed thereon was applied to the use of a corporation, of which plaintiffs were directors and defendant a stockholder. The corporation did not sign the notes. Thereafter renewal notes were executed by the corporation and the plaintiffs, which notes the corporation signed as principal and plaintiffs as sureties. *Held*, in an action to recover from defendant, as a stockholder, his proportion of the debt, that the change of the corporation's obligee from the plaintiffs and other makers of the original notes on the advancement to it of the money borrowed to the payee of the renewal notes did not operate to revive the liability of defendant on the original debt, which at the time of the execution of the renewal notes was barred by Code Civ. Proc. § 359, limiting actions to enforce a stockholder's liability to three years after the liability was created.

6. Same.

In an action to recover from defendant, as a stockholder, his proportion of the debt, brought after his liability on the original debt to the plaintiffs and other makers of the original notes was barred by Code Civ. Proc. § 359, *held* that, the notes being but new evidence of the same obligation, they did not create a new liability of the corporation as to which plaintiffs became sureties and entitled to avail themselves of the rule that on the payment by a surety a new cause of action accrues in his favor on an implied assumpsit to repay such money.

7. Same—Officers—Dealings of Directors with Corporation — Stockholders' Liability.

Plaintiffs, with others, executed notes, and the money borrowed thereon was applied to the use of a corporation, of which plaintiffs were directors and defendant a stockholder. The corporation did not sign the notes. Thereafter renewal notes were executed by the corporation and the plaintiffs, which notes the corporation signed as principal and plaintiffs as sureties. At the meeting at which the execution of the renewal notes was authorized plaintiffs and other signers of the original notes were present and acted as directors, and constituted the majority of directors in attendance, and all voted for such resolution. *Held*, in an action to recover from defendant, as a stockholder, his proportion of the debt, that plaintiffs' effort to change their position from that of creditors of the corporation on the advancement to that of sureties for the corporation on the renewal notes, did not affect their status as to the real indebtedness, they as directors not being permitted to make any change in the indebtedness to their advantage, against either the corporation or the stockholders, and that they were not entitled to recover as such sureties, regardless of the fairness of the transaction.

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by O'Neill, T. Peterson, and Neils Johnson against John Quarnstrom. Judgment for defendant, and plaintiffs appeal. Affirmed.

Lamy & Putnam, for appellants. McD. R. Venable and C. P. Kaetzel, for respondent.

TAGGART, J. This is an action to recover from defendant, as a stockholder of a corporation, his proportion of a debt of the corporation, paid by plaintiffs, who claim to have made such payment as sureties. Judgment was for defendant upon a defense of the statute of limitations, and plaintiffs appeal from the judgment.

The statute was pleaded in accordance with section 458 of the Code of Civil Procedure. There was no finding in the words of the plea that the bar of the statute had fallen, but the facts upon which defendant relied to support this plea the court found in detail. Appellants contend that there should have been an express finding upon the issues raised by the plea, and also that, if it be conceded that this is unnecessary, the facts found by the court are not sufficient to support a judgment in favor of defendant.

The first point appears to have been disposed of by a number of decisions of the Supreme Court adversely to appellants' contention. Findings, as a rule, should be of ultimate facts, but it is not necessary that these should be in the language of the pleading (Clary v. Hazlitt, 67 Cal. 286, 7 Pac. 701), and, where probative facts are found, and the court can declare that the ultimate facts necessarily result from the facts which are found, the finding is sufficient (Water Co. v. Richardson, 72 Cal. 601, 14 Pac. 379; Mott v. Ewing, 90 Cal. 235, 27 Pac. 194). It is not necessary that the court find in direct language that the action was barred by the statute, but it may find the facts which show that it was so barred. It is not necessary that the facts as found should be in any particular form or follow the pleadings. If the truth or falsity of each material allegation in issue can be demonstrated from the findings, the law is complied with. Ready v. McDonald, 128 Cal. 665, 61 Pac. 272, 79 Am. St. Rep. 76. The findings in the case at bar show, as to the two promissory notes to be considered on this appeal, that: They were executed in renewal of two other notes previously given by plaintiffs (with other persons named) to the same payee. The corporation, of which defendant was a stockholder, was not a party to or signer of these original notes, but the money borrowed thereon was received by and applied to the use and benefit of the corporation. One of the original notes was dated October 5, 1899, and was for the sum of $3,000. The note given in renewal of this was dated January 23, 1903, and was for the sum of $3,387.50, made up of said principal of $3,000 and the interest accruing to date of renewal. The other original note was dated January 12, 1900, for the sum of $2,500, and the note renewing it was dated January 23, 1903, and for the sum of $2,631, being the amount of the original principal sum with accrued interest added. The two renewal notes were executed by the corporation (Templeton Milling Company) and the signers of the original notes for which they were substituted and were given to the same payee, the Andrews Banking Company. The Templeton Milling Company received no consideration whatever for the execution of the two renewal notes, and no money was had or received by it on account thereof, except that which it received when the original notes were given. It appears from the findings that the execution of the renewal notes was authorized by a resolution of the board of directors of the milling company passed and adopted at a regular meeting, in which resolution it was expressly declared that the corporation signed as principal and the others as sureties. It is also found that at the meeting at which said resolution was adopted plaintiffs and three others of the signers of the original notes were present and acted as directors of said corporation and constituted a majority of the directors in attendance, and that each and all of them voted for said resolution.

The cause of action here under consideration is a "liability created by law," as that term is used in section 359 of the Code of Civil Procedure (Green v. Beckman, 59 Cal. 545; Moore v. Boyd, 74 Cal. 167, 15 Pac. 670), and an action must be brought thereon within three years after the liability was created (Hunt v. Ward, 99 Cal. 614, 34 Pac. 335, 37 Am. St. Rep. 87). The statute begins to run against the stockholders' liability as soon as the debt is contracted, and the giving of a note as an evidence of the debt at a later date by the corporation does not operate to extend the time within which an action may be brought against the stockholder. Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; Redington v. Cornwell, 90 Cal. 63, 27 Pac. 40; Winona v. Bull, 108 Cal. 1, 40 Pac. 1077. If the liability of the stockholder be created by the giving of a note by the corporation, the statute commences to run in his favor from the date of its execution and not from its maturity. The postponement of the liability of the corporation to action by an agreement on its part with the creditor does not affect the running of the statute in favor of the stockholder. Bank v. Pac. C. S. Co., 103 Cal. 594, 37 Pac. 499. A note given in renewal or extension of the indebtedness of a corporation cannot operate to renew or extend the liability of the stockholder or prevent the statute of limitations from running against it. Santa Rosa Bank v. Barnett, 125 Cal. 407, 58 Pac. 85; Goodall v. Jack, 127 Cal. 258, 59 Pac. 575; Jones v. Goldtree Bros., 142 Cal. 383, 77 Pac. 939.

Appellants contend that, accepting the law to be as declared by the cases cited, another rule, found in Yule v. Bishop, 133 Cal. 574, 65 Pac. 1094, is applicable here. That is, that the payment by a surety or accommodation maker or indorser of a promissory note extinguishes the note, but that a new cause of action immediately accrues in favor of such surety, accommodation maker, or indorser against the real maker upon an implied assumpsit to repay the money so advanced; that, in case of a corporation, the liability of the stockholder of such corporation to such surety, etc., to reimburse him would not be barred until three years after date of the payment of the note. See, also, Loewenthal v. Coonan, 135 Cal. 381, 67 Pac. 324, 87 Am. St. Rep. 115; Crystal v. Hutton, 1 Cal. App. 251, 81 Pac. 1115; Enscoe v. Fletcher, 1 Cal. App. 663, 82 Pac. 1075. It is not altogether clear upon what theory, if any, appellants regard the original obligation or debt. Under the findings made by the trial court, this is the important question in considering the defense of the bar of the statute of limitations. The original indebtedness of the corporation was either to the Andrews Banking Company, or to plaintiff and his co-makers of the original notes, and the "liability was created" at the time they were made. Section 359. It is clear that in an ordinary action at law the Andrews Banking Company could have recovered nothing on the original notes from the milling company or its stockholders as such. The debt of the corporation, therefore, was on an advancement to it by the makers of the original notes. These were dated October 5, 1899, and January 12, 1900, respectively. No action could have been brought on the first one against the stockholders after three years from October 5, 1899, and none on the second after three years from January 12, 1900, unless something occurred to toll the statute. Not until January 23, 1903, was anything of this character done or attempted. On that date the Andrews Banking Company accepted the Templeton Milling Company as its principal debtor and the makers of the original notes as sureties. This change of the corporation's obligee did not operate to revive the liability of defendant on the original debt; and the notes being but new evidence of the same obligation, based upon the same original indebtedness, they did not create a new liability of the corporation, as to which plaintiffs became sureties, and entitled to avail themselves of the rule laid down in Yule v. Bishop, supra.

If it be conceded that the Andrews Banking Company could have recovered on these so-called renewal notes, not only against the Templeton Milling Company, but against the defendant on his statutory liability as a stockholder, it does not follow that this is true as to plaintiffs. Their effort, acting as a majority of the board of directors of the corporation, to change their position from that of a creditor of the milling company to that of a surety for the corporation on an obligation of the latter to the banking company, does not affect their status as to the real indebtedness. If, as to the Andrews Banking Company, the renewal notes were an original obligation of the milling company, as to plaintiffs the rule as to the action of directors of a corporation clearly prevents any change in the indebtedness to their advantage against either the corporation or the stockholders thereof. Plaintiffs are here attempting to recover upon a contract of the corporation which was created by them as directors in their own interests. Such a contract is void. The law does not stop to inquire into the fairness or unfairness of the transaction. Pacific Vinegar Works v. Smith, 145 Cal. 352, 78 Pac. 550, 104 Am. St. Rep. 42.

Judgment of the superior court affirmed.

We concur: **ALLEN, P. J.; SHAW, J.**

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6 Cal. App. 455

ELY v. WILLIAMS et al. (Civ. 316.)

(Court of Appeal, Second District, California. Sept. 23, 1907.)

1. Chattel Mortgages—Right to Sell Under Foreclosure—Presence of Property at Sale.

Personal property, to be sold as a pledge or under foreclosure of a mortgage, must be present at the sale.

2. Same—Rights of Parties—Title and Possession.

Under Civ. Code, § 2920, defining a mortgage as a contract hypothecating specific property for the performance of an act without the necessity of a change of possession, and section 2927, providing that a mortgage does not entitle the mortgagee to possession unless authorized by the express terms of the mortgage, a mortgage gives the mortgagee neither the title, possession, nor right to possession of the mortgaged property unless authorized by the express terms of the instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 272–281.]

3. Same—Effect of Change of Possession.

Change of possession of mortgaged property to the mortgagee affects neither the interest nor title of the mortgagor therein, which is not cut off until the property is sold at public auction as a pledge or under sale in foreclosure proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 272–281.]

4. Same—Right to Replevin Pending Foreclosure—Statutory Provisions.

Code Civ. Proc. § 726, providing that there can be but one action for the recovery of a debt or the enforcement of any right secured by mortgage on personal property, which action must be in accordance with the provisions of the chapter, relates only to the enforcement of rights necessary to the recovery of the debt and foreclosure of the lien given to enforce it, and not to collateral contracts; hence, where a chattel mortgage authorizes the mortgagee to take possession on default in any payment, and to sell as provided by law or foreclose by action, replevin for the property will lie pending foreclosure of the mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 286–293.]

5. Replevin—Right to Possession—Sufficiency.

The right to possession of personal property given by a chattel mortgage on default in payment is sufficient to support replevin.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, §§ 45–68.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Replevin by W. H. Ely against Ben C. Williams, and another. From a judgment for plaintiff, defendants appeal. Affirmed.

W. W. Kaye and Thomas Scott, for appellants. J. W. P. Laird and E. B. Coil, for respondent.

TAGGART, J. Appeal from a judgment in favor of plaintiff in an action of claim and delivery.

Plaintiff is the mortgagee and defendants are the mortgagors of the personal property which is the subject-matter of the action. The court finds: The defendants gave a chattel mortgage to secure the payment to plaintiff of a certain promissory note set out in the mortgage, which was given as the purchase price for the goods mortgaged. They defaulted in the payments therein provided to be made, and plaintiff demanded possession of said personal property from them in accordance with the terms of said mortgage. They refused to deliver the property to plaintiff, and upon such refusal he brought this action and caused the sheriff of Kern county to take possession of the property. Defendants reclaimed the property and resumed possession thereof by giving the undertaking provided by law for that purpose. Prior to the filing of the complaint in this action, but on the same day, plaintiff instituted an action in said superior court wherein, in due course, he obtained judgment against defendants for the balance found due on said promissory note, foreclosing said chattel mortgage and decreeing that said property be sold to satisfy said judgment. The judgment in the case at bar is in the alternative form, in favor of the plaintiff for the recovery of the personal property described therein, or for its value, which is found to be $1,800.

The question to be determined on this appeal, as stated by appellants in their brief, is "whether, under the mortgage, a replevin suit for the possession of the mortgaged property may be prosecuted [by the mortgagee against the mortgagors] pending an action to foreclose the mortgage?" It is urged that, when plaintiff elected to foreclose his lien and began his action under section 726 of the Code of Civil Procedure, the very provision of the law which authorized such a suit forbade the prosecution of any other action. That section 726 provides there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, and plaintiff exhausted his right of action by the foreclosure suit. The mortgage contains the following clause: "It is also agreed, that if the mortgagors shall fail to make any payments as in the said promissory note provided, then the mortgagee may take possession of said property, using all necessary force so to do," etc. This is followed by provisions for sale of the property, as provided by law, or foreclosure of the mortgage by action, substantially in accordance with section 2967 of the Civil Code. So far as the contract discloses, the right of the mortgagee to possession upon condition broken is not affected by the method he may elect to follow in making a sale of the mortgaged property to satisfy the obligation. There is no limitation as to the time when he shall exercise this right, whether before or after notice of sale as a pledge, or before or after action begun to foreclose. To make a valid sale of personal property it must be present at the sale, whether it be sold as a pledge or under order of sale upon a decree of foreclosure. Therefore it is necessary that the mortgagee, or some one acting on his behalf, shall obtain such possession in order that the property may be applied to the payment of the debt secured thereby. The mortgagors, upon demand after default, refused to deliver the property to the mortgagee, and no doubt would refuse to deliver it to any one acting for the mortgagee, whether agent, sheriff, or even a receiver, conceding the case to be a proper one for the appointment of the latter (a conclusion which we do not think the facts of the case warrant). Without possession no sale could be made, and, if appellants' contention be correct and the bringing of the action to foreclose could be successfully pleaded in abatement of any action to recover the possession of the mortgaged property, the foreclosure proceeding would be rendered ineffective because of the impossibility of executing the decree by a sale. A construction of the law which would bring about such a result is to be avoided, if possible. If this be the effect of the decision in the Idaho case cited by appellants (Cederholm v. Loofborrow, 2 Hasb. [Idaho] 9 Pac. 641), we do not think it should be followed. The opinion in that case does not disclose the contractual relations created by the mortgage before that court, nor the statutory provisions relating to chattel mortgages in that territory at the time of the decision.

The right of the mortgagee to possession of the mortgaged property is one created by the contract. Under our Code, a mortgage gives to the mortgagee neither the title, possession, or right to the possession of the mortgaged property, unless authorized by the express terms of that instrument. Civ. Code, §§ 2920, 2927. If there be a change of possession from the mortgagor to the mortgagee, whether accomplished voluntarily, by the use of the necessary force authorized by the terms of the mortgage, or by an action of replevin, it does not affect the interest of the mortgagee in the property. The title remains in the mortgagor (Harper v. Gordon, 128 Cal. 489, 61 Pac. 84), and his equity of redemption is not cut off until the property is sold at public auction as a pledge, or under an order of, sale in a proceeding to foreclose. Wilson v. Brannan, 27 Cal. 258. On the other hand, the right of the mortgagee to elect between the remedies provided in the mortgage is not dependent upon the terms of the mortgage alone, as that right is conferred by the statute also. Civ. Code, § 2967. The right of possession exists only by virtue of the contract. If this contractual right, which the Code expressly permits to be created, but which does not exist by statute, is to be of any avail or use, the provision of section 726 that "there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter," must be construed to have reference to the enforcement of those rights only which are necessary to the recovery of the debt and the foreclosure of the lien given to secure it, and not to any collateral contract in the mortgage which does not affect the interests of the parties in the mortgaged property. This construction is supported by the opinion in Harper v. Gordon, supra, and we think correctly declares the law.

While the action of claim and delivery is here used in practically the same manner as the provisional remedy given by the Code—that is, to secure the possession of the mortgaged property that it may be available for the execution of the judgment or decree in the foreclosure proceeding and its use is ancillary and auxiliary to the foreclosure—it rests upon the right of possession given by the contract. This is sufficient foundation for the right of action. Flinn v. Ferry, 127 Cal. 652, 60 Pac. 434. The judgment in the replevin action will in no way affect the issues tried in the foreclosure proceeding, and, if in favor of plaintiff, will only operate to aid in the proper execution of the decree rendered in that proceeding. The ruling of the trial court upon defendants' plea of another action pending should be sustained.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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6 Cal. App. 459

SEXTON v. RICHARDSON. (Civ. 378.)

(Court of Appeal, Second District, California. Sept. 23, 1907.)

1. CONTRACTS — CONSTRUCTION — PERSONAL SERVICES—VARIANCE.

Where plaintiff contracted to render services as a foreman and landscape gardener at a fixed salary, and to take charge of defendant's property, give his whole time to the work, and to keep the premises and roads thereon in perfect repair, the contract was not a general one to perform certain work according to specifications, but for personal services, and the obligation to keep the premises in perfect repair only contemplated such repair as would result from personal efforts properly directed, so that evidence that plaintiff was prevented by defendant from keeping the premises in perfect repair as he agreed was not a variance as an excuse for nonperformance where the complaint alleged full performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1740.]

2. MASTER AND SERVANT — CONTRACT OF EMPLOYMENT—WRONGFUL DISCHARGE.

In an action for breach of a contract of employment by discharge without cause, and for unpaid salary, an instruction that, if plaintiff was prevented from devoting his entire time and skill to the work specified in the contract by assuming other work at the employer's request, he was not absolved from carrying out the terms of the contract, was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 59.]

Appeal from Superior Court, Santa Barbara County; Felix W. Ewing, Judge.

Action by Ernest Sexton against Harold R. Richardson. Judgment for plaintiff, and defendant appeals. Affirmed.

Henley C. Booth, for appellant. W. P. Butcher, for respondent.

ALLEN, P. J. Action on a contract. Judgment for plaintiff, from which defendant appeals upon a bill of exceptions.

The contract between the parties was in writing, and was one for employment at a fixed salary. The services to be rendered by plaintiff to defendant were those of foreman and landscape gardener, plaintiff to take charge of the property of the defendant and give his whole time and attention to the work, and plaintiff stipulated that he would keep in perfect repair the premises and the roads and highways on such premises. The plaintiff, in addition to his salary, was to be furnished with a house in which to live, a horse and vehicle for his personal use, and a cow for the use of his family. The term of employment was to extend from April 24, 1905, to the corresponding day of the succeeding year. It is averred by plaintiff that he duly performed all of the obligations of the contract imposed upon him, but that he was discharged by defendant without cause, to his damage in the sum of $400; that, in addition, the consequent outlay for a house for his family, and for a horse and buggy for the unexpired term of employment, aggregated $190, and, in addition, $88 of salary earned before his discharge was unpaid, on account of all of which a judgment was asked in the sum of $678. The defendant by his answer raised an issue as to the discharge without cause and as to the amount of damage, and by way of counterclaim averred that, by reason of the failure of the plaintiff to carry out his part of the contract, defendant was damaged in the sum of $750. The jury found in plaintiff's favor and returned a verdict for $566, upon which judgment was rendered.

The first point argued upon the appeal is that the court erred in admitting testimony on the plaintiff's part that, while he had not kept the premises in perfect repair, yet the omission in that regard was occasioned by the defendant's acts in requiring the performance of work and labor outside of his employment which so occupied the time of plaintiff that he was not able to fully keep the premises and roads in perfect repair, and by the fact that to keep the premises in perfect repair required work and labor in addition to that possible by plaintiff's personal efforts; it being insisted that the complaint alleging full performance, no evidence was admissible justifying the nonperformance. The employment was for personal services, and not a general contract to perform certain work according to specifications or design. A reasonable construction of the contract can only be that the parties intended that the whole of plaintiff's time and skill should be devoted to the work, and the obligation to keep the premises in perfect repair could only mean such repair as would result from the personal efforts of the plaintiff, properly directed. The allegation of performance, therefore, related to plaintiff's having devoted his skill and attention to the work. That he did this, except when prevented by defendant, is clearly established. That the results hoped for and promised were not attained might be explained by showing that defendant himself was responsible, and that it was not possible of performance under the terms of the contract. Mere difficulty of performance, or improvidence in entering into the contract, with full knowledge of all the facts, is not involved.

The second question presented relates to the refusal of the court to give to the jury an instruction asked for by the defendant. This instruction embodied the proposition that if plaintiff was prevented by defendant from devoting his entire time and skill to the prosecution of the work, in that he assumed at defendant's request other duties which interfered with his employment, still he would not be absolved from carrying out the terms and provisions of the contract. Under our construction of the contract, which is that it is one of employment merely, we approve the action of the trial court in refusing such instruction.

An examination of the record discloses no prejudicial error, and the judgment is affirmed.

We concur: TAGGART, J.; SHAW, J.

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6 Cal. App. 451

ABROOK v. ELLIS et al. (Civ. 378.)

(Court of Appeal, First District, California. Sept. 21, 1907.)

1. APPEAL—REVIEW—CONTINUANCE—DISCRETION.

Refusal of an application for a continuance will not be disturbed on appeal, in the absence of an affirmative showing of abuse of the trial court's discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3837.]

2. CONTINUANCE — ABSENCE OF EVIDENCE — DISCRETION.

Appellants, having been served with notice that a case had been peremptorily set for March 4, 1903, applied for a continuance because of the nonreturn of depositions, which would not be in court before June 1st. The affidavit contained the names of the witnesses, a statement of their testimony, and a showing of diligence, and also alleged that appellant C. was the sole attorney for the defendant in a criminal case set for the same day, and that he had received no notice to set the case for trial. Plaintiff's attorney testified to the service of such notice, denied most of the statements in C.'s affidavit, and testified that, when the case had been originally called, appellants demanded a jury, which necessitated a transfer to another department; that a commission had issued to take the testimony of the absent witness in October, 1902, which had been dismissed for appellant's failure to serve interrogatories, and that in February, 1903, the commission referred to in C.'s affidavit had been issued; that C.'s client in the criminal case had received a 30-year sentence, and that there was no necessity for haste in the trial of that case. *Held*, that the denial of the continuance was a proper exercise of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, § 17.]

3. ADMINISTRATORS—APPOINTMENT — COLLATERAL ATTACK.

An objection to an administrator's capacity to sue because of his failure to give a proper bond is unsustainable as a collateral attack on the decree by which he was appointed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 178.]

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by John Abrook, as administrator of the estate of Mary Kilroy, alias Mary Abrook, deceased, against Clara Ellis, alias, etc., and others. From an order denying a motion for a new trial made by defendants Ellis and George D. Collins, they appeal. Affirmed.

George D. Collins, for appellants. Riordan & Lande and Kierce & Gillogley, for respondent.

KERRIGAN, J. This is an appeal by defendants Clara Ellis and George D. Collins from an order denying their motion for a new trial.

Mary Kilroy, a resident of San Francisco, died in London September 6, 1901. At the time of her death, she owned and had on deposit in certain banks in San Francisco sums of money aggregating over $15,000. The deceased was generally known by the name of Mary Kilroy, although she was sometimes called Mary Abrook. She left surviving her a husband, John Abrook, and a daughter, Clara Ellis. December 7, 1901, Clara Ellis through her attorney, George D. Collins, filed a petition for special letters of administration, wherein it is alleged that the value and character of the property of the deceased are unknown to the petitioner; that the petitioner is the daughter and the only heir and next of kin of the decedent. The petition was immediately granted, and on the same day, the petitioner having filed a bond in the sum of $1.500, special letters of administration were issued to her. She at once, as such special administratrix, drew from the German Savings & Loan Society and the Hibernia Savings & Loan Society, banking corporations, $13,069.69, and on December 10, 1901, she withdrew from the latter bank the further sum of $2,342.03. December 9 and 21, 1901, she, under her maiden name, Clara Plumridge, and George D. Collins, deposited jointly in the Crocker-Woolworth National Bank sums amounting to $7,840. Clara Ellis on December 9, 1901, and John Abrook on December 10, 1901, filed their respective petitions for general letters of administration of the estate of Mary Kilroy, deceased. The petition of John Abrook was granted, and letters issued to him April 11, 1902. The petition of Clara Ellis was denied, and on January 30, 1902, the order granting special letters to her was revoked.

This action is brought by respondent as administrator to recover the sum of $7,840 on deposit in the Crocker-Woolworth National Bank, and to enjoin appellants, Clara Ellis and George D. Collins, from withdrawing the whole or any portion thereof. The bank answered, making no claim to the money, and requesting permission to deposit it in court and be released from all liability to anyone in relation thereto. The case was set for trial May 4, 1903, and on that day Mr. Jacob S. Meyer, representing George D. Collins, the attorney for the appellants, moved for a continuance of the trial of said action. In support of the motion, an affidavit by George D. Collins was read, which stated, among other things, that a commission had theretofor issued herein to take the testimony of certain witnesses in and about London, England; that, it was then being executed, and would be in court June 1st; that said deposition would then have been in court were it not for the delays caused by respondent. The affidavit contains the names of the witnesses, a statement of their testimony, of its materiality, and of what was done in an endeavor to produce it. It is further averred that in a certain criminal action also set for trial on this date George D. Collins was the sole attorney for the defendant in said action; that the case at bar had been forced to the head of the calendar in order to bring it to trial May 4, 1903, and that affiant had received no notice of any motion to set this case for trial. In opposition to the motion Thomas D. Riordan, one of the attorneys for the respondent, was sworn and testified. He denied most of the statements in the affidavit of Collins, and, among other things said, that the cause was originally in Department 4 of the superior court in San Francisco, and was ready for trial when appellants demanded a jury, whereupon, Department 4 not being a jury department, the case was transferred to Department 7 of said court; that in the month of October, 1902, a motion for a commission to issue to take the testimony of some witnesses in and about London, England, had been granted, but that no direct interrogatories had been presented to the court or served upon respondent until some five months after the issuance of the commission; that upon motion of respondent the commission was dismissed; that in February, 1903, another commission had been sent to London, which is the one to which Collins refers in his affidavit. The witness further said that the defendant King in the criminal case referred to in the Collins affidavit had received a sentence of 30 years, and that said King must remain in custody until the judgment of the court was set aside, and hence there was no hurry in trying that cause. The witness Riordan also read in evidence a notice served on each of the appellants April 27, 1903, that the case at bar was peremptorily set for trial May 4, 1903, at 10 o'clock, and that respondent would insist upon going to trial that day. The witness further testified that in the month of February, 1903, this case was ready for trial; that Mr. Collins got a postponement thereof on the representation that the next morning he was going to Washington to participate in the trial of a case; that he did not go to Washington on the next day nor for a week thereafter. The court denied the motion for a continuance. and the case proceeded to trial before the court, sitting with a jury, in the absence of the appellants Clara Ellis and George D. Collins. The jury rendered a verdict in favor of the respondent, upon which judgment was entered against appellants.

Under the circumstances of this case, the court did not err in denying the motion for a continuance. Such a motion is addressed to the discretion of the trial court, and its action will not be disturbed on appeal unless the record affirmatively shows that it abused its discretion. See Musgrove v. Perkins, 9 Cal. 212; Griffin v. Polhemus, 20 Cal. 180; Kneebone v. Kneebone, 83 Cal. 647, 23 Pac. 1031; Barnes v. Barnes, 95 Cal. 177, 30 Pac. 298, 16 L. R. A. 660; Baumberger v. Arff, 96 Cal. 262, 31 Pac. 53; Peachy v. Witter, 131 Cal. 319, 63 Pac. 468. In Musgrove v. Perkins, supra, the Supreme Court, per Field, J., said: "The granting or refusing a continuance rests in the sound discretion of the court below; and its ruling will not be reviewed except for the most cogent reasons. The court below is apprised of all the circumstances of the case, and the previous proceedings, and is therefore better able to decide upon the propriety of granting the application than an appellate court, and, when it exercises a reasonable and not an arbitrary discretion, its action will not be disturbed." In Baumberger v. Arff, supra, it is said: "The plaintiff did not have an absolute right to a continuance because of the absence of his attorney, but the motion was one which was to be disposed of in the sound discretion of the court, and in view of all the circumstances then made to appear."

It is next claimed that the plaintiff is not the administrator of the estate of Mary Kilroy, deceased; that the evidence shows that he did not give a bond in twice the value of the personal property of the estate as required by section 1388, Code Civ. Proc., and that, therefore, the order appointing him is void. The decree appointing John Abrook was a conclusive judicial determination of that matter, subject only to be reversed, set aside, or modified on appeal, and it cannot be collaterally attacked.

There is no other point requiring attention. The order appealed from is affirmed.

We concur: HALL, J.; COOPER, J.

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6 Cal. App. 462

BECKER v. SCHWERDTLE. (Civ. 348.)

(Court of Appeal, Third District, California. Sept. 24, 1907. Rehearing Denied by Supreme Court Nov. 21, 1907.)

1. PARENT AND CHILD—CONVEYANCE BY PARENT TO CHILD—CONSIDERATION—FINDINGS.

Evidence *held* to support a finding that a parent's deed to her child was delivered in consideration of love and affection, and for the better support of the grantee as recited therein, and that it was not fraudulent nor delivered in expectation of the grantor's death.

2. APPEAL—FINDINGS—REVIEW.

The trial court's findings of fact are conclusive on appeal if there is any substantial evidence to support them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

3. DEEDS—PARENT AND CHILD—CONVEYANCE BY PARENT TO CHILD—VALIDITY—PRESUMPTIONS.

Though under some circumstances in case of a conveyance by parent to child the burden is on the child to show that the deed was obtained without fraud or undue influence, the fact that the conveyance is from parent to child does not render the deed presumptively invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 587-593.]

4. PARENT AND CHILD — CONVEYANCES — VALIDITY.

A voluntary deed executed by a mother to her son, without any imputation of undue influence, cannot be set aside because an honorable man would not have accepted it, though it stripped the mother of all her property; courts being unauthorized to enforce merely moral obligations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parent and Child, § 111.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Dorothea Becker against John George Schwerdtle. From a judgment for defendant, plaintiff appeals. Affirmed.

A. L. Shinn, for appellant. A. M. Seymour and D. L. Donnelly, for respondent.

BURNETT, J. A demurrer to the second amended complaint was sustained by the trial court without leave to amend. A judgment of dismissal followed. From this judgment an appeal was taken to the Supreme Court and the judgment was reversed. The case is reported in 141 Cal. 386, 74 Pac. 1029, to which we refer for a full statement of the averments of the complaint. The cause was tried and judgment rendered for defendant, from which plaintiff appealed.

Quite a number of propositions are learnedly discussed by appellant, but the one vital and controlling question is whether the deed from plaintiff to defendant was delivered in consideration of love and affection and for the better support of the grantee, as recited in said instrument, or in expectation of death, with the understanding that it should take effect only in case plaintiff did not recover from the grave illness from which she was suffering at the time the deed was delivered; or, lastly, was said deed secured by a fraudulent promise on the part of defendant made without any intention of performing it and with the intent to deceive plaintiff and thereby induce her to execute the conveyance. The trial court found that the consideration was as mentioned in the deed, and, in effect, that there was no fraud and said deed was not delivered in expectation of death. We, of course, are bound by the finding, if there is any substantial evidence in its support. In Tillaux v. Tillaux, 115 Cal. 667, 47 Pac. 692, the Supreme Court, speaking through Mr. Justice McFarland, said: "A deed by the owner of land duly signed and acknowledged by him and delivered to the grantee, conveying the land to the latter in fee simple, is one of the most solemn of civil acts. It is not a thing to be played with, or reclaimed at pleasure, as a hawk in falconry. It is not void on account of either want or failure of consideration; nor does want or failure of consideration raise a resulting trust." The mere fact that the conveyance is from parent to child does not change the rule nor render the deed presumptively invalid. Pomeroy's Eq. Jur. § 962; Bowdoin College v. Merritt (C. C.) 75 Fed. Rep. 483. However, under certain circumstances, the burden is upon the grantee to show that a deed from his parent was obtained without fraud or undue influence. The doctrine is announced in Soberanes v. Soberanes, 97 Cal. 145, 31 Pac. 912, through Mr. Justice Paterson, as follows: "Some of the cases hold that undue influence is not to be inferred from the relation of parent and child where the gift is from the parent to the child (Millican v. Millican, 24 Tex. 446); but when the parent is of great age, or is enfeebled by disease, and conveys his entire estate to one child, to the exclusion of other children dependent upon his bounty, the burden is unquestionably upon the donee to show that the gift was made freely and voluntarily and with full knowledge of all the facts and with perfect understanding of the effect of the transfer."

In the case at bar it cannot be said that the grantor was of great age—although she was 64. She was, though, somewhat enfeebled by disease, and she conveyed all her property to an only child, to the exclusion, however, of a grandchild. But the evidence seems clear that her mental faculties were unclouded, and there is no question that she understood the effect of a transfer of her property. If we assume that under the peculiar circumstances of the transaction the burden was cast upon the grantee to show that the conveyance was made freely and voluntarily and with the intention to vest the title immediately and irrevocably in him, still we would not be justified in disturbing the judgment of the lower court, because there is sufficient evidence in behalf of respondent's contention to sustain that burden and support the corresponding finding. It appears that plaintiff was living apart from her second husband, and, in order to prevent him from securing or succeeding to any of her property, she had determined and expressed her intention to convey it to respondent. Accordingly, some six months before the deed was delivered, she signed and acknowledged it; but she retained it in her possession until the time of her illness aforesaid. In testifying as to what occurred at the time of the delivery of the deed and as to the consideration that moved her, among other things she said: "I told him when I gave him over the bank account I wanted that turned back again, if I would get better, just as I gave it to him, and the deed, I told him, if I got better, I wanted $20 a month for my support. He did not say anything at all to me. At the time of the delivery of the deed I was sure he would comply with the request or conditions which I expressed at the time. * * * The reason I made that deed down there that day I did not want Becker to have any of the property my husband left me. I wanted it to go to my son—he to look out for this niece. At the time I gave the deed to Johnnie I relied upon my belief that he would pay $20 a month in case I got well. * * * The only reason I gave him the deed was because I thought I was going to die, and I wanted him to have my property. I thought he had a right to it when I was through with it, because he would look out for my granddaughter was part of the consideration. When Johnnie got the deed, I told him if I got better I expected $20 a month for my support. That is all I said, I am positive." She further said in answer to direct questions on cross-examination that she deeded the property to respondent because he was her son and because of her love and affection for him, and because she did not want Becker to have any of the property. From the foregoing it is fairly inferable that she intended to have the title vest in her son at the time the deed was delivered free from any trust or condition whatever. That the deed was not delivered in "expectation of death" is disclosed by her declaration that, if she got better, she expected $20 a month for her support. She gave no intimation that the deed was to be held in trust, or that the property was to be reconveyed in case of her recovery. Accepting her testimony as true, a fair interpretation of her acts and declarations at the time the deed was delivered amounts to this: She believed she was going to die. Her intention was that the son should have the real property in any event, but in case she recovered she expected him to pay her $20 a month. While at the time she delivered the deed she may have believed that she would not recover, it does not follow necessarily that in contemplation of law the deed was delivered in expectation of death or that it can be defeated upon her recovery. As said by the Supreme Court in Carty v. Connolly, 91 Cal. 21, 27 Pac. 599, through Mr. Justice Garoutte: "It is not a question of physical condition, of pain or absence of pain, of long life or short life, but it is a question of mental capacity and the free and untrammeled action of the mind. These are the ultimate facts, and the belief existing in the grantor's mind that he is suffering from a mortal illness is but an incident throwing whatever light it may possess upon the solution of the ultimate facts, and the power and brightness of that light will fluctuate with the varied circumstances and surroundings of each particular case." Granting that plaintiff at the time she delivered the deed believed she would not recover, and that section 1150, Civ. Code, applies to a voluntary conveyance of real property as well as to a transfer of personal property, still there was sufficient adverse evidence to overcome the presumption that the conveyance was made "in view of death."

The only other consideration in this connection meriting attention relates to the question of fraud in securing the deed. The contention of appellant is that respondent, in order to induce his mother to convey him the property, and with the intent to deceive her and without any intention of performing his agreement, promised to pay her $20 a month; but, giving full credit to the testimony of plaintiff, it is manifest that no express promise was made. It is at least doubtful whether anything was said about the money until after the deed was delivered, and, conceding that there was an implied agreement to pay, it is not clear that the evidence would support a finding that he did not intend at the time to keep his promise. But we are required also to look at that part of the evidence most favorable to respondent's contention. We find that defendant testified to facts from which the conclusion follows that no fraud whatever was committed. He says that nothing was said about money, that his mother insisted upon his taking the deed and recording it, although he declared he did not want the property, and he further declared his mother made statements indicating her belief that she would recover from her illness. There are other circumstances which we deem it unnecessary to detail tending to show that the deed was delivered freely and voluntarily and with intention to vest the title absolutely in the grantee. For us to disturb the finding as to the character of the transfer would be to usurp the prerogative of the trial court.

Certain other findings are assailed as not supported by and as opposed to the evidence. For instance, it is claimed that the evidence does not warrant the conclusion that "plaintiff did not repose the greatest confidence and trust or any confidence or trust in defendant, and that plaintiff did not believe that defendant would deal justly an fairly with the plaintiff in all things or in anything"; or, again, that "plaintiff became very ill, but was not enfeebled in mind or body, and that plaintiff did not fully believe or believe at all that she would not recover from said illness"; or "that the plaintiff did not fully believe or believe at all that defendant would pay plaintiff the sum of $20 per month, or any other sum, or that defendant would comply with any request that plaintiff might make." It is clear that the mother did place some trust and confidence in her son, and it is only charitable to conclude that she believed he would deal fairly and justly with her. And it seems almost incredible that any mother under such circumstances, should believe that her son would not comply with any request that she might make. Again, it is true that the plaintiff "became very ill," but it is not true that she "was not enfeebled in body." But as to these findings and some others which are assailed it is sufficient to say that they become immaterial in view of the conclusion of the court as to the consideration for the deed and the absence of fraud in the transaction. For, whatever might be the finding upon the other issues, if the deed was delivered voluntarily for love and affection and with the free and untrammeled intent to vest the title in the grantee—and it is in effect so found—then the judgment must be for defendant. It must be admitted that defendant was quite reckless in the preparation of his findings. He seemed afraid to have any of the controverted allegations of the complaint found to be true. It may be that this was to maintain consistency in view of the strange denials of his answer, among which is the following: "And further denies that defendant now claims to be the owner in fee of said real property under or by virtue of said deed." It is obvious that he did claim under said deed, and by virtue thereof the judgment was in his favor. However, no notice of this denial was taken by counsel either here or in the court below, and we simply advert to it to point the moral that greater consideration should be paid to the accuracy of verified statements.

Objections were made to certain rulings of the court during the trial. We have examined them, and, conceding that some of them were erroneous, it is obvious that they were not prejudical to the substantial rights of the plaintiff. The moral consideration arising from such transactions between mother and son is pressed upon our attention in favor of appellant. But, as said in Soberanes v. Soberanes, supra: "Transactions of the kind in question should be thoroughly sifted, but a voluntary deed, free from any imputation or undue influence, executed by a mother with her eyes open, cannot be set aside merely upon the ground that an honorable man would not accept a gift which strips his mother of all of her property and leaves her dependent upon the charity of others." And again: "Neither courts of equity nor of law have a right to enforce mere moral obligations." But, however unfilial the conduct of respondent may appear, and however shocking to a fine sense of honor, in extenuation it should be said that he returned nearly $2,000 to his mother and he also testified that he furnished her a home as long as she would live with him.

At any rate, we see no legal cause to disturb the judgment, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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7 Cal. Unrep. 339

PONET v. LOS ANGELES BREWING CO.

(Civ. 364.)

(Court of Appeal, Second District, California. Sept. 23, 1907.)

APPEAL—AFFIRMANCE—ERROR NOT SHOWN.

Where, on an appeal, no brief is filed by either party, and no stipulation or order extending time to file briefs appears, and on call of the appeal there is no appearance by either party, no reason being advanced why the judgment should not be affirmed, and none appearing, to the reviewing court, the judgment will be affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4454.]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Victor Ponet against the Los Angeles Brewing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wright, Bell & Ward, for appellant. J. Wiseman McDonald, for respondent.

TAGGART, J. Appeal from judgment for plaintiff for two months' rent under lease. Defendant served and filed notice of appeal June 4, 1906, and transcript was filed in this court December 11, 1906. No brief of points and authorities has been filed by either party, and no stipulation of parties or order of the court extending time of either to file such briefs appears in the records of said cause in this court.

The appeal was placed upon the calendar for oral argument on the 24th day of July, 1907, and regularly called on that day, but no one appeared to represent either party thereto, whereupon the cause was ordered submitted. No reason being advanced why the judgment of the lower court should not be affirmed, and none appearing to this court, it is ordered that the judgment of the superior court in said cause be affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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6 Cal. App. 440

PATTERSON v. RUBENSTEIN. (Civ. 355.)

(Court of Appeal, Third District, California. Sept. 20, 1907.)

1. Appeal—Review—Briefs—Waiver of Error.

Specifications of error, not commented on in appellant's brief, will be treated as waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4256.]

2. Same—Scope of Review.

Where appellant's assignments of error as to the exclusion of evidence have been waived, the appellate court must confine its review of the evidence to that which was admitted, and must accept the facts and any just inferences therefrom which tend to sustain the findings.

3. Same—Harmless Error—Findings.

Appellant is not prejudiced by a finding not supported by the evidence, if it is immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4238.]

4. Vendor and Purchaser—Contract—Abrogation—Findings—Evidence.

In an action for balance alleged to be due on a contract for the sale of land, evidence *held* to sustain findings that the contract had been abrogated by mutual consent of the parties, and that thereafter another contract had been made to sell the land to defendant at a lower price, and that plaintiff received a part of the consideration for the second sale in discharge of all his claims under the original contract.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by David S. Patterson against Albert Rubenstein. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

J. F. Conroy and H. Scott Jacobs, for appellant. M. E. Power and R. J. Hudson, for respondent.

CHIPMAN, P. J. Action to recover the balance alleged to be due under a contract for the sale and purchase of land. The cause was tried by the court sitting without a jury, and defendant had judgment, from which, and from the order denying his motion for a new trial, plaintiff appeals.

Plaintiff claims as assignee of a certain contract executed January 27, 1905, by the Western Colonization & Investment Company, a corporation (hereinafter referred to as the "company"), and defendant. By this contract the company agrees to sell and defendant agrees to buy sections 21 and 34, township 21 S., range 20 E., M. D. B. & M., "at the price of ten ($10.00) dollars per acre, amounting in the aggregate to twelve thousand eight hundred ($12,800.00) dollars," upon the following conditions: Five hundred dollars on the execution of the contract, and the balance "on or before ten days from the date of this contract." The company agreed to furnish defendant "within a reasonable time" an abstract "showing a title free and clear of all incumbrances." The company also agreed to deliver to defendant "properly indorsed certificates of purchase for said sections 21 and 34 from the state of California." Receipt of the $500 is acknowledged by the contract, and it is agreed that if the company complies with its agreement and defendant fails to pay the balance agreed to be paid the $500 shall be forfeited, but otherwise if the company fails to furnish said properly indorsed certificate. The contract is signed "Western Colonization & Investment Company, by D. S. Patterson [plaintiff] and Albert Rubenstein [defendant]."

It is alleged in the complaint that the company and plaintiff have "in all respects fully complied with the terms and conditions of said contract"; that on the day of its execution the company assigned said contract to plaintiff; that thereafter, at the request of defendant, to wit, on or about February 9, 1905, plaintiff tendered to defendant due assignment of said certificate of purchase, "together with an abstract of title to said sections, showing the title to said sections to be free and clear of all incumbrances; that thereafter, on the 14th day of March, 1905, said defendant paid on account of said lands and certificates the further sum of $8,960, and thereupon received from plaintiff the assignment of said certificate duly executed as aforesaid"; and that there remains due and unpaid the sum of $3,340. By his answer defendant denies specifically all the averments of the complaint, except the execution of the alleged contract, and avers that on or about the month of March, "and prior to the 14th day thereof," the contract mentioned in the complaint was "by mutual agreement of the parties abrogated and annulled"; that "said land was on said date and for many years prior thereto had been embraced in Tulare Lake reclamation district of said county of Kings, and was on said date and for more than one year prior thereto had been subject to a lien of $928.62 for moneys theretofore assessed against the same by said levee district for reclamation purposes, which said lien had never been paid or discharged, and that on or about said last-mentioned date, and after said agreement mentioned in said complaint had been abrogated and annulled, while said land was subject to said lien as aforesaid, said Western Colonization & Investment Company agreed to sell said land to said defendant and assign to him said certificates of purchase for the sum of

$8,960 (the same being at the rate of $7 per acre for said land), provided the said defendant would assume the payment of said lien, * * * and said defendant then and there agreed to purchase said land for said sum and to assume the payment of said lien, and said defendant on or about the 16th day of March, 1905, paid said * * * company said sum of $8,960 in full for the purchase price of said land and assumed said lien, and said * * * company caused said certificates of purchase to be duly assigned and transferred to said defendant, and said defendant then and there became the legal owner and holder thereof and the legal owner and holder of said land."

Upon these issues the court found the following facts: That the company and defendant entered into the contract pleaded in the complaint; that on January 28, 1905, the company delivered to plaintiff a written assignment of said contract, but that it was made by the company and received by plaintiff as security for the payment to plaintiff of $3,748.19 advanced by plaintiff to one Geo. M. Perine for the benefit of the company and at its request, and that defendant "never had any knowledge or notice of the fact that said assignment was ever made or existed"; that at the making of said contract defendant paid to the company, through plaintiff, "who was acting as the agent of said corporation for the purpose of making said contract, said sum of $500, but neither said corporation nor said plaintiff ever tendered or offered said defendant any assignment of any certificate of purchase for the land described in said contract for any part of said land with any abstract of title to said land, showing the title to the same to be free and clear of all incumbrances, but, on the contrary, said land was at all the times mentioned in said complaint subject to a lien of $979.60 for taxes assessed against the same prior to the making of said contract by Tulare Lake reclamation district No. 749, * * * within which levee district said lands were and are situated, and at all said times said land was also subject to a lien for state and county taxes for the year 1904, amounting to $13.20, which lien attached to said land on the first Monday of March, 1904, and neither of said liens has ever been paid or discharged, either in whole or in part"; that neither said company nor plaintiff has complied with the terms of said contract and defendant has not failed or neglected to comply with any of its terms, and defendant is not indebted to plaintiff in any sum of money. It is then found that on or about March 7, 1905, the said contract was by mutual consent of the parties thereto, and by and with the consent of plaintiff, abrogated and annulled, and with plaintiff's consent the company entered into a new contract of sale and purchase of said land substantially as averred in the answer; that at the same time defendant paid to plaintiff the said sum of $3,748.19, "and plaintiff did at said time receive said last-named sum in full compensation for and in discharge of all his claims and demands secured by said assignment of said contract so set out in plaintiff's complaint as aforesaid." From these findings the court deduced the conclusions of law that plaintiff is not entitled to recover anything from defendant, and that defendant is entitled to judgment accordingly and for his costs.

The issues are very clearly stated in the pleadings, and with equal clearness the solution of the controversy is set out in the findings. Whether this solution of the learned trial judge is borne out by the record depends upon the facts established to the satisfaction of the court rather than upon any questions of law involved. Appellant's brief is devoted exclusively to a discussion of the evidence, with the view of showing that the findings do not find support from the facts adduced. Appellant bases his argument in part upon evidence which was excluded by the court, in part upon conflicting testimony, and in part upon the assumption that the uncontradicted testimony of appellant, as a witness in his own behalf, must be given full credit here, although the trial court may have had cause to discredit, and may have discredited, his statements. Appellant has specified in his bill of exceptions 20 errors of law in excluding certain evidence; but in his brief he has not taken up these alleged errors, nor has he shown wherein there was error in the rulings, nor has he asked this court to pass upon them. It was said in People v. McLean, 135 Cal. 306, 309, 67 Pac. 770, 771: "It is due to this court from the members of the bar to point out clearly and concisely the rulings complained of as erroneous and the reasons why they are so, with reference to authorities, if any. In case counsel will not take the trouble to do so, we shall deem the matters as of not sufficient importance to merit notice in an opinion." See People v. Gibson, 106 Cal. 458, 475, 39 Pac. 864; People v. Woon Tuck Wo, 120 Cal. 294, 297, 52 Pac. 833. The court will treat specifications of errors not commented upon in the brief of appellant as waived. We must therefore confine our review of the evidence to that which was admitted by the trial court, and in doing so must accept the facts and any just inferences from the facts which tend to sustain the findings.

It appears from an agreement introduced in evidence, dated November 23, 1904, in which W. H. O'Bryan, W. H. Townsend, Warren Wilson, W. I. Keese, and the company were the first parties, and J. E. Viney and A. Rubenstein (defendant), copartners, were second parties, that on July 22, 1904, second parties entered into a contract to purchase from one George M. Perine certain several sections of land situated in Kings county, among them the two sections in question, and certain shares of the Lake Land, Canal & Irrigation Company; that second parties, on August 10, 1904, assigned this contract to a pool consisting of all the parties named in the contract of November 23d, except the company, in accordance with an agreement between themselves whereby they became associated "for the purchase of all said lands from said Geo. M. Perine, and for the sale thereof, at a profit to be divided between themselves"; that said members of said pool entered into an agreement on July 19, 1904, whereby they gave to the company "the exclusive right to handle said lands and to subdivide and sell the same for the said parties at a profit, and account to said parties therefor in the manner prescribed in said contract" of July 19, 1904; that said company sold all said lands except the lands in controversy, and as to which, while the company was still given the selling power, it was provided that, as to the unpaid balances on previous sales and the purchase money for the lands in question, "said Perine shall, upon the request in writing of the Western Colonization & Investment Company, execute and deliver a deed in accordance with the agreement heretofore made by him with Viney and Rubenstein, conveying upon O. J. Wigdal, of the city of Los Angeles, or upon the direction in writing of said Wigdal, to whomsoever said Wigdal may designate, sections 21 and 34 aforesaid" (land involved); that the company shall pay over to Wigdal all moneys remaining in the hands of Perine belonging to said pool, and the money so received to be applied "first to the costs and expenses incurred by said Wigdal in the execution of the trust hereby created." This agreement further provided that Wigdal as such trustee should pay from the proceeds of sales certain stated amounts to members of the pool to make good their original investment, after which the remaining proceeds were to be disposed of by Trustee Wigdal as specifically provided, and the company was to receive as its share of the profits the water stock above referred to. O'Bryan and Townsend, members of the pool, were also, respectively, president and secretary of the company. It will thus be seen that the company was made the selling agent of the property. Wigdal was trustee to carry out the transactions, and the members of the pool were the principals or beneficiaries. On January 21, 1905, the company gave to plaintiff written authority for 15 days "to negotiate a sale" of said sections "for the price of $8 per acre in cash, to be paid upon the delivery of a deed to the purchaser for said property, or a certificate of purchase subject to reclamation assessments, if any." On January 27, 1905, a contract in writing was entered into for the sale and purchase of said land for the sum of $12,800, or $10 per acre. The contract purported to be between the company as first party and defendant as second party, and was signed: "The Western Colonization & Investment Company, by D. S. Patterson, Albert Rubenstein." It was agreed therein that second party should pay $500 on the execution of the contract and the balance on or before 10 days thereafter; that first party should furnish an abstract within a reasonable time "showing a title free and clear of all incumbrances"; that first party would deliver to second party "properly indorsed certificates of purchase for said sections."

Plaintiff testified that he took the contract to Los Angeles, and went with it to the office of the company, and showed it to Mr. Townsend, the secretary, and that he made the indorsement appearing thereon, which purported to be an assignment by the company "for value received" to plaintiff of all its interest in said contract, and is signed by the company by Townsend as secretary, attested by the corporate seal, and was subsequently, March 8, 1905, acknowledged by him as such secretary. Plaintiff testified that they (meaning the company) agreed to let him have the land for $7 per acre while assigning to him a contract made by the company for $10 per acre. Plaintiff also testified that the written authority of January 21, 1905, to sell the land for $8 per acre included $1 commission for selling. The assignment of the contract of January 27th bears no date, but witness thought it was executed on January 28, 1905. It further appeared from plaintiff's testimony that Perine held the certificates of purchase and on February 7, 1905, they came to the Los Angeles National Bank with a draft attached for $3,748.19 and plaintiff paid the draft; that the certificates were assigned to Wigdal, who made out assignments to plaintiff, and sent them, with a draft attached for $5,211, to the First National Bank of Hanford for collection; that plaintiff and defendant examined the papers, and defendant said they were all right, but that his party to whom he had sold the land was not ready to take them up; that plaintiff thereupon executed assignments to defendant and left them with the bank with a draft attached for $12,300 ($500 of the purchase price having been paid); that defendant told plaintiff that he would pay the balance as soon as the party to whom he had sold paid him; that plaintiff's assignments to defendant remained in the bank five or six days, and plaintiff then ordered them returned, and Wigdal ordered his to be returned to him (Wigdal); and that plaintiff received back his assignments on February 16, 1905. Plaintiff furnished an abstract of title to the land; but it disclosed an unpaid assessment of the reclamation district amounting to $979.60, and that section 34 had been sold to the state in June, 1904, for unpaid taxes, and that the taxes for the current year were unpaid.

Defendant testified that he called attention to the condition of the title, and that he informed plaintiff that the persons to whom he had bargained the land had gone, and that he could not hold them any longer, and that if he "could pick them up again" he "would take the land, otherwise not." This conversation was on February 8, 1905. The testimony of Wigdal was that, after the papers had been in the Hanford bank five or six days, plaintiff called at the Home Savings Bank in Los Angeles, of which Wigdal was cashier, and "requested him to telegraph the Hanford bank to return the draft and the papers attached to it about February 15, 1905." The certificates of purchase and other documents were accordingly returned to Wigdal, the parties to whom defendant had expected to sell the land could not be "picked up again," and the transaction under the contract of January 27th seems to have been treated by all parties as at an end. Defendant met plaintiff at Los Angeles about March 7, 1905. He testified: "Mr. Patterson says: 'Well, you fell down on that deal.' I says—I explained to him that I didn't get the papers on time, I couldn't hold my people any longer, and I can't handle it now." Some further conversation ensued as to a new deal between them, but nothing came of it, and nothing was said by plaintiff about holding defendant to the contract.

Wilson, a member of the pool, testified that three weeks before the ultimate sale of the land by the company to defendant, which occurred March 7, 1905, he met O'Bryan, president of the company, and urged upon him the importance of effecting a sale. O'Bryan told him they thought a sale had been made to defendant, but that it had fallen through, "and the lands were now for sale to some one else." A week later he had another conversation with O'Bryan "along the same line, not different from the previous one—that the land was then unsold." At this conversation O'Bryan explained plaintiff's interest in the matter, which was that he had advanced money to meet the draft made by Perine, "and they were having some trouble with Mr. Patterson (plaintiff); he wanted his money; he wanted it returned; that Mr. Rubenstein (defendant) had defaulted in his purchase and the company will have to return the money to Mr. Patterson, which they couldn't do until it was sold to someone else." On March 7th witness met defendant, who inquired "if the land was still for sale and in possession of the pool," and was told by witness that he so understood from the manager of the company "who were agents for the sale of the land," and that he (witness) was very desirous of selling the land himself for his own interest and would do what he could to further a sale. Defendant made an offer of $7 per acre, which witness expressed a willingness to accept, but said he was not the selling agent, "although authorized in a way to dispose of the land at a minimum price of $7 per acre." He said he would "go to the phone and get their authority to sell the land at $7." Witness called up O'Bryan, president of the company, and told him the land was for sale at $7, and that a purchaser "was in the bank at that moment who wished to purchase the land. He had his money ready to pay for it." O'Bryan "stated that Mr. Wigdal should be called to the phone, and that he be authorized to receive the money in payment of the land there. That was acted upon. I called Mr. Wigdal to the phone, and he entered into a conversation with Mr. O'Bryan." Defendant was present at the time and heard the conversation, which was to the effect that Mr. Wigdal "was authorized to receive the money in payment of the land" at the rate of $7 per acre, defendant to assume the assessment charges on the land.

Witness Wigdal testified to his conversation by telephone with O'Bryan substantially as stated by witness Wilson. He further testified that plaintiff and Mr. Conroy, who was plaintiff's attorney, and was also attorney for the company, came to him and left with him the Perine draft, which plaintiff had taken up, and instructed him to send the draft with the certificates of purchase to the Hanford bank; that he had instructions from the company in writing as to the disposition to be made of the money to be paid by defendant. He testified: "Mr. Patterson was to receive his money back, the $3,748.19. Nothing was said about his receiving any other money. I believe Mr. Conroy said to me to hold those certificates until Mr. Patterson got his money. They were assigned to him. The conversation was in Mr. Patterson's presence." He testified that he paid plaintiff $3,748.19, and disbursed other money paid him according to instructions received, and that he received no instructions from the company nor from defendant to collect any amount of money on the sale "in excess of $7 an acre." Referring to the disposition made by him of the $8,960, the purchase price of the land, paid by defendant, witness testified: "Mr. Patterson made no objection to my disposition of the money as stated. Mr. Conroy, acting for him, made no objection to it. I never told Mr. Patterson nor Mr. Conroy the name of the person to whom the sale was to be made. I told them a sale would be made. I did not state the amount of the sale."

It appeared that to close the final sale to defendant it became necessary for plaintiff to make an assignment of the certificates of purchase to defendant, as Wigdal had previously executed an assignment to plaintiff, when the first deal was made, and, as he testified, it was "to perfect the chain of indorsements" to defendant that he required of plaintiff an assignment to defendant. Plaintiff complied with Wigdal's demand for the assignment, but made no claim for any money beyond his advance in payment of the Perine draft. It was an undisputed fact in the case that defendant had no knowledge that the company, through O'Bryan and Townsend, had assigned to plaintiff all interest it had in the contract of January 27th between the company and defendant. Defendant supposed that when his transaction under that contract was terminated, or treated as abandoned, the company could sell the land, and he dealt with it accordingly, and, as he had no knowledge that the company had assigned the contract to plaintiff, it seems to us he had a right to assume that the contract of January 27th was no longer in force, but was, as the court found, "by the mutual consent of the parties abrogated and annulled."

The evidence shows that plaintiff and his attorney, who was assisting him in the matter, knew that the company was making a sale of the property on March 7th, and that it was a new and different sale from that made to defendant by the contract of January 27th. Plaintiff at no time informed defendant that he held that contract by assignment. Plaintiff had signed the company's name, not his own, as the selling party to the contract. His original authority was "to negotiate a sale." Defendant was a member of the pool, and knew, as did plaintiff, that the company also had the power to make the sale and that Wigdal was trustee to execute it. The only anxiety shown by plaintiff in the matter was to get the money he had advanced to pay the Perine draft. He made assignments to defendant at Wigdal's request, without making any claim beyond this amount. These facts tend strongly to support the findings of the court. There is evidence tending to show that plaintiff was acting as agent of the company in making the contract of January 27th, and was to receive a commission. The subsequent action of Townsend, as secretary of the company, in assigning it without any apparent consideration to plaintiff, thus depriving the beneficiaries of the pool, for whom the company was acting and towards whom it was bound to act in entire good faith, of several thousand dollars, was, to say the least of it, a colorable transaction. It is not surprising that plaintiff failed to disclose it when the second sale was being concluded, or to insist upon his alleged rights under it, and that neither O'Bryan nor Townsend was called as a witness to explain it.

The court found that the assignment made to plaintiff on January 28th was made by the corporation and received by plaintiff to secure to plaintiff the payment of the Perine draft. The evidence was that this draft was drawn upon Wigdal and was taken up by plaintiff, but it does not clearly appear at what dates the draft was made and paid. We infer that plaintiff paid this draft after the contract was entered into and after it was assigned to plaintiff, and if this be true it can hardly be true that the assignment was made to secure a payment made at a later date than the assignment itself. However this may be, we do not deem it material, for the transaction came to naught, and plaintiff was repaid his advance and the original contract of sale was abrogated, and, so far as appears, plaintiff retained the $500 paid on this contract by defendant. The finding not being material, plaintiff is not prejudiced, though it is not supported by the evidence.

So far as we can discover from the evidence admitted by the court, the material findings are warranted, which latter support the judgment.

The judgment and order are therefore affirmed.

We concur: HART, J.; BURNETT, J.

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6 Cal. App. 434

JENNER v. MURPHY et al. (Civ. 379.)

(Court of Appeal, First District, California. Sept. 18, 1907.)

1. EVIDENCE—PRESUMPTIONS—JUDICIAL PROCEEDINGS.

The law presumes that a judgment, until reversed, is a correct judicial determination of the rights of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 104.]

2. FRAUDULENT CONVEYANCES—RIGHT TO ATTACK—JUDGMENT CREDITORS.

A creditor who has reduced his claim to judgment may, pending an appeal from the judgment without undertaking to stay execution, sue to set aside a conveyance by the debtor as fraudulent.

3. SAME — CONVEYANCE OF DISTRIBUTIVE SHARE.

A decree of distribution following and affirming a conveyance by one distributee of his share to another distributee, though conclusive on the heirs and sufficient to pass the legal title, does not affect the right of a judgment creditor of the distributee who conveyed his share to attack the conveyance as fraudulent.

4. SAME—EXHAUSTING REMEDY AT LAW.

A creditor who reduces his claim to judgment may sue to set aside a conveyance of the debtor as fraudulent, without first going through the form of a levy and sale under execution.

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Nora Helen Gertrude Jenner against Bertram Samuel Joseph Finnistone O'Neil Murphy and another. From a judgment for plaintiff, defendant Daniel T. Murphy appeals. Affirmed.

Bishop, Wheeler & Hoefler (William Rix, of counsel), for appellant. Frank H. Powers and Elliott McAllister, for respondent.

COOPER, P. J. Plaintiff recovered judgment. Defendant Daniel T. Murphy made a motion for a new trial, which was denied, and this appeal is by him from a part of the judgment and from the order denying his motion for a new trial. The action was brought by plaintiff, the divorced wife of Bertram Samuel J. F. Murphy, hereinafter designated as Samuel J. Murphy, to obtain a decree that two certain deeds, dated, respectively, May 27, 1886, and May 26, 1897, made by defendant Samuel J. Murphy to defendant Daniel T. Murphy, are fraudulent and void as to plaintiff, and that a certain judgment for the sum of $8,284.13, with interest, rendered in the superior court of the city and county of San Francisco, in favor of plaintiff and against defendant Samuel J. Murphy, in a suit upon a prior judgment for permanent alimony, recovered by plaintiff against the said defendant Samuel J. Murphy in England, be declared a lien upon the property so transferred by said deeds to defendant Daniel T. Murphy until he shall pay and satisfy said judgment. The court found in favor of defendant Daniel T. Murphy as to the first deed, and hence it will not be necessary to state any facts as to that. The defendant Samuel J. Murphy made default, and hence it will only be necessary to state the facts as to the second deed, and its effect as between the plaintiff and the appellant.

In 1891 the plaintiff and defendant Samuel J. Murphy intermarried. In February, 1895, a decree of divorce was rendered in Great Britain, dissolving the said bonds of matrimony, and awarding to plaintiff $50 per month alimony. Appellant had heard of this divorce prior to the conveyance made to him by his brother Samuel J. Murphy in 1897. A portion of the money due plaintiff as alimony was thereafter, on November 11, 1898, included in a judgment in favor of plaintiff and against Samuel J. Murpny for the sum of £1,450. Upon this last-named judgment the plaintiff brought an action in the superior court of the city and county of San Francisco against defendant Samuel J. Murphy, and upon the 6th day of May, 1901, judgment was duly entered in favor of plaintiff in said action for the sum of $8,284.13. From this judgment an appeal was taken and the judgment affirmed. Murphy v. Murphy, 145 Cal. 482, 78 Pac. 1053. The action at bar was commenced August 5, 1901, after the entry of the last-mentioned judgment in the superior court, and pending its appeal to the Supreme Court. No stay bond was executed pending the said appeal. The court below found that the said deed of May, 1897, was executed for the purpose of hindering, delaying, and defrauding the plaintiff in collecting any sums that might be due or become due to her from defendant Samuel J. Murphy, and ordered that appellant pay to plaintiff out of the property so held by him for defendant Samuel J. Murphy the sum of $9,944.31, being the amount, with interest and costs, of the said judgment rendered in favor of plaintiff and against said Samuel J. Murphy in the superior court of the city and county of San Francisco, and that, until the same be paid, it remain a lien upon the undivided interest in two certain pieces of real estate held by appellant for defendant Samuel J. Murphy under the said deed of May, 1897.

The first point urged by the appellant is that plaintiff has not the status of a creditor so as to entitle her to assail the transfer, for the reason that an appeal had been taken from her judgment rendered in the superior court against Samuel J. Murphy. It is true that a fraudulent conveyance, as against a resident of the state, can only be attacked by a creditor who has reduced his claim to a judgment and who is entitled to an execution, which could be levied and satisfied only for such fraudulent conveyance. Plaintiff alleged, proved, and the court found, that she had a judgment, and one upon which she was entitled to an execution. The appellant claims that, because an appeal had been taken, the judgment was not a final judgment; or, in other words, his contention is—and he asks us to hold—that a creditor, who has reduced his claim to a judgment in a court having jurisdiction, cannot be allowed to bring an action to set aside a fraudulent conveyance pending an appeal from such judgment, although no undertaking has been given to stay execution. He asks us to hold that a judgment creditor entitled to an execution may be deprived of the right to maintain an action like this pending an appeal which may be delayed for years, and with no security for the final payment of the judgment. We would be loth to follow any case which would sustain such a doctrine, but to the credit of the law no case has been cited which even lends countenance to such contention. The language of the law books is that a creditor who has reduced his demand to a judgment at law may maintain his action to set aside a conveyance which hinders and obstructs the right of the creditor to reach the debtor's property by execution. The law presumes that a judgment, until reversed, is a correct judicial determination of the rights of the parties. It presumed so in this case, and, as has been stated, the court on appeal so held. If the appellant's contention be correct, the law, while giving the plaintiff the right to an execution, would be so impotent that it could not in any way assist her by removing the obstruction which prevents the enforcement of the execution. It is true that pending an appeal the judgment was not final, but it was nevertheless a judgment. It was entered as the Code provides it should be. It entitled the plaintiff to a writ of execution. It was admissible in evidence for the purposes of this case. In California, etc., Bank v. Graves, 129 Cal. 649, 62 Pac. 259, it was held that the judgment roll was admissible upon an application for a writ of assistance pending an appeal from a judgment of foreclosure, where no undertaking had been given to stay the execution. The same was held in Montgomery v. Tutt, 11 Cal. 190, in which case Judge Field said: "When the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution." In Cook v. Rice, 91 Cal. 664, 27 Pac. 1081, the plaintiff asked for an injunction and for damages for certain trespasses upon certain lands. Defendant pleaded as an estoppel a former judgment, in which it was held that the plaintiff was not entitled to any part of the land except ten acres specifically described. When the judgment roll in the former suit was offered in evidence, it was objected to because the time for appealing had not expired, and the judgment was not final. The court said, speaking through Mr. Justice Temple: "It was not necessary that it should be final in the sense that it was not liable to be reversed on appeal. It was enough that the judgment was in force, not suspended by an appeal or otherwise, and that while in force it finally disposed of the controversy." In the case at bar the judgment was in force, not suspended by the appeal, and while so in force it finally disposed of the controversy. Plaintiff having a judgment, the judgment roll was admissible to show it. It may further be said that defendant Samuel J. Murphy was a nonresident of the state at the time this action was commenced, and it has been held that in such case the plaintiff is not required to be a judgment creditor. First Nat. Bank v. Eastman, 144 Cal. 493, 77 Pac. 1043, 103 Am. St. Rep. 95. However, we do not rest our decision upon this ground.

There is no merit in the second point urged by appellant, that the interest in the property upon which the judgment was declared to be a lien was not acquired by him and did not pass to him through the deed declared to be fraudulent, but from an independent source through a decree of distribution from his sister's estate. The deed contains the following clause: "And whereas on or about the 28th day of March, 1897, Mary Margaret Isabella Murphy, a sister of the parties hereto, died at Ongar, Essex, England, and the party of the first part is one of her heirs at law, and he desires to grant and convey absolutely to the party of the second part all his right, title and interest in and to the property and the estate of the said Mary Margaret Isabella Murphy, deceased." And concludes with the clause: "The said party of the first part does, by these presents, give, grant, bargain, sell, convey and confirm unto the party of the second part, and to his heirs and assigns forever, all the right and interest of the party of the first part in and to the property and estate of the said Mary Margaret Isabella Murphy, deceased, to which he may be entitled as heir at law or otherwise; to have and to hold the same unto the said party of the second part, his heirs and assigns forever." The deceased sister had left a will, by the terms of which her brothers and sisters were excluded, and her estate left to one Smullen. The probate of the will was contested by some of the heirs, and pending the contest a settlement of the matter appears to have been made, as shown by the terms of a stipulation contained in the findings. This stipulation was signed by appellant, and also by Samuel J. Murphy by appellant, his attorney in fact. It contained among others the following recital: "Whereas since the death of said Margaret I. Murphy, deceased, said Samuel has assigned * * * to Daniel T. Murphy * * * and whereas, William J. Smullen * * * has conveyed any and all rights * * * to those who are the heirs at law of the said Margaret I. Murphy; and whereas, * * * without agreement to the contrary, the said parties * * * would be entitled in the distribution * * * and the said Daniel T. Murphy to one-sixth thereof in his own right, and one-sixth thereof as assignee of said Samuel J. Murphy. Now therefore * * * each of the parties hereto does hereby grant and convey to each of the other parties." It therefore clearly appears that the share of Samuel J. Murphy to an undivided one-sixth of his sister's estate was treated in the stipulation as being conveyed to appellant by the fraudulent deed, and the decree of distribution followed, which only fed the deed and made definite the property that passed by it. Not only this, but the complaint, which is verified, contains the following allegation: "That one-half of said eleven-forty-eighths so claimed by defendant Daniel T. Murphy is claimed under said indenture of May 26th, 1897, and but for said alleged transfer of May 26, 1897, would now be the property of defendant Samuel J. Murphy, and subject to the payment of said judgment in favor of plaintiff." This allegation is not denied, and no issue was made thereon.

The decree of distribution but followed the stipulation entered into in regard to the estate of the deceased sister. It was conclusive upon the heirs, and passed the legal title to appellant, but it did not affect the right of a judgment creditor to show who was the real owner of the property. In Martinovich v. Marsicano, 137 Cal. 355, 70 Pac. 459, the appellant had obtained a judgment, pending administration of an estate, against one of the heirs. Before distribution the heir, against whom the judgment had been obtained, made a deed, conveying all her interest in the estate to the other heirs, and upon petition and due notice a decree of distribution was made to the other heir. The court held that the decree of distribution was not binding upon the judgment creditor, and in no way affected his lien. See, also, Estate of Crooks, 125 Cal. 461, 58 Pac. 89; Barnard v. Wilson, 74 Cal. 512, 16 Pac. 302; Chever v. Shing Hong Poy, 82 Cal. 68, 22 Pac. 1081. Such decree of distribution cannot be made the shield to protect the property of Samuel J. Murphy from all attacks by creditors. It cannot bind a court of equity, nor prevent it from investigating the facts, and brushing aside all illegal and fraudulent transfers for the purpose of seizing the assets of the debtor, and applying them to the satisfaction of the judgment creditors' claim. In such a case a court of equity will not be turned aside by shadows, but will grasp the substance—the assets of the fraudulent debtor—no matter where they may be found, and apply them to the payment of the honest creditor.

It is argued that the plaintiff had a remedy at law, as she could have levied execution upon and sold the alleged interest of Samuel J. Murphy in and to the real estate standing in the name of appellant. It is said "she could have first sold out the interest of Samuel J. Murphy in the property, and then brought suit to set aside the conveyance." We have never before heard of a rule that one must be a judgment creditor, and also have gone through the form of a levy and sale under execution, before he could maintain an action to set aside a fraudulent conveyance. The contention is not worthy of further discussion.

The evidence supports the findings, and the judgment is the legal conclusion from the facts found.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

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PEOPLE v. BANK OF SAN LUIS OBISPO et al. (L. A. 2,076, 2,117.)

(Supreme Court of California. Nov. 8, 1907.)

1. APPEAL—DECISIONS REVIEWABLE—BANKS—DISSOLUTION.

Though a proceeding under St. 1903, p. 368, c. 266, § 10, authorizing the dissolution of an insolvent bank or one engaged in unsafe banking, on the petition of the Attorney General at the instance of the bank commissioners, is a special proceeding, and such act does not provide for an appeal, an appeal is authorized by Code Civ. Proc. § 52, subd. 4, providing that the Supreme Court shall have appellate jurisdiction "in all special proceedings," and by section 939, declaring that an appeal may be taken from a final judgment in a special action or proceeding within six months after the entry of judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 132, 138.]

2. SAME—STATUTES — CONSTRUCTION — RIGHT OF APPEAL.

The right of appeal being remedial, the courts, in doubtful cases, will decide in favor of the right, whenever substantial interests are affected by the judgment.

3. COURTS — APPELLATE COURTS — APPEAL TO WRONG COURT—TRANSFER.

Where an appeal is taken to the Supreme Court in a case of which the District Courts of Appeal have exclusive jurisdiction, it is the duty of the Supreme Court, under the constitutional provision that no appeal shall be dismissed because taken to the wrong court, to transfer the cause to the District Court of Appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1303.]

4. BANKS AND BANKING—DISSOLUTION—PROCEDURE.

Since St. 1903, p. 368, c. 266, § 10, providing for the dissolution of insolvent or unsafe banks, provides no method of procedure, the procedure should follow that specified for ordinary actions.

5. NEW TRIAL — WHEN AUTHORIZED — STATUTES.

Code Civ. Proc. § 588, provides that issues arise on the pleadings when a fact or conclusion of law maintained by one party is controverted by the other. Section 656 defines a new trial as a re-examination of an issue of fact in the same court, after a trial and decision by a jury or court, or by referees. Section 657 declares that a new trial may be granted for specified causes materially affecting the substantial rights of a party. *Held*, that a motion for a new trial is authorized at law, in equity, or in a special proceeding, whenever under the pleadings an issue of fact is presented to be determined.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 4, 5.]

6. BANKS AND BANKING—INVOLUNTARY DISSOLUTION—PROCEEDINGS—NEW TRIAL.

St. 1903, p. 368, c. 266, § 10, authorizes the dissolution of a bank at the suit of the Attorney General, where the bank is insolvent, or its directors are transacting its business in an unsafe manner and by unsafe practices. *Held* that, while such section provided for the summary winding up of the affairs of a bank under such circumstances, suit brought by the Attorney General was not necessarily of a summary character in its proceedings, so that, where an issue of fact was raised therein as to the insolvency of the bank, and as to alleged improper acts of its directors, a motion for a new trial was authorized after decree of dissolution.

7. NEW TRIAL—SPECIAL PROCEEDINGS—STATUTES.

Where a complete scheme of procedure is provided for a statutory proceeding from its commencement to the entry of judgment, and an appeal is expressly authorized, but no provision made for a new trial, the latter remedy is unavailable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 1–5.]

8. APPEAL—SECOND APPEAL.

Where an appeal first taken was valid and effective, a second appeal will be dismissed on motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 47, 48.]

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Proceedings by the people, by U. S. Webb, Attorney General, against the Bank of San Luis Obispo and others. From a decree in favor of petitioners, defendants appeal. On motion to dismiss. Motion to dismiss appeal taken December 15, 1906, denied, and motion to dismiss appeal taken June 11, 1907, granted.

James L. Crittenden, for appellants. U. S. Webb, Atty. Gen., and George A. Sturtevant, Asst. Atty. Gen., for the People.

LORIGAN, J. Plaintiff moves to dismiss two appeals taken by the defendants from the judgment rendered against them in the above-entitled action.

The action was brought in the name of the people of the state of California, upon the information of the Attorney General, and on the complaint of the bank commissioners, against the said bank of San Luis Obispo and its directors, under the provisions of section 10 of the bank commissioners' act (St. 1903, p. 368, c. 266). The complaint alleged that the defendant bank was on November 2, 1905, a corporation doing a general banking business at San Luis Obispo, San Luis Obispo county, in this state; that on that date its directors were conducting such banking business in an unsafe manner and by unsafe practices which it had been by the board of bank commissioners ordered to discontinue, but which it had not done on January 24, 1906; that the board of bank commissioners had determined on that day that said corporation was insolvent. And it is then alleged as a fact that the said corporation was insolvent and unable to pay its obligations from its own means, as such obligations became due and payable in the ordinary course of business; that on that day the bank commissioners had taken control of the bank and all its property and effects. And it was asked that the corporation be declared insolvent, that it be ordered into involuntary liquidation, and that its directors and other officers be enjoined and restrained from the transaction of any further business except for the purposes of liquidation. The defendants answered and denied that the bank had conducted business in an unsafe manner, or had pursued any unsafe practices; denied that the bank was insolvent or unable to pay all its obligations from its own means; and avers that said bank at all times mentioned in the complaint had, and then had, ample assets to pay and satisfy any and all of its obligations. The cause was tried, and the court filed its findings of fact and conclusions of law. It found that the defendant bank was conducting business in an unsafe manner; that at all times after January 10, 1906, said bank was insolvent and unable to pay its obligations due and payable in the ordinary course of business from its own means; and that without the consent of the banking corporation the board of bank commissioners had taken possession of all of the property and effects of said bank, as alleged in the complaint; and judgment was entered ordering the bank into involuntary liquidation, enjoining and restraining it from the transaction of any further business, appointing a receiver, and directing the bank commissioners to turn over to the receiver all the property, money, and effects of said corporation which it had taken into its possession. This judgment was entered on December 12, 1906. On December 15, 1906, the defendants served and filed a notice of appeal to this court from said judgment, and on the same date the defendants served and filed their notice of intention to move for a new trial of the action, and also filed the requisite undertakings to perfect the appeal and to stay proceedings under the judgment. On March 29, 1907, the plaintiff herein filed a motion to dismiss said appeal on two grounds: First, that more than 40 days had elapsed since the appeal was perfected, and no transcript had been filed or served; second, that this court had no appellate jurisdiction of any action commenced under and pursuant to the provisions of section 10 of the bank commissioners' act, to which we have referred. Thereafter on June 11, 1907, the defendants served and filed another notice of appeal from said judgment, which in due time the plaintiff also moved to dismiss, on the ground that when said second appeal was taken the appeal of December 15, 1906, had already been taken to this court, was pending here, and had not been dismissed or abandoned.

Addressing ourselves to the first motion to dismiss. On the hearing, the objection of respondent that the transcript had not been filed or served within 40 days after the appeal from the judgment was met by a showing on the part of appellants that there was still pending and undisposed of in the trial court a motion for a new trial in the cause, which, under rule 2 of this court (78 Pac. vii), extended the time for the filing of the transcript for 40 days after the disposition of the motion. This showing would be a sufficient answer to that portion of the motion to dismiss based on the failure to file the transcript; but respondent insists that, under the special proceedings authorized by the bank commissioners' act, not only is there no right of appeal, but, further, that there is no right to move for a new trial. There is therefore presented for consideration under the first motion to dismiss, on the general ground that this court has no appellate jurisdiction of a proceeding commenced under the provisions of said act, two points: First, whether a right of appeal from the judgment entered in such proceeding exists; and, second, whether a motion for a new trial is authorized. Proceeding to a consideration of these points, and taking up first the question as to whether a right of appeal from a judgment entered under the provisions of the act exists:

The contention of respondent that no such right exists is based solely upon the proposition that the proceeding authorized by section 10 of the bank commissioners' act is essentially a special proceeding; that such proceeding was intended by the Legislature to be summary in character; and that, as no provision is made in the act itself for an appeal, it was contemplated that the judgment of the superior court should be final. This is the only point made as to the right of appeal and the only one with which we shall concern ourselves. That the proceeding authorized under the act is a special proceeding there can be no question, and it may be also conceded for present purposes that such proceeding is of a summary character. But, although a special summary proceeding, it does not follow therefrom that, in the absence of an express declaration of the Legislature that any judgment rendered under it shall be final and conclusive, we are authorized in saying that the general provisions of the Code of Civil Procedure applying to appeals shall have no application in this character of cases. Conceding that the Legislature might have in terms declared a judgment in such proceedings final, the fact that it did not do so is persuasive to the effect that, if any right of appeal was given under the general provisions of the Code, it was not intended to be interfered with. The fact that the proceeding was to be summary, as contended for by respondent, while it might have afforded ample reason and justification for the Legislature (conceding it had the power, a question not involved) to have deprived the parties in the proceeding of any right of appeal which otherwise existed, can afford no reasonable warrant for our construing or inferring this to have been the intent of the act, when the Legislature might have, but failed to, expressly declare it. The right of appeal is remedial, and in doubtful cases the doubt should be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment, and that the substantial rights of a defendant are affected by a judgment against it rendered in such a proceeding is not open to question. No satisfactory reason can be suggested, if the right of appeal is generally given by the provisions of the Code of Civil Procedure in this character of cases—special proceedings of a civil nature—why the Legislature, if it contemplated depriving the parties of such right in this particular special proceeding, did not say so. On the other hand, if such right of appeal existed under the provisions of the Code and was available generally in special proceedings, the fact that the Legislature did not in terms deprive the parties of such right in this particular special proceeding or use some apt language in the act—such as making any judgment final, or final and conclusive—expressing such intention, clearly indicates that such right was not intended to be disturbed. And that in special proceedings generally, the right of appeal is conferred from judgments entered therein under certain provisions of the Code of Civil Procedure, is expressly declared in Morton v. Broderick, 118 Cal. 474, 483, 50 Pac. 644. That case involved the right of appeal from a judgment in a special proceeding brought under an act of the Legislature (St. 1881, p. 54, c. 52), providing for the removal of legislative bodies of municipalities for failure to fix water rates within a given time, as required by article 4 of the Constitution. The act declared that a legislative body failing to fix such rates was guilty of malfeasance in office, and provided for proceedings to be taken for their removal therefrom. No provision was made in the act for an appeal from any judgment rendered under it. It was silent in that respect. A proceeding was brought against the board of supervisors of San Francisco under the act, entitled Fitch v. Board of Supervisors, and such proceedings had that a judgment of removal from office was entered against the board and the individual members composing it, and immediately a notice of appeal was given by the defendants therein, and an appeal therefrom was perfected. The case of Morton v. Broderick, supra, a mandamus proceeding, directly involved the question of the right of the defendants in the Fitch Case to appeal and the effect of such appeal. We are only concerned here with the determination there upon the question of the right of appeal. One of the same objections against that right was interposed there as here, namely, that the proceeding under the act was a special civil proceeding of a summary character, and that no provision was made in it for an appeal and no right of appeal was otherwise provided. It was held, however, in that case, that the right of appeal in such cases was conferred by sections 52 and 939 of the Code of Civil Procedure; the first section referred to (in subdivision 4 thereof) providing that this court shall have appellate jurisdiction "in all special proceedings," and section 939 providing that "an appeal may be taken from a final judgment in an action or special proceeding commenced in the court in which the same is rendered within six months after the entry of judgment." We think the view expressed by the court in the case of Morton v. Broderick as to the right of appeal in special proceedings conclusive against the contention of respondent here. In the absence of any provision in the bank commissioners' act denying the right of appeal from the judgment in the special proceeding therein provided for, the provisions of the Code of Civil Procedure above referred to, conferring generally such right of appeal in special proceedings, confers the right in this particular proceeding. No distinction can be drawn between the act in question in the Morton Case and the one here, as far as that right is concerned. As, in the absence of any provision denying the right of appeal under the act of 1881, it was held in that case that the general provisions of the Code of Civil Procedure conferred that right, so it must be held that they equally confer it as to any judgment under the bank commissioners' act. Both are special proceedings, and the one no more summary in character than the other, and neither in terms nor by necessary implication denies the right of appeal which the sections of the Code of Civil Procedure otherwise confer.

Counsel for appellant, in support of its right of an appeal, calls our attention to People v. Bank of Mendocino, 133 Cal. 107, 65 Pac. 124, and we mention it that it may not be deemed overlooked. It insists that in that case, which involved an appeal from an order made in a proceeding under the bank commissioners' act, it was directly decided that the right of appeal from a judgment entered in such proceeding existed. While it was so stated in the course of the opinion in that case, the question was not directly presented for determination. The view, however, of the court expressed therein, though not raised on the appeal, was in entire harmony with the conclusion previously reached in Morton v. Broderick, on this point, upon the authority of which case we are satisfied of the right of the appellant to prosecute this appeal.

We are mindful that section 52 of the Code of Civil Procedure, referred to in Morton v. Broderick, confers appellate jurisdiction upon this court "in all special proceedings," and that, under the present constitutional provision, defining the jurisdiction of this and the district courts of appeal, appellate jurisdiction is conferred exclusively upon the latter in certain designated special proceedings, with a further provision that they shall have appellate jurisdiction in such other proceedings of like character as may be provided by law, excepting cases in which appellate jurisdiction is conferred upon this court. No point is made on this motion to dismiss as to the appellate jurisdiction of either this or the District Courts of Appeal to entertain this appeal. That particular point is not made or involved. The sole point is that the bank commissioners' act provides for no appeal, that the proceeding is of a summary nature, that in contemplation of the Legislature an appeal was not intended, and that the general provisions of the Code of Civil Procedure as to appeals in special proceedings, to which we have referred, do not apply, and we have confined ourselves to a consideration of that point alone, namely, whether a statutory right of appeal exists. We hold that it does. Whether authority to hear such appeal is conferred on this court, or upon the District Courts of Appeal, is another question, which cannot affect the right of the appellant to take an appeal and to have its appeal heard in whichever appellate tribunal has jurisdiction. If it should appear that the District Courts of Appeal have exclusive jurisdiction under the Constitution of the appeal in this proceeding, no right of the appellant can be affected because it has taken its appeal to this court. It would be our duty under the constitutional provision, which declares that no appeal shall be dismissed because taken to the wrong court, to transfer the cause for hearing on its merits to the District Court of Appeal. We deem it our duty, however, now that the question is presented here as to the right of appeal, to determine in the first instance, whether such right of appeal to either tribunal exists as a statutory right, and, as we have said, we are satisfied that it does.

Nor do we think there is any force in the contention that appellant is not entitled to move for a new trial. It appears to us so clear that it has that a less extended consideration of this matter need be had than is devoted to its right to an appeal. While counsel for respondent designates the proceeding under the bank commissioners' act as a summary one, there is nothing in the provisions of that act which indicates that the proceedings authorized to be taken under it are to be of a summary character. It is true that the act provides for the immediate commencement of an action by the Attorney General after notice from the bank commissioners of the condition of the bank, and provides that, after a decree ordering the corporation into involuntary liquidation, the bank commissioners shall proceed to make such liquidation as economical and expeditious as the interests of the creditors, depositors, and stockholders will admit. This, however, has relation to the duty of the Attorney General and the bank commissioners. There is nothing in the terms of the act itself with reference to the proceedings to be had under it indicating that any summary or hurried action is to be had. With relation to such proceedings, it simply provides that when the bank commissioners have unanimously concluded that unsafe practices are being pursued by officers of the bank, or that the bank is insolvent, they shall immediately take control of the banking corporation and notify the Attorney General, who shall immediately commence suit against the corporation to enjoin it from the transaction of further business. If upon the trial it is found by the court that the corporation is solvent and may safely continue business, the court shall dismiss the action and order the property restored to the corporation; but if it finds that it is unsafe for such corporation to transact business, or that it is insolvent, it shall order such corporation into involuntary liquidation, issue an injunction restraining further transaction of business by it, appoint a receiver, and order the property of the bank to be delivered to him for purposes of liquidation. This is all the provision made in the act with reference to the suit it authorizes to be brought under it. It provides for no special method of procedure, and, in its absence, of course, the suit is to be commenced and prosecuted under the same formal provisions of the Code of Civil Procedure as apply generally to the trial of ordinary actions. The parties are to be brought in under the usual process, the ordinary forms of pleadings are to be adopted, issues of law may be raised and issues of fact presented, findings made, and judgment and decree entered. As the general rules of pleadings and procedure concededly apply to any action brought under the act, at least up to the entry of judgment, it is difficult to understand why a limitation should be placed upon the right of a defendant to invoke the further provisions of the law generally applicable where issues of fact are involved, and be denied the right usually conferred thereby to move for a new trial. We perceive no reason for the distinction. There is nothing in the act itself denying the right to move for a new trial. The rule is that whenever, under the pleadings in a suit, an issue of fact is presented to a court, which is to be determined by the preponderance of evidence submitted on the issue, a party is entitled, after a decision or finding of the court on such issue, to have the court re-examine it upon a motion for a new trial, and this rule applies whether the action be one at law or equity or in special cases or special proceedings. This is the general rule as to all trials where an issue of fact is involved and determined (sections 588, 656, 657, Code Civ. Proc.), and there is nothing in the act taking away the right to move for a new trial, and nothing in the provisions of the Code limiting its exercise to actions or proceedings other than special proceedings of the character here involved. Under section 10 of the bank commissioners' act the issue involved, where an issue is made at all, is one of fact. This was the issue made by the pleadings in this case and found adversely to the defendant, and under the general rule we are satisfied that the defendant had a right to move for a new trial.

There is nothing in the case of Estate of Franklin, 133 Cal. 584, 65 Pac. 1081, or in Packard v. Craig, 114 Cal. 95, 45 Pac. 1033, cited and relied on by respondent, opposed to this conclusion. In the Franklin Case, it was held that a motion for a new trial was not applicable to a probate order settling the annual account of an executrix upon a contest as to its items; that such a contest in a probate proceeding did not assume the character of a civil action so as to make the provisions of the Code of Civil Procedure, relative to new trials, applicable to it. The marked and essential difference between the contest involved in the Franklin Case and the proceeding here is that in this proceeding it not only assumed the character of a civil action, but was in fact conducted under the rules governing pleading and procedure in civil actions and was the only way it could have properly been conducted, and hence the provisions of the Code of Civil Procedure governing new trials are applicable to it for the very reason that they were held inapplicable in the Franklin Case. Packard v. Craig, supra, cited by respondent, was an election contest, and it was held that, under the provisions of the Code of Civil Procedure providing for such contests, a motion for a new trial had no place in such action. The provisions of the Code are practically no different from those embraced in the act of 1850 on the same subject referred to in Dorsey v. Barry, 24 Cal. 449, and other cases referred to and cited in the Packard Case. All these cited cases, and the Packard Case, hold that the act of 1850, and the present Code provisions which follow it, provide for a complete mode of procedure in election contests, and that this "special procedure was withal so complete in itself that it was manifestly the intention of the Legislature that the litigation should be kept to the method which the act prescribed and end where it ended," and therefore that this class of cases was not within the scope of the provisions relating to new trials; that in such complete procedure no provision is made for the reexamination of issues of law or fact, but provision is made only for an appeal.

Of course, where a complete scheme of procedure is provided by the statute from the commencement of the action to the entry of judgment and expressly provides for an appeal and makes no provision for a new trial, the latter remedy is not available. This would appear plain, and proceeds upon the well-recognized principle that, where a particular method of review is provided, it is exclusive of all other methods. And, in election contests, that a new trial is not contemplated is not only apparent from the scheme of procedure which provides only for an appeal, but it is further apparent from section 1127, Code Civ. Proc., applying to such contests, that no such right could be availed of. This section 1127 provides that when a judgment annulling or setting aside an election is entered, and no appeal is taken within 10 days thereafter, the commission of office issued is void, and the office vacant. This section is incompatible with the existence of an effectual right to move for a new trial. However, as we say, the Packard and kindred cases based the denial of the right to move for a new trial on the fact that a complete mode of procedure is provided by the Code in election contests, and on that alone. But the reasoning of those cases can have no application to the proceeding at bar, as the latter does not provide for any mode of procedure at all. It provides, as we have pointed out, only for the commencement of a suit, leaving the general rules of procedure, including the right to move for a new trial which applies in other cases, to apply to it.

The matter requires no further discussion. We are satisfied that the right to move for a new trial and the right to appeal exist as to suits brought under the provisions of the bank commissioners' act, and that the motion to dismiss the first appeal should be denied.

As to the motion to dismiss the second appeal, it is granted. The appellant having taken a valid appeal in the first instance, no right to take a second exists.

We concur: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.

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152 Cal. 246

TURNER v. MARKHAM. (L. A. 2,082.)

(Supreme Court of California. Nov. 7, 1907. Rehearing Denied Dec. 5, 1907.)

1. APPEAL — RIGHT OF REVIEW—ESTOPPEL—ACCEPTANCE OF BENEFITS.

A party cannot accept the benefits of a judgment and appeal from it, and, if he accepts the benefits, he affirms the validity thereof, and is estopped from prosecuting his appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 979–994.]

2. SAME.

A judgment debtor who, pending his appeal from a judgment subjecting his homestead to execution under Civ. Code, §§ 1245, et seq., accepts part of the proceeds from the sale of the homestead, as the amount of his exemption, is estopped from prosecuting the appeal, since, if he succeeds in overthrowing the sale, the purchaser may, under the express provisions of Code Civ. Proc. § 708, recover from the judgment creditor the amount paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 973–994.]

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by W. D. Turner against H. H. Markham. From a judgment for plaintiff, defendant appeals. Dismissed.

Wright, Bell & Ward, Walter J. Trask, and Benj. E. Page, for appellant. Hunsaker & Britt and Porter, Sutton & Cruickshank, for respondent.

HENSHAW, J. Plaintiff, a judgment creditor of defendant, successfully undertook to subject the homestead of defendant to execution, under sections 1245 et seq. of the Civil Code. The homestead property was sold for about $20,000. Defendant Markham has taken this appeal from the court's order and judgment so subjecting the homestead to execution sale. Pending his appeal, he accepted from the sheriff $5,000, to which he was entitled as the amount of his homestead exemption. Respondent now moves to dismiss his appeal upon the ground that, having accepted the fruits of the judgment, he is estopped from further prosecuting his appeal from it. It is, of course, the general rule that a party litigant cannot accept the benefits of a judgment and appeal from it. He has his option to proceed with his appeal or to accept what the judgment may award him and to forego his appeal. If he does accept the fruits of the judgment, his election so to do estops him from further prosecution of the appeal. It is, in effect, his affirmance of the validity of the judgment against him. People v. Burns, 78 Cal. 645, 21 Pac. 540; In re Baby, 87 Cal. 200, 25 Pac. 405, 22 Am. St. Rep. 239; Estate of Shaver, 131 Cal. 219, 63 Pac. 340; Storke v. Storke, 132 Cal. 349, 64 Pac. 578; County of San Bernardino v. County of Riverside, 135 Cal. 618, 67 Pac. 1047.

By appellant, however, it is argued that this is not the simple case of a judgment creditor accepting the fruits of the judgment; that, in any event, he was entitled to the $5,000 which he took; and that the acceptance of the $5,000, which was unquestionably his, should not be held to operate to destroy his right to have determined the question as to whether or not his homestead should have been subjected to execution process and sale. Moreover, he contends that his acceptance of the $5,000 was not voluntary, but was under a certain sort of legal compulsion, because if he had refused to accept the money and allowed it to remain in the hands of the sheriff for more than six months, pending the determination of his appeal, that money in turn would have been liable to seizure at the hands of his creditors. It is true, as appellant says, that the amount of money to which he was entitled was not in dispute. But none the less the very matter in controversy was whether his homestead should take the form of money or of land, and in accepting the money there was an acquiescence upon his part in the judgment which decreed the form which the exemption should take. In re Baby, 87 Cal. 201, 25 Pac. 405, 22 Am. St. Rep. 239, the appellants appealed from a decree of distribution. Pending their appeal, they received and receipted for the distributive share of the estate awarded them by the decree. Their contention upon the appeal was that they were entitled to more than the decree gave them. This court declared that their acceptance amounted to a satisfaction of judgment, which satisfaction became "the last act and end of the proceeding," and upon motion dismissed the appeal. So, also, in Estate of Shaver, 131 Cal. 219, 63 Pac. 340, the court, dismissing a similar appeal, declared: "The precise question involved herein was presented in Estate of Baby. * * * The right to accept the fruits of a judgment and the right of appeal therefrom are not concurrent. On the contrary, they are totally inconsistent. An election to take one of the courses is therefore a renunciation of the other." These cases are cited in illustration of the length to which the rule has been carried. Clearly no estoppel could be said to have arisen against the appellants because of their action in accepting the judgment, since the position of the adverse party—the estate or the other heirs, devisees, and legatees thereof—was in no way changed to its or their injury by the conduct of the appellants in accepting the amount awarded by the decree of distribution. Each side to the controversy there conceded that the appellants were entitled to the amount which they took, and the only question at issue was whether they were entitled to more than was awarded them, a question as to which the respondents on the appeal could not be injured by the appellants' acceptance of what admittedly they were entitled to. Yet nevertheless in these cases the rule of election was invoked. Much stronger than those cases is the one at bar. The appellant has accepted $5,000 and has devoted it to his own use. He is a judgment debtor in insolvency. If he succeeded upon his appeal in overthrowing the sale of his homestead, the purchaser at that sale could recover from the judgment creditor the full amount paid. Code Civ. Proc. § 708. So that, if this appeal should, under these circumstances, be successfully prosecuted, respondent would become liable for the $5,000 which appellant has taken to his own use. Here clearly is a situation presented where the appellant by his election has changed the position of the respondent to the latter's injury, and the doctrine of estoppel by election is clearly applicable.

The motion to dismiss is therefore granted.

We concur: LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; McFARLAND, J.

(152 Cal. 249)

In re SUTRO'S ESTATE. (S. F. 4,768.)*

(Supreme Court of California. Nov. 7, 1907.)

1. APPEAL — REQUISITES — BOND — APPLICATION TO NOTICE.

Notice of an appeal from a decree of distribution was served and filed May 31, 1906, and on June 4th following appellants served another notice of appeal identical with the first, except as to the date. On June 5th they filed an undertaking, reciting that the appellants named were about to appeal from the decree, etc., but failing to specify whether the appeal referred to was the one taken by the notice of May 31st or June 4th. *Held*, that the undertaking was ineffective to support either appeal, and, no other undertaking having been filed within five days succeeding May 31st, the notice of appeal filed on that day became ineffectual for any purpose, as expressly provided by Code Civ. Proc. § 940.

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*For opinion on petition for rehearing, see 92 Pac. 1027.

2. SAME.

Code Civ. Proc. § 940, provides that a notice of an appeal shall be ineffectual unless an undertaking given within five days after the service and filing of such notice. A notice of appeal was served and filed May 31, 1906, and another on the succeeding June 4th. No sufficient undertaking to perfect the first appeal was filed within five days, but on June 9th a second undertaking was filed, reciting that the appellants named were about to appeal from the decree, that they had filed their notice of appeal, and that in consideration thereof the undertaking was given, etc. *Held* that, as the first notice of appeal had become ineffective at the time this undertaking was given, it would be presumed that it applied to the second notice so as to be sufficient to perfect an appeal thereunder.

3. SAME—JOINDER IN APPEAL.

Code Civ. Proc. § 963, provides that an appeal may be taken from an order or judgment directing distribution of an estate or part thereof, and from an order refusing a new trial. Section 938 declares that any party aggrieved may appeal in the cases prescribed, and section 941 declares that the undertaking on appeal must be to the effect that the appellant will pay all damages and costs awarded against him on the appeal or on a dismissal thereof, not exceeding $300. *Held*, that under Code Civ. Proc. § 17, providing that the singular number includes the plural, and the plural the singular, the words "appeal," "appellant," and "party aggrieved" might be read so as to include the plural, and hence, where various persons were interested in defeating a decree of distribution appealed from, a single appeal in which they all joined, supported by a single undertaking in the sum of $300, was proper, though the appellants asserted different and distinct interests in the property.

4. SAME—INADEQUACY OF SECURITY.

Under Code Civ. Proc. § 941, authorizing an appeal on giving an undertaking that appellant would pay damages and costs not exceeding $300, the fact that the security thereby afforded may be inadequate does not affect the validity of the appeal.

5. SAME—MOTION TO DISMISS—ADVERSE INTEREST.

The claim that some of the appellants are not adversely affected by the decree appealed from, or have no interest in the controversy, should be considered in connection with the merits of the case, and not on a preliminary motion to dismiss.

6. NEW TRIAL—MOTION—WHEN AUTHORIZED.

A motion for a new trial is authorized on determination of a contested petition for partial distribution of real estate belonging to a decedent's estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 4, 5.]

In Bank. Appeal from Superior Court, San Francisco County; J. V. Coffey, Judge.

Petition by Kate Nussbaum and others for distribution of certain lands, of which it was alleged Adolph Sutro died seised and intestate, to which Emma L. Merritt and others filed objections. From a decree in favor of petitioners, and from an order denying objector's motion for a new trial, they appeal. On motion to dismiss. Granted as to the appeal attempted to be taken May 31, 1906, and denied as to the appeal taken June 4, 1906.

See 77 Pac. 402.

Morrison & Cope, Bradley & McKinstry, and J. C. McKinstry, and U. S. Webb, Atty. Gen., for appellant. Charles S. Wheeler and Garret W. McEnerney (J. F. Bowie, of counsel), for respondent.

SHAW, J. This cause comes before us upon a motion to dismiss certain appeals.

Kate Nussbaum, Rosa V. Morbio, Clara A. English, and Edgar E. Sutro, four of the surviving children of the deceased, and John C. Brickell, as trustee of Edgar E. Sutro, petition the superior court for the distribution to each of the said four children of a one-sixth interest in certain lands of said deceased claimed by them as heirs, which lands, they alleged, the deceased did not dispose of by his will. The appellants herein appeared in the superior court to oppose the petition for partial distribution, and filed answers in opposition thereto. Although they all opposed the distribution, they did not all do so upon the same grounds, nor join in one answer. Their respective interests in the estate were not identical. Emma L. Merritt was a child of the deceased, the executrix of his will, a legatee thereunder, and trustee of a certain trust therein declared in the land in controversy. In her answer she denies that the deceased did not, by his will, dispose of the property in question, or that the petitioners, or either of them, were entitled to a share therein, or that the estate was in a condition for partial distribution. She filed a separate answer as trustee, setting up the trust, and denying the intestacy and the right of the petitioners to a share of the lands. The will purports to create another trust covering the property in question, which trust was to begin after the expiration of the trust estate devised to Emma L. Merritt. The appellants William W. Morrow, George C. Pardee, E. E. Schmitz, Frank J. Murasky, and George A. Newhall answered the petition, averring that they were constituted by the will trustees of the last mentioned trust, and that, as such, they were, or at the expiration of 10 years specified as the duration of the trust to Emma L. Merritt would be entitled to the property, and authorized to administer and dispose of it in accordance with the terms of the will, and also denying the intestacy and the right of petitioners. Thereafter the petition came on for hearing, all the appellants appeared in opposition thereto, a trial of the issues was had, the evidence of the respective parties heard, findings made by the court, and thereupon a decree was made and entered, distributing to each of the petitioners the one-sixth interest in the property, as prayed for. No separate trial was had with respect to each answer, but the whole case was heard and determined upon the same evidence. The appellants moved for a new trial of the cause, which motion was denied.

On May 31, 1906, the appellants served and filed a notice of appeal, stating therein that they, and each of them, appealed from certain parts of the decree of distribution. On June 4, 1906, they served and filed another notice of appeal, identical with that of May 31st, in all particulars, except the date. On June 5, 1906, an undertaking on appeal was filed reciting the fact that the appellants, naming them, were about to appeal from the decree, and stating that "in consideration of the premises and of said appeal" the surety promised that the appellants would pay "all damages and costs which may be awarded against them, or any of them, on the appeal, or on the dismissal thereof." It did not, however, specify, or in any manner state, whether the "appeal" referred to was that taken by the notice of May 31, 1906, or the one taken by the notice of June 4th, either of which appeals was at the time the undertaking was made and filed valid and effectual, provided a valid undertaking to sustain it had been then filed. The undertaking, being ambiguous in respect to the appeal referred to, was of no effect whatever, and did not support either appeal. Home & L. A. v. Wilkins, 71 Cal. 626, 12 Pac. 799; McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16; People v. Center, 61 Cal. 191; Corcoran v. Desmond, 71 Cal. 103, 11 Pac. 815; Centerville v. Bachtold, 109 Cal. 113, 41 Pac. 813; Estate of Heydenfeldt, 119 Cal. 347, 51 Pac. 543. No other undertaking was filed within five days succeeding May 31, 1906, and consequently the appeal taken by the notice filed on that day became "ineffectual for any purpose." Code Civ. Proc. § 940.

On June 9, 1906, another undertaking on appeal was filed in the cause. It recited that the opponents of the said petition for partial distribution, naming the appellants as such, were about to appeal from the said decree, or a part thereof, and had filed their notice of appeal therefrom, and stated that "in consideration of the premises, and of said appeal," the surety therein promised that the appellants would "pay all damages and costs which may be awarded against them, or any of them, on the appeal, or on a dismissal thereof." This undertaking also failed to state whether the appeal referred to therein was that of May 31st, or that of June 4th. It is claimed that this makes it void, and that the appeal of June 4th is consequently ineffectual, for the same reasons as those above stated with relation to the appeal of May 31st. We do not think the same result follows. When the first undertaking was filed, both appeals had been taken, and both were still alive and capable of being perfected. The time for filing the undertaking had not expired on either of them. The undertaking might have been intended to support either of the pending appeals, and would have supported either, if the other had not been in existence to create the latent ambiguity which made it void as to both. It would have been difficult, if not impossible, for the respondent to show what appeal the surety intended to answer for, and certainly no inference in favor of either could be drawn either from the instrument itself, or from the facts aliunde, shown by the record referred to therein. In respect to the undertaking of June 9th, the case is different. At the time it was made and filed there was but one effectual appeal existing. An undertaking to support the appeal of May 31st, executed on June 9th, would have been mere waste paper, and its execution a useless act. The appeal of June 4th was in existence, however, and upon that appeal a valid undertaking could at that time be given, and this appeal is accurately described in the undertaking in question. Under these circumstances, the surety in the latter understanding will be conclusively presumed to have intended to undertake for the appeal then in force, the only appeal for which he could then execute a valid undertaking, and not to have referred to a prior ineffective appeal, as to which the contract would have been wholly inoperative. The presumption that he intended to make a valid contract removes any latent ambiguity that might otherwise have been raised by the fact of there having been two appeals taken. We hold the undertaking to be valid.

It is further contended that there are, in fact, four appeals instituted by the notice of June 4th, that a separate undertaking for $300 each should have been given for each of these appeals, and that, as the undertaking of June 9th is for $300 only, purports to refer to but one appeal, and does not specify which one, it is void as to all, and that, for this reason, all the appeals must be dismissed. This contention also applies to the appeal from the order denying a new trial, which is taken by the same parties representing the same interests. This claim is based on the fact that the respective appellants did not assert the same interests or rights in the estate of the deceased, and did not object to the distribution upon precisely the same grounds, and upon the theory that two or more persons who seek, upon different grounds, and on behalf of different rights or interests, to defeat an application for partial distribution, cannot join in a single appeal from the decree, but must appeal separately and must give a separate undertaking upon each appeal. In support of this proposition, it is urged that some of the appellants are not aggrieved, and that the appeal as to them must be dismissed with costs, and that, if the sureties should pay this cost, it would pro tanto discharge the undertaking, and leave the remaining appeals to stand without the security of the $300 undertaking which the statute prescribes; that the questions to be decided in behalf of some of the appellants are not identical with those presented by the others; that there is no joint or common interest between them with respect to the appeals; that one may succeed and the others fail; that the one who succeeds will recover of respondents all the costs of the appeal, whereas, the respondents will be entitled to recover their costs against those who fail, and from these conditions it is feared that confusion and injustice would ensue. Further, it is said, with some inconsistency, that, if there is but one appeal, the judgment must be either reversed or affirmed as to all, and that, if the appellants present different rights and questions, this court will be unable to determine what judgment to give, and, lastly, that the terms of the statute conferring the right of appeal require separate undertakings to be given for each of the appellants, or set of appellants, representing separate interests, or setting up distinct and different grounds of opposition to the relief sought and given by the judgment or order appealed from. We are of the opinion that these objections are untenable. The Code provides that "an appeal" may be taken from an order or judgment directing a distribution of an estate or part thereof, and from an order refusing a new trial (section 963, Code Civ. Proc.), that "any party aggrieved may appeal in the cases prescribed" (Code Civ. Proc. § 938), and that the undertaking on appeal must be to the effect that "the appellant will pay all damages and costs awarded against him" on the appeal or on a dismissal thereof, not exceeding $300 (Code Civ. Proc. § 941). "The singular number includes the plural and the plural the singular" (Code Civ. Proc. § 17), and hence these provisions must be read as if the words "appeal," "appellant," and "party aggrieved" were in the plural. So read, they authorize any number of parties, claiming to be aggrieved, to join in an appeal and to support such appeal by one undertaking in the prescribed sum of $300. This is the literal meaning of the language thus construed, and no good reason appears for giving it a narrower construction as applied to the present case. The object of the proceeding in the lower court was to obtain a distribution to the petitioners of their asserted shares in the property in question, and thereby to free those shares from the further control of the executrix and from further charges or burdens to which they might be subjected by reason of the administration of the estate. The claim was founded upon the theory that the will made no valid disposition of the lands sought to be distributed. The appellants in their various capacities had, or claimed, interests in the property by virtue of the provisions of the will, and they were all interested in upholding the will and the validity of the several provisions made by it with respect to the property. They were therefore all interested in preventing the distribution prayed for. To do this they made common cause in the court below upon the trial of the case. They are all alike desirous of procuring from this court a reversal of the decree of distribution there made. Technically, the appeal is not taken to establish and enforce the respective rights and interests which the appellants respectively claim in the property, but to vacate the decree of the court below distributing the property to the petitioners. The fact that, if the decree is reversed, the respective appellants will upon the subsequent proceedings in the court below assert different and distinct interests in the property and that the decision on this appeal may establish their rights thereto, does not have the effect of compelling them to take separate appeals from the decree of distribution which operates to defeat all their interests if it shall stand affirmed. As they all seek to reverse this decree, they should be allowed to join in one appeal for that purpose. The terms of the statute are not so imperative as to require a different construction.

The costs and damages of a respondent on an appeal which does not stay proceedings are insignificant. There is no probability that the penalty of $300 will prove inadequate in this case. But, if it were true that it might prove insufficient in amount, it would not defeat the appeal. The statute might have allowed the appeal without providing any security to the respondent for costs and damages. The fact that the security provided may prove inadequate is therefore immaterial, except as it may have a bearing upon the proper interpretation of the statute. We do not think the remote contingency that the sum fixed may not be sufficient security to protect the respondent in cases where several parties, differently interested against a judgment of the character here involved, join in one appeal therefrom, is of sufficient importance to compel the narrow, technical, and somewhat forced construction contended for. There may be a possibility that the respondents may suffer from an insufficient undertaking. But in every other material respect the joinder in one appeal in a case like the present one is to their advantage. There will be less cost to be incurred by them, a more speedy determination of all the questions upon which their right depends can be obtained, one transcript only need be filed, and hence the costs against them will be much less if the appeal succeeds, and, if it is successful in part only, the court has full power to adjust the costs as justice may require. Possibly there may be some cases where the interests of two or more parties are so different and distinct and the consequences of a successful appeal, in respect of subsequent proceedings, are so grave that a joint appeal on behalf of all would not be permissible. It was so held in Sangamon Co. v. Brown, 13 Ill. 207, where two or more parties, owning different tracts of land through which the county authorities were proceeding to condemn a right of way for a road, attempted to join in a single appeal from the county board to the county court, and where, if successful, separate trials in the appellate court would have been necessary as to each one.

We do not regard that case as authority in the case here presented. Our conclusion upon the whole matter is that there is but one appeal from the judgment or decree, and but one appeal from the order refusing a new trial, and that the bonds are sufficient upon each appeal.

The claim that some of the appellants are not adversely affected by the decree appealed from, or have no interest in the controversy, is one which would properly be considered in connection with the merits of the case. So far as that contention is concerned, the motion to dismiss may be renewed upon the final submission of the appeal.

The proposition that a motion for a new trial cannot be entertained in a proceeding for partial distribution, and hence that an appeal will not lie from an order refusing such new trial, has been practically decided against the respondents in a number of cases in this court. Leach v. Pierce, 93 Cal. 624, 29 Pac. 238; Estate of Ryer, 110 Cal. 556, 42 Pac. 1082; Estate of Bauquier, 88 Cal. 315, 26 Pac. 178, 532; Estate of Walkerly, 94 Cal. 353, 29 Pac. 719; Estate of Spencer, 96 Cal. 449, 31 Pac. 453; Estate of Hartmann, 140 Cal. 467, 74 Pac. 7. This is one of the grounds of the motion to dismiss the appeal from the order, but it was not pressed upon the argument and needs no further consideration. As above stated, the appeal of May 31, 1906, became ineffectual for any purpose upon the failure to file a valid undertaking in support of it. In accordance with the uniform practice of this court that appeal will be dismissed.

The motions to dismiss the appeals are denied, except as to the appeal attempted to be taken from the decree by the notice of May 31, 1906, and, as to that appeal, the motion is granted and that appeal is dismissed.

We concur: BEATTY, C. J.; McFARLAND, J.; ANGELLOTTI, J.; LORIGAN, J.

(152 Cal. 242)

LOS ANGELES RY. CO. v. CITY OF LOS ANGELES. (L. A. 1,847.)

(Supreme Court of California. Nov. 7, 1907.)

1. STREET RAILWAYS—FRANCHISE—CONSTRUCTION.

Though the rights of a street railway company and a city are governed by the contract contained in a franchise granting a right of way, the provisions of Civ. Code, § 502, relating to such franchises enters into the contract, and must be considered in construing it.

2. MUNICIPAL CORPORATIONS — ORDINANCE CONFLICTING WITH STATE LAWS.

A city in granting a street railway franchise is only an agency of the state, and, if there is any conflict between the granting ordinance and the general laws of the state, the state laws will govern.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 175, 1432, 1482.]

3. STREET RAILROADS—IPSO FACTO FORFEITURE—PROVISIONS OF STATUTE—ORDINANCE.

Civ. Code, § 502, authorizes the governing body of a municipal corporation to fix the time for completion of work on a street railway to which a franchise is granted, and provides that failure to comply with the provisions of the ordinance "works a forfeiture" of the right of way and franchise. *Held*, that the words quoted make the statute self-executing. Hence, where a city ordinance granting a franchise to a street railway company fixed the time for completing the work, and provided that, if it was not completed by the time set, the franchise should be forfeited as to the portion uncompleted, failure to complete the work within the time prescribed works an ipso facto forfeiture of the uncompleted portion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railways, § 50.]

4. SAME—FORFEITED FRANCHISE — ENJOINING REMOVAL OF TRACKS.

When failure to complete a street railway within the time prescribed in the franchise ordinance works an ipso facto forfeiture of the uncompleted portion of the right of way, the city cannot be restrained from interfering with laying of tracks thereon or from removing tracks unlawfully laid; the railroad not being in possession and having no right to lay tracks thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railways, § 50.]

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by the Los Angeles Railway Company against the city of Los Angeles to enjoin interference with tracks along a right of way. From a judgment for defendant, plaintiff appeals. Affirmed.

Bicknell, Gibson, Trask, Dunn & Crutcher, for appellant. W. B. Mathews and Herbert J. Goudge, for respondent.

BEATTY, C. J. This is an appeal by the plaintiff—a street railway corporation—from a judgment of the superior court denying its prayer for an injunction restraining the defendant from interfering with the exercise of an alleged franchise. The record consists of the pleadings, certain stipulated facts, and the decree, from which it appears that by an ordinance of the city of Los Angeles, duly adopted May 11, 1897, the predecessors of plaintiff were granted a franchise to construct and operate a street railway over and along certain streets of that city, the work of construction to be commenced within 6 months, and completed within 18 months from the passage of the ordinance. By a subsequent ordinance the time of completion was extended six months, but at the end of this extended time—May 11, 1899—only 1¾ miles out of 4¾ miles of the projected road had been built, leaving 1 mile at one end and 2 miles at the other end of the route covered by the franchise entirely vacant and unoccupied, in which condition it remained until May 1, 1903, a period of four years. One of the express conditions contained in the ordinance granting the franchise was the following: "If said road is not fully completed and in operation within said time, then this franchise shall be forfeited as to the portion thereof uncompleted." The grantees of the franchise paid the city therefor the sum of $5,000. No ordinance declaring the franchise forfeited was ever passed or adopted, but on May 15, 1903, while the plaintiff was engaged in the work of extending its tracks over a portion of the route described in the ordinance which had been left unoccupied from May 11, 1899, to May 1, 1903, the defendant, by its police officers and superintendent of streets, entered upon this new construction, compelled plaintiff to suspend work, and threatened to tear up and remove the newly laid tracks. To enjoin this proceeding the present action was commenced May 15, 1903. It appears from the decree that an injunction pendente lite was issued restraining defendant, its officers, agents, etc., from tearing up, removing, destroying, or in any wise interfering with the new portion of the track then in process of construction, and this temporary injunction remained in force until October 12, 1905, when it was dissolved by the final decree from which this appeal is prosecuted.

The question whether the superior court erred in dissolving the temporary injunction and denying a permanent injunction depends mainly upon the further question whether the franchise of plaintiff was forfeited ipso facto by its failure to complete the road within the time limited by the grant. The respondent claims that it was so forfeited under the provisions of section 502 of the Civil Code, while the appellant contends that, without a decree declaring a forfeiture in an action by the Attorney General in behalf of the state, the franchise remained unimpaired. It is argued in support of this view that nothing is involved in this controversy beyond the respective rights of the plaintiff and defendant growing out of and dependent upon the ordinance granting the franchise, which, it is contended, embraces all the terms of the contract, and which upon the received construction of grants providing for forfeitures upon breach of conditions subsequent, means no more than that their breach entitles the grantor to maintain an action to enforce the forfeiture. The respondent, on the other hand, contends that section 502 of the Civil Code in force at the date of the grant is a part of the contract, and that it is self-executing in working a forfeiture for failure to complete the construction of the road within the time specified in the ordinance.

We agree with the appellant that the rights of the parties are measured by the terms of their contract, but we think the statute (Civ. Code, § 502) enters into the contract, and that its provisions must be taken into account in construing the contract. The city in granting a street railway franchise is but an agency of the state, and, if there were any conflict between the ordinance containing the grant and the general laws of the state, the latter would govern. In this case, however, there is no conflict. The ordinance provides that in case of a failure to complete the work within the time limited the franchise shall be forfeited, but, if this provision is not self-executing, it is not in conflict with a provision of the statute which is self-executing; and so the only question is as to the proper construction of these words of section 502 of the Civil Code: "A failure to comply with either of the foregoing provisions of this section or with either of the provisions of the ordinance granting said right of way *works a forfeiture* of the right of way and also of the franchise, etc." We are of the opinion that the words italicized make the statute self-executing. A judgment declaring and enforcing a forfeiture does nothing more than work a forfeiture, and when a breach of condition works a forfeiture there is no office for a judgment to perform, except, perhaps, to supply conclusive evidence of the fact—evidence which may in certain contingencies be useful, though not for all purposes essential.

Our conclusion upon this point is fully supported by the cases of Oakland R. Co. v. Oakland B. B. & F. V. Co., 45 Cal. 365, 13 Am. Rep. 181, and Upham v. Hosking, 62 Cal. 250. In neither case was the language providing for a forfeiture any stronger or more explicit than the language of section 502, Civ. Code, but in both it was held that the forfeiture was complete upon failure to comply with the conditions of the respective grants. Those decisions have been frequently cited and never overruled by this court, though questioned in other jurisdictions. Borland v. Lewis, 43 Cal. 569, is another case in which the provision for a forfeiture was held to be self-executing, but there the language of the statute was different and stronger than that in question here. A large number of decisions in other jurisdictions are cited by the appellant, many of which support its contention; and many of an opposite tendency are cited by respondent. We do not consider it necessary to review these cases, since our own decisions must control. The decision in People v. Electric Ry. Co., 91 Cal. 338, 27 Pac. 673, so far as it touches the question we are considering, implies that, if the time allowed for construction had expired before the commencement of the action, the franchise would have been forfeited, but the question whether the provision of section 502, Code of Civil Procedure, for forfeiture of the franchise for failure to complete the work in time is self-executing, would not have been involved. In Santa Rosa, etc., Co. v. Central Co., 112 Cal. 436, 44 Pac. 733, the question was involved and the final affirmance of the judgment of the superior court by reason of the equal division of the qualified justices of this court was in effect a decision that the forfeiture in such cases is self-executing. It follows from this conclusion that the plaintiff, having forfeited its right to use or occupy the street which it had left vacant for four years after the expiration of the time limited for the completion of its road, had no more right to lay its track there than one who had never been granted a right of way, and the city was clearly within its right in preventing the trespass.

Some cases are cited in support of the contention that even if the right of way was forfeited ipso facto on the 12th of May, 1889, the city could not lawfully oust plaintiff from the possession of the street by force. But those cases are not in point. The plaintiff was not in possession. It was attempting unlawfully to take possession, and the city was merely resisting an unlawful entry upon a street which its duty to the public required it to keep clear of unauthorized obstructions.

The judgment of the superior court is affirmed.

We concur: SHAW, J.; McFARLAND, J.; SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.

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6 Cal. App. 520

HAYES v. BOARD OF TRUSTEES OF CITY OF OCEANSIDE, CAL., et al. (Civ. 383.)

(Court of Appeal, Second District, California. Oct. 2, 1907.)

1. Intoxicating Liquors—License—Application—Requisites.

A city ordinance provided that liquor licenses should only be granted by the board of trustees on an application signed by five resident freeholders of the city residing or doing business within 1,200 feet of the premises where the liquor was proposed to be sold, stating that the applicant was a sober and suitable person to conduct the business and describing the premises, that, on the filing of the application, the board should investigate the qualification of the applicant and suitability of the premises, and, unless both facts were found in the affirmative, the application should be denied. *Held*, that an application was not objectionable because it failed to state that the signers possessed the requisite qualifications.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 64, 66.]

2. Same—Jurisdiction of Board.

Where a city ordinance authorized the city's board of trustees to grant liquor licenses on an application signed by certain resident freeholders possessing certain qualifications, in case the applicant was qualified and the place was suitable, whether the application was signed by the requisite number of persons possessing the prescribed qualifications, the qualifications of the applicant, and the fitness of the premises were all questions of fact for the board, and their decision thereon was conclusive, in the absence of fraud collateral to the question, no provision being made for review, under the rule that, when the jurisdiction of an inferior tribunal depends on the existence of facts, an adjudication by such tribunal of the existence of the facts is final.

3. Prohibition—Right to Writ—Other Adequate Remedy.

Though a city's board of trustees proceeded to make an order granting a liquor license without jurisdiction, the aggrieved party would have an adequate remedy by a writ of review, and could not therefore maintain prohibition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, §§ 4–19.]

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Application for prohibition by Fred Hayes against the board of trustees of the city of Oceanside and others. From a judgment dismissing the petition and denying the writ, plaintiff appeals. Affirmed.

T. L. Lewis, for appellant. D. Rorick and L. E. Dadmun, for respondents. C. W. Pendleton, amicus curiæ.

SHAW, J. This is a proceeding instituted by appellant for a writ of prohibition against the board of trustees of the city of Oceanside, requiring it to desist and refrain from making an order granting a license to one Hale Backensto to sell intoxicating liquors at retail in said city. In accordance with the prayer of the petition, an alternative writ was issued directed to said board and requiring it to show cause why it should not be restrained from issuing said license. Respondents demurred to the petition, upon the grounds, among others, that the petition did not state facts sufficient to entitle petitioner to the writ as prayed for, and that the court had no jurisdiction of respondents or the subject-matter of the action. The demurrer was sustained. Petitioner elected to stand upon his petition, whereupon the court rendered judgment dismissing the petition and denied the writ.

Oceanside is a municipal corporation of the sixth class, and by its board of trustees duly adopted an ordinance providing for the granting of licenses to sell intoxicating liquors in said city, which ordinance, among others, contains the following provisions:

"Sec. 7. No license to sell intoxicating liquors shall be ordered or authorized to be issued by the board of trustees unless prior thereto the applicant for said license shall have filed in the office of the city clerk of said city an application for such license, signed by five resident freeholders of said city, residing or doing business within twelve hundred feet of the premises where said intoxicating liquor is proposed to be sold, stating that the applicant is a sober and suitable person to conduct the business of selling intoxicating liquors, and describing the place where said business is to be carried on.

"Sec. 8. Upon the filing of an application as required in section seven, the board of trustees shall investigate the qualifications of the applicant and the suitability and fitness of the premises in which the proposed business of selling intoxicating liquor is to be carried on, and unless it shall affirmatively appear that the applicant is a suitable person, and the premises are fit and in a suitable location for the said business, said application shall be denied."

There is nothing in the point urged by appellant that the application should have stated that the signers thereof possessed the qualifications prescribed in section 7 of said ordinance. It was in proper form, and it purports to be signed by 12 persons who, after describing the place where the business is to be conducted, certify that they "are acquainted with Hale Backensto, the applicant above named, and that he is a sober and suitable person to keep and conduct such place and business." Said section prescribes that the five persons whose signatures shall be affixed to the application shall be "resident freeholders of said city, residing or doing business within twelve hundred feet of the premises where said intoxicating liquor is proposed to be sold," but it does not require that such facts shall be set forth in the application. The only requirement is that they shall describe the place where the business is to be carried on, and state that the applicant is a sober and suitable person to conduct it. The presentation of this application containing the statements required by the ordinance and purporting to be signed by the requisite number of persons, authorized the board to proceed with an adjudication of the facts upon the existence of which its power to grant the license depended; that is, whether or not the application was signed by the requisite number of persons who possessed the qualifications prescribed by the ordinance, and also investigate the qualifications of the applicant and the fitness of the premises in which it was proposed to carry on the business of selling liquor at retail. Whether the application was signed by the requisite number of persons possessing the prescribed qualifications, as well as the qualifications of the applicant and the fitness of the premises, were all questions of fact submitted by the ordinance to said board for its decision, which, when made, was conclusive. The law is well settled that, when the jurisdiction of an inferior tribunal depends upon the existence of facts, an adjudication by such tribunal of the existence of such facts is a conclusive determination of the question of its jurisdiction and as to which there can be no review. Mooney v. Supervisors (Cal. App.) 83 Pac. 165; People v. Loyalton, 147 Cal. 774, 82 Pac. 620; People v. Los Angeles, 133 Cal. 338, 65 Pac. 749. In Wells on Jurisdiction, § 61, it is said: "Where the jurisdiction of even an inferior court is dependent on a fact which that court is required to ascertain and settle by its decision, such decision is held conclusive." In the proceeding at bar no provision is made for a review, and, in the absence of any fraud collateral to the question, no means exists for correcting the adjudication of the board, however erroneous its decision may be.

A further ground of demurrer interposed by respondents was that the petition showed on its face that petitioner had a plain, speedy, and adequate remedy in the ordinary course of law. It appears from the petition that the board of trustees had taken no action in the matter, but it was alleged that it threatened to and would, unless restrained, grant said license. The application, as we have seen, was sufficient to justify the board in proceeding with an adjudication, and it is quite likely that if without jurisdiction to grant the license it would, upon a proper hearing, discover its want of jurisdiction, and, even if it proceeded to make an order granting the license in the absence of jurisdiction, the aggrieved party could suffer no injury, for the reason that he would still have an adequate remedy by writ of review. The writ of prohibition should not ordinarily issue where certiorari will lie, unless it appears that the applicant for the writ will necessarily be injured if the tribunal sought to be prohibited is permitted to proceed. Town of Santa Monica v. Eckert et al. (Cal.) 33 Pac. 880.

It is also urged by respondents that the petitioner is not a person or party beneficially interested in the matter. Our conclusion, however, renders it unnecessary to pass upon this point.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

6 Cal. App. 482

PEOPLE v. QUIMBY. (Cr. 51.)

(Court of Appeal, Third District, California. Oct. 1, 1907. On Rehearing, Oct. 30, 1907. Rehearing Denied by Supreme Court Nov. 29, 1907.)

1. HOMICIDE—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

One convicted of murder in the second degree is not injured by errors in instructions on murder in the first degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 720; vol. 15, Criminal Law, § 3161.]

2. SAME—EVIDENCE—INSTRUCTIONS.

Where, in a homicide case, the evidence showed that decedent, on meeting accused, charged him with killing a hog of decedent, and that accused denied the accusation; that decedent threw to the ground a knife he held in his hands, approached accused, and struck him blows about the face; that accused either stepped or was forced back a few feet by the impact of the blows, and almost concurrently with that movement drew a revolver and fired at decedent, killing him, and accused claimed that decedent had the knife in his hand when the blows were struck—the court properly charged on murder in the first and second degrees and on justifiable homicide.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 642-648.]

3. CRIMINAL LAW—INSTRUCTIONS—EVIDENCE.

The court in a criminal case may instruct on any material question on which there is any evidence deserving of any consideration; it being for the jury to determine what facts are proven by the evidence, and it being the duty of the court to state the law by which the jury are to be governed in their consideration of such evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1803-1807.]

4. HOMICIDE—EVIDENCE—SUFFICENCY — MURDER IN SECOND DEGREE.

In a homicide case, the evidence *held* to support a verdict of murder in the second degree.

5. SAME—INSTRUCTIONS.

On a trial for murder committed during a difficulty between accused and decedent, the court properly charged on murder perpetrated by means of poison, lying in wait, etc., as defined by Pen. Code, § 189, thereby explaining to the jury the forms in which, according to the varying circumstances, murder may present itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 644.]

6. SAME — JUSTIFIABLE HOMICIDE—INSTRUCTIONS.

Where the court in a homicide case gave a charge embodying the law concretely on the subject of justifiable homicide, a charge embodying the entire field of the law on the subject, in the language of Pen. Code, § 197, defining justifiable homicide, was not objectionable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 611-617.]

7. CRIMINAL LAW—INSTRUCTIONS—REVIEW.

In determining whether an erroneous instruction operated prejudicially to accused, the entire charge must be considered, and, if as a whole it correctly states the law, it is free from error, though selected passages may state a proposition without, at the same time and in immediate connection, stating the exceptions to which it is subject in its application to the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1990.]

8. HOMICIDE—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where the court in a homicide case correctly defined in its instructions malice essential to constitute murder in either degree, an erroneous charge that, where the circumstances of a killing show an abandoned heart, the killing is murder in the second degree, unless the evidence proves the existence in the mind of accused of the specific intent to take life, in which case the killing is murder in the first degree, was not prejudicial to accused, especially where he was convicted of murder in the second degree only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 715-720.]

9. SAME—THREATS—EVIDENCE — ADMISSIBILITY.

On a trial for homicide, evidence that decedent, prior to the time of the difficulty resulting in his death, declared that he expected to "die with his boots on," was properly excluded, where the name of accused was not mentioned by decedent in connection with his declaration, and where accused had no knowledge, at the time of the killing, of the statement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 399-413.]

10. CRIMINAL LAW—MISCONDUCT OF JUROR.

Proof that a juror in a homicide case inquired of the deputy sheriff having charge of the jury what punishment the law prescribed for manslaughter; that the officer replied that he did not know; that the juror stated that he thought it was from 1 to 10 years; and that the officer replied that might be so, but that he did not know—was not proof of misconduct warranting a reversal of a verdict of guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 2048-2053.]

11. SAME—MISCONDUCT OF DISTRICT ATTORNEY.

The misconduct of the district attorney in a homicide case arising from his remarks in his argument to the jury that he did not know the relevancy of the testimony of a third person, or he would have had him present, and that it was fair to presume that his testimony would not benefit accused or accused would have had him in court, was not ground for reversal, where on objection the court charged the jury to disregard the remarks, and stated that the personal views of counsel had no place in the deliberations of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1670, 1677, 1693.]

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Stephen A. Quimby was convicted of murder in the second degree, and he appeals. Affirmed.

John A. Wall, for appellant. U. S. Webb, Atty. Gen., for the People.

HART, J. Under an information charging him with the crime of murder, the appellant was convicted of murder of the second degree. He appeals from the judgment and an order denying his motion for a new trial.

The homicide occurred at a small village known as Darrah, in Mariposa county, on the 6th day of November, 1906, the day upon which the general election throughout the state was held that year. The polling place at Darrah on that day was in the public school building. The deceased, Richard Smither, had been prior to the fatal shooting at the residence of Richard Darrah, having gone there, accompanied by the latter, at about the hour of 11 o'clock a. m. The deceased and Darrah had a few drinks of whisky at the latter's house, and shortly thereafter the former went to the polling place, a distance of about 100 yards from Darrah's residence, having in his possession a bottle of whisky, a box of cigars, and a pocket knife, all of which articles he carried in his hands. Darrah stated that the deceased, while at the former's residence, extracted the cork from a bottle containing whisky by means of the large blade of his pocketknife, and added that "Smither was an expert at pulling out corks with a knife." The bottle taken to the polling place by the deceased was not, however, the bottle from which the deceased had removed the cork at Darrah's house, but was, as Darrah expressed it, "a bottle of whisky that was unopened." Upon reaching the schoolhouse, the deceased met the defendant, and immediately charged him with having shot and killed one of his (deceased's) hogs. The defendant declared the accusation to be baseless, whereupon the deceased, according to the testimony of all the witnesses, with the single exception of that of the defendant, who claimed that the deceased still had the knife in his hand when the blows were struck, threw the box of cigars, the bottle of whisky, and the knife to the ground, and, approaching the defendant, struck him one or two blows about the face. The defendant, upon being struck by deceased, either stepped or was forced back a few feet by the impact of the blows from the deceased, and almost concurrently with that movement drew a revolver from his pocket and fired at and mortally wounded Smither, who expired shortly after the infliction of the wound. These are substantially the facts leading to and attending the commission of the homicide as established at the trial. The appellant complains of certain instructions given to the jury by the court, of rulings rejecting certain proffered testimony, and of alleged misconduct of the jury. It is also claimed that the appellant suffered serious, and therefore, prejudicial, injury from certain alleged improper remarks of the district attorney during the course of his argument.

1. The objections urged against that portion of the court's charge to the jury bearing upon the two degrees of murder and upon justifiable homicide are founded upon the contention that there is no evidence in the record to which such instructions are pertinent. This position necessarily involves the claim that the evidence adduced at the trial is insufficient to justify the verdict. While an examination of the record has resulted in the disclosure of no reason for warranting a doubt of the pertinency of the instructions given by the court bearing upon the two degrees of murder, the criticism of such of the instructions as define murder of the first degree and the various elements of which, according to circumstances, it may consist, could be passed without consideration, since such instructions in any event could not have injured the defendant in view of the fact that the jury returned a verdict adjudging him guilty of the lesser of the two degrees of the crime charged. But counsel for appellant concedes that the instructions given to the jury upon both the degrees of murder correctly declare the law applicable thereto, if the evidence established facts which would sustain a conclusion by the jury that the defendant was guilty of either of the two degrees of murder. We think the evidence, as disclosed by the record before us, justified the giving of the criticised instructions. There is no conflict in the evidence, except, as we have seen, such as arises from the testimony of the defendant himself, upon the point that the deceased, before assaulting the defendant, cast to the ground the knife which he held in his hand at the time he first accosted the defendant and accused him of killing the hog. Some five or six witnesses, who testified, to having seen the whole difficulty from its beginning to the time of the firing of the shot, declared that the deceased threw the knife to the ground before striking the defendant. There is, it is true, some variance between the witnesses as to the time at which the knife was picked up from the ground by one Monroe Eubanks, a witness to the shooting. Most of the witnesses testified that the knife was picked up before the deceased struck the defendant, while Eubanks himself stated that he did not take possession of the knife until after Smither had been shot. Obviously, of course, the importance of the circumstance as to the point of time with reference to the shooting—whether prior or subsequently thereto—at which the knife was picked up lay in the influence it might exercise in the determination of the question by the jury of whether the deceased did or did not have the knife in his hand when he assaulted the defendant; the claim of the latter being that he was so attacked by the deceased. There was, however, other evidence which rendered appropriate the instructions complained of. John Lewis, a witness for the people, testified, in part, as follows: "* * * I saw Mr. Smither set or drop the box of cigars down. When he raised up or straightened up, he made a run at Mr. Quimby and he struck with his right and left hand, and Mr. Quimby kind of had his hand up some way that way. I don't know exactly how it was. He (Smither) struck at him a couple or three times. Then Smither stepped back, then turned and walked like he was going to pick up the cigars, three or four steps, then he turned round facing Mr. Quimby, and at the same time Mr. Quimby took a step like that and got his six-shooter out in his hand and then he shot with his right hand." It will thus be seen that according to Lewis the deceased, after striking the defendant, turned his back to and left the latter, going in the direction of the spot where he had placed the cigars; that the defendant shot Smither after the latter had desisted from further combat. It is true, as seen, that the defendant claimed that the deceased, after the altercation, rushed toward him threateningly with an open knife in his hand, and, fearing injury or perhaps death at his hands, he shot the deceased in self-defense; but the character of the court's instructions was not to be determined alone by the defendant's testimony, or, for that matter, by the testimony of any other single witness. It is elementary that the court may instruct a jury upon any material question upon which there is any evidence deserving of any consideration whatever, for it is with the jury to determine what facts are proven by the evidence, and it is the duty of the court to state to them the law by which they are to be governed in their consideration of such evidence. We think there is no room for doubt that the evidence before us was and is sufficient to uphold the verdict.

In addition to the facts to which we have specifically adverted, it is important to bear in mind that it appears quite clear, that the deceased had the open knife in his hand from the time he left Darrah's residence until he dropped it to the ground prior to striking the defendant. It is also in this connection a fact of potent significance that the defendant himself testified that he was uninjured by the blows received from the deceased. But the appellant declares that that part of the court's charge relating to murder committed under the circumstances mentioned in section 189 of the Penal Code was clearly erroneous, because there was no evidence in the record upon which such an instruction could be properly predicated. It is true that the defendant was not accused of having caused the death of Smither by means of poison, lying in wait, etc., nor is there any pretense that the crime was committed while the slayer was engaged in the perpetration or attempt to perpetrate any of the crimes enumerated in said section; yet we see nothing improper in the court's action in elucidating and explaining to the jury the multifarious forms in which, according to the varying circumstances under which human life may be taken with the malice as known and understood in its legal sense and nomenclature, murder may present itself. The jurors must be presumed to be possessed of such a degree of intelligence as to enable them to comprehend and understand the pertinency to the evidence of the court's declaration of the law, and that, under the evidence, their verdict could not be founded upon any consideration of the elements constituting the kinds of murder referred to in section 189, supra, within which the act of the defendant, if murder at all, could not, of course, by any possibility, be brought. The Legislature has said that murder committed under the circumstances contemplated by that section is murder of the first degree, and as to the other kinds of murder, whether they be of the first or of the second degree, must be determined by the jury itself from all the circumstances by and under which the act was committed. And we therefore think it was proper for the court to explain to the jury all the circumstances under which a homicide might be murder of the first degree, so as thus to invest the triers with full knowledge of the law upon the subject and thereby the better enable them to apply it to the particular facts of the case before them. Besides, as we have already observed, as the verdict was of murder of the second degree, the instruction could not in any view have done the appellant injury.

It is urged that the court went too far in its instruction upon the question of justifiable homicide. These instructions covered the entire field of the law upon the subject, involving a full exposition of the occasions upon which, under the provisions of our Penal Code, the taking of human life would be justified. While all the different circumstances under which homicide is justifiable are not present in the case at bar, we can perceive no harm which could have resulted to the defendant by the giving of the instructions to which objection is made. In telling the jury what circumstances would excuse or justify the act of a person in taking human life, the court declared the law which applied to the theory upon which the defendant presented his case—that the killing was in necessary self-defense. The instruction was given in the exact language of section 197 of the Penal Code, and contains therefore a correct statement of the law generally upon justifiable homicide. Besides, the court, in instructions requested by the appellant, declared to the jury the law concretely upon this subject, and in conformity with the hypothesis of self-defense as contended for by the defendant.

Appellant also insists that the following language of one of the given instructions was prejudicially erroneous: "* * * Or the circumstances of the killing show an abandoned heart, this is murder of the second degree, unless the evidence proves the existence in the mind of the slayer of the specific intent to take life. If such specific intent exists at the time of such unlawful killing, the offense committed would, of course, be murder of the first degree." This instruction, it is obvious, does not contain an accurate statement of the law upon murder of the first degree, nor do we think the quoted language as an instruction is warranted by anything that is said in the cases upon which it is claimed that it is founded. See People v. Doyell, 48 Cal. 96; Ex parte Wolff, 57 Cal. 94. But, in determining whether or not an erroneous instruction operated prejudicially to the defendant, the entire charge of the court must be considered, "and if, as a whole, it correctly states the law, it is free from error, notwithstanding selected passages may state a proposition without at the same time and in immediate connection stating the exceptions or qualifications to which it is subject in its application in the case in hand." People v. Mendenhall, 135 Cal. 346, 67 Pac. 325. See, also, People v. Doyell, 48 Cal. 85; People v. Flynn, 73 Cal. 511, 15 Pac. 102; People v. Worden, 113 Cal. 569, 45 Pac. 844. In other parts of the charge the court clearly and explicitly and accurately defined the malice essential to the consummation of either of the degrees of that crime. The instructions, taken and viewed in their entirety, presented, we think, the case fully, clearly, and correctly. Moreover, as heretofore stated with reference to other instructions, the pertinency of which is challenged, the verdict of the jury furnishes evidence quite conclusive that the instruction containing the quoted language was harmless.

The attack upon the instruction in which the court explained the various forms of verdict, any one of which the jury could adopt according to the conclusion reached by it under the evidence, is barren of meritorious foundation. We think, as we have already indicated, that the evidence was sufficient to warrant any verdict which the jury might have been persuaded to reach, and that consequently the instruction does not, as counsel urges, "assume the existence of evidence that had not been offered in the case."

2. The court did not err in refusing to permit the witness Hart to testify, on behalf of the defendant, to certain declarations alleged to have been made by the decedent some time prior to the date of the homicide. It was sought to be established through this witness that Smither, at Hart's store, in the presence of said witness and others, on some occasion preceding the day upon which the shooting

occurred, declared that he expected to "die with his boots on." The witness stated that the name of the defendant was not mentioned by the deceased in connection with said declaration, nor was the defendant present when it was uttered. The declaration does not appear to have been directed to any particular person, nor does it appear that the defendant had any knowledge at the time of the shooting of its having been made by the deceased. The testimony thus attempted to be elicited from the witness was not competent for any purpose.

3. After the jury retired for the purpose of deliberating upon the case, Juror Peterson asked the deputy sheriff (Paine) having charge of the jury what punishment the law prescribed for manslaughter. As to the exact language with which the deputy sheriff clothed his reply to the question there is some conflict between counsel for defendant in his affidavit and the deputy sheriff and one Lind, who was with Paine at the time the juror asked the question. Paine and Lind state that the conversation was as follows: Peterson: "What is the penalty for manslaughter?" to which Paine replied, "I don't know." Peterson: "I think it is from one to 10 years." Paine: "Maybe it is; but I don't know." The affidavit of counsel for appellant states that Paine's answer to the last question was "substantially" as follows: "I think so, but I don't know." The court below, in passing upon the facts thus presented upon the alleged misconduct, evidently accepted the statements of Paine and Lind of what occurred. It is also apparent from the use of the word "substantially" by counsel for appellant in describing Paine's answer that counsel himself was not certain and definite as to what was actually said by Paine in reply to the juror. Taking the version of what transpired, as given by Paine and Lind, it is manifest that the alleged misconduct could not have produced prejudicial harm to appellant. The juror himself seemed to be better informed as to the penalty prescribed for manslaughter than the officer. Besides, the juror received no information from the officer. It is not pretended that the evidence was discussed by Peterson and Paine. While the juror, as is too often the case, grossly violated the admonition of the court against talking about the case with persons other than his compeers upon the jury, we cannot, as already suggested, perceive anything in his conduct militating against the substantial rights of appellant, or warranting a reversal of the case.

4. It is charged that the district attorney, during the course of his address to the jury, transcended the record and made remarks concerning matters foreign to the case. The district attorney was discussing certain language which it was claimed was used by the deceased while the altercation between the defendant and the former was in progress, and expressed a doubt as to whether the deceased, addressing the defendant, used the word "retaliate." That officer then proceeded to say: "While there were a great many people around and in that neighborhood, but few seem to know anything of the conversation. Only one man has been testified to that might know and that was Eli Revel. He is not a witness or was not a witness. I did not know the relevancy of his testimony or I would have had him here, and it is only fair to presume that his testimony would not benefit the defendant or the defendant would have him here—." At this point counsel for the defendant interposed an objection to the remarks of the district attorney upon the ground that they constituted misconduct. The court thereupon instructed the jury in clear and emphatic language that it was their duty to disregard the remarks objected to, and at the same time stated that "the personal views and opinions of counsel, if any were expressed, must have no place in your deliberations. Counsel have no right to offer them to you, and you must not be swayed or guided in any way by such statement." We do not think the remarks of the district attorney, though altogether unjustifiable, are such as to demand a reversal of the case. The court, as seen, was prompt and clear in instructing the jury to disregard the remarks, and we must assume that the triers paid due heed to the instruction. In most of the cases in this and other jurisdictions, in which reversals have been asked upon the ground of misconduct of the prosecuting attorney based upon improper remarks addressed to the jury, it has been held that it is only where the misconduct has been called to the attention of the trial court and said court has refused to instruct the jury to disregard the remarks that a reversal will be ordered upon that ground. We are not, however, to be understood as holding that there might not be misconduct upon the part of the state's attorney in his address to the jury which the instruction of the court would not cure. But the case at bar comes within the rulings in People v. Benc, 130 Cal. 165, 62 Pac. 404; People v. Smith, 134 Cal. 457, 66 Pac. 669; People v. Fitts (Cal. App.) 91 Pac. 536; People v. Yee Foo (Cal. App.) 89 Pac. 450.

We find no error in the record demanding a reversal. The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Rehearing.

HART, J. A careful consideration of the points discussed in the petition for a rehearing has developed no reason for a modification of the views expressed in the main opinion upon said points.

A rehearing is therefore denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

6 Cal. App. 514

PEOPLE v. ROBERTSON. (Cr. 50.)

(Court of Appeal, Third District, California. Oct. 2, 1907.)

1. Embezzlement—Defenses—Estoppel.

Where defendant, a deputy assessor, received money in part payment of taxes assessed against a corporation, and the payment was duly credited on the assessor's books, but was converted by defendant, he was estopped to deny, in a prosecution for embezzlement, that he was the agent of the county and held the money in trust for his principal, on the theory that, as the assessor was required to assess the property as a possessory interest, he was prohibited by Pol. Code, § 382, from accepting the taxes in installments, and that defendant held the money only as bailee for the corporation.

2. Same—Instructions.

Where, in a prosecution of a deputy county assessor for taxes collected and converted to his own use, the evidence showed that defendant collected the money for the use and benefit of the county, an instruction that money collected by a county official "for the use and benefit of the county" belongs to it was not objectionable, because money collected for a county by a county officer does not always belong to the county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 72–74.]

3. Criminal Law—Evidence—Admissions.

In a prosecution of a county officer for embezzlement, an admission of defendant tending to show guilt was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 894–936.]

4. Same — Appeal — Objections Not Made Below—Nonresponsive Answer—Motion to Strike.

In the absence of a motion to strike out a part of an answer as not responsive, accused could not object on appeal that the witness should not have been permitted to so testify.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2672–2674.]

5. Same—Review — Harmless Error — Evidence.

Where, in a prosecution for embezzlement, the only defense was that the money did not belong to the county, as alleged, and that there was therefore a variance as to the ownership of the property, defendant was not prejudiced by a nonresponsive portion of an answer of a witness that he checked up defendant's books and discovered a shortage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3137.]

6. Same—Evidence—Other Offenses — Admissibility to Show Intent.

In a prosecution of a deputy county assessor for embezzlement, evidence of other acts of embezzlement than that relied on was admissible to show intent or guilty knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 830–832.]

7. Witnesses—Examination—Conclusion.

A question as to whether a witness knew of any other amount than the sum accused was charged with embezzling received by him while he was deputy assessor, and not accounted for and paid over to the county treasurer, was objectionable as calling for a conclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 833–836.]

8. Criminal Law—Appeal—Prejudice.

Where, in a prosecution for embezzlement, there was no controversy as to the fraudulent appropriation of the money, accused was not prejudiced by an objectionable question by which it was sought to show other acts of embezzlement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3130, 3131, 3137.]

9. Same—Sentence—Time—Continuance.

Postponement of sentence from January 21st to March 6th, to await the result of another trial of accused for a similar offense, was not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2500.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

C. J. Robertson was convicted of embezzlement, and he appeals. Affirmed.

Rowan Hardin, for appellant. U. S. Webb, Atty. Gen., for the People.

BURNETT, J. From the judgment following a conviction of embezzlement, and from the order denying his motion for a new trial, defendant brings this appeal.

In appropriate phraseology, defendant, as deputy assessor of Tuolumne county, is accused by the information of having received the sum of $130.40 belonging to said county and of having embezzled the same. The evidence shows clearly and without conflict that the money was paid to defendant by the superintendent of the Nonpareil Mining Company on certain taxes owing by said corporation. The payment was by means of a check, and the money was obtained by defendant on August 6, 1906, by cashing the check for that amount at the Tuolumne County Bank. The county assessor testified that the defendant admitted that he received the money as payment on the said mining company's tax. The payment was credited by the county assessor to the company's account for taxes, and he supplied the deficiency caused by defendant's fraudulent appropriation. In fact, there is no doubt that the money was sent by the mining company in part payment of its tax; that it was so received by defendant and fraudulently appropriated by him to his own use.

Appellant contends, however, for the exceedingly technical proposition that, as the money constituted only a partial payment of the tax, it could not be received legally by the assessor as the money of the county, and consequently it was held by defendant as bailee of the mining company, and not "in the course of his duty and employment as such deputy assessor," as alleged in the information. Hence it is claimed there was a variance between the proof and the allegation of the information as to the ownership of the property. Appellant states his position as follows: "As the assessor was required to assess the property as a possessory interest, under the provisions of section 382 of the Political Code, he could not accept the taxes in installments." But, admitting that the money was irregularly received for the county, it can be of no avail to appellant, for the obvious reason that he is estopped from denying that he was the agent of the county in the transaction, and that he held the money in trust for his principal. In Ex parte Hedley, 31 Cal. 113, the Supreme Court quotes with approval the following from Bishop's Criminal Law, § 3671: "In reason, whenever a man claims to be a servant while getting into his possession by force of this claim the property to be embezzled, he should be held to be such on his trial for the embezzlement. Why should not the rule of estoppel known throughout the entire civil department of our jurisprudence apply in the criminal? If it is applied here, then it settles the question; for by it, when a man has received a thing of another under a claim of agency, he cannot turn around and tell the principal asking for the thing: 'Sir, I was not your agent in taking it, but a deceiver and a scoundrel.'" In State v. Spaulding, 24 Kan. 1, it appears that the defendant was city clerk, and the money which he was charged with embezzling came from license fees which he collected. Under the ordinances of the city, the license fee was payable to the city treasurer, who issued a receipt therefor, upon the production of which the sole duty of the city clerk was to make out and attest the license. The clerk had nothing to do with the money. However, he collected from numerous licensees the money due on the delivery of their licenses. Having been indicted for embezzling the same, he undertook to defend on the ground that, as his receipt of the money was unauthorized and outside the line of his duty, it was not the money of the city, but of the licensee, and hence the indictment for the embezzlement of the city's funds could not be maintained. The court, speaking through Mr. Justice Brewer, disposed of defendant's contention as follows: "We hold that, when one assumes to act as agent for another, he may not, when challenged for these acts, deny his agency; that he is estopped, not merely as against his assumed principal, but also as against the state; that one who is agent enough to receive money is agent enough to be punished for embezzlement." Among other cases illustrating the principle are the following: People v. Treadwell, 69 Cal. 226, 10 Pac. 502; People v. Royce, 106 Cal. 187, 37 Pac. 630, 39 Pac. 524; People v. Cobler, 108 Cal. 541, 41 Pac. 401; People v. Oldham, 111 Cal. 648, 44 Pac. 312; State v. Cloutman, 61 N. H. 143.

Complaint is made by appellant of the action of the court in refusing a certain proposed instruction in line with the contention that the assessor had no right to collect this money at the time of the event. But if correct as a guide for the action of the assessor in collecting taxes, the principle has no application here. Granting that it was the duty of the assessor to collect the whole amount of the company's tax prior to August 6th, yet his failure so to do cannot be urged in defense of appellant's conduct, as we have seen from the authorities already cited.

Again, it is insisted that the law was not properly given in the following instruction: "Money collected by a county official for the use and benefit of the county, the money so collected belongs to such county." The argument is that moneys collected for a county by a county officer do not always belong to the county. In other words, money may be illegally collected by the officer. This is undoubtedly true, but it is manifest that no such implication is contained in the instruction. Moneys so collected would not be "for the use and benefit of the county." It is said in People v. Gray, 66 Cal. 277, 5 Pac. 240: "As soon as moneys are collected by an officer of the state for the use and benefit of the state, the moneys so collected belong to the state." The obvious meaning of the instruction here is if the money is collected by an officer for the actual use and benefit of the county, and it is for such use and benefit, it must be held to belong to the county. But, if the principle as an abstract proposition is stated too broadly, it is strictly correct as applied to the undisputed facts of the case at bar, and hence could not be prejudicially erroneous. The money was due the county. It was paid for its use and benefit, and it was received for that purpose by one authorized to receive it, and the fact that a larger amount should have been paid sooner could hardly divest the county of its title to the installment collected by the deputy assessor. The irregularity of the proceeding does not affect the question that we are considering. Section 3885 of the Political Code provides that "no assessment or act relating to assessment or collection of taxes is illegal on account of informality nor because the same was not completed within the time required by law." But, again, in view of the principle of estoppel as hereinbefore enunciated, since the evidence showed without conflict that appellant collected the money for the use and benefit of the county, it was not improper to tell the jury that if so collected the money must be considered the property of the county.

Appellant makes also the point that the court erred in overruling an objection to this question asked of Assessor West: "I will ask you whether or not about the month of August you had a conversation with the defendant in reference to his shortage in your office as deputy assessor?" The answer was: "I did. The defendant said at the time he was short. I checked up the books at that time in the assessor's office to ascertain the shortage." It was entirely proper to offer evidence of any admission of defendant tending to show guilt. A part of the answer was not responsive to the question, but no motion was made to strike it out. This is a sufficient answer to appellant's contention that under the authority of People v. Walker, 142 Cal. 93, 75 Pac. 658, the witness should not have been allowed to testify that he "checked up the book and discovered a shortage." It was impossible, of course, for the court to anticipate such an answer to the question. Again, it is manifest that if the objection had been properly made, and the ruling erroneous, it would be without prejudice for the reason already stated. Indeed, the only defense seems to have been that the money did not belong to the county, and hence that there was a variance between the proof and the allegations of the information as to the ownership of the property.

Another point made by appellant is that the court erred in admitting the testimony of Assessor West as to other acts of embezzlement; but it is clearly established that such evidence is admissible, as declared by the trial court in its instructions to the jury, "simply for the purpose of showing the intent or guilty knowledge, with which the defendant committed the particular act charged against him, if he did commit it." People v. Gray, 66 Cal. 277, 5 Pac. 240; People v. Cobler, supra. The manner in which this evidence was presented is somewhat objectionable. For instance, Mr. West was asked this question: "Do you know of any other amount, other than this $130.40, received by Mr. Robertson while he was deputy assessor under you as assessor of this county and not accounted for and paid over to the county treasurer?" This calls for a conclusion of the witness, but no such objection was made by defendant. If it had been, the court would probably have required the prosecution to prove in the regular manner, as it did in the main charge, the receipt of the money by defendant and the fact that he had not paid it into the county treasury. But, as we have already seen, there seems to have been no controversy as to the fraudulent appropriation of the money. Hence, if erroneous, the action of the court was without prejudice.

The only other point made by appellant is that the court erred in continuing the time for sentence from January 21st to March 6th. This was done to await the result of another trial of defendant for a similar offense. It is difficult to see how the question can be reviewed, as it is not presented by the bill of exceptions, and the action of the court is not properly authenticated; but it is clear that there was no error in postponing sentence. Ex parte Morton, 132 Cal. 348, 64 Pac. 469.

The record is free from error. The only defense is exceedingly technical and without merit. The guilt of the defendant was clearly shown.

The judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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6 Cal. App. 475

PRATT v. WELCOME. (Civ. 379.)

(Court of Appeal, Second District, California. Sept. 30, 1907.)

1. REPLEVIN—VALUE OF PROPERTY—FINDING—SUFFICIENCY OF EVIDENCE.

Where, in replevin, the testimony showed, on one side, that the property was worth $500, and, on the other side, $200, the court could find the value at $300, being not bound to find in the precise figures of any witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 383.]

2. NEW TRIAL—OBJECTIONS—COMPETENCY OF WITNESS—WAIVER.

Objections to a witness' qualification to give an opinion must be made when the testimony is offered, or they will not support a motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 62–66.]

3. APPEAL — OBJECTIONS — COMPETENCY OF WITNESS—WAIVER.

Objections to a witness' qualification to give an opinion must be made when the testimony is offered, or they will not be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1272, 1283–1289.]

4. COURTS — JURISDICTION — WHAT DETERMINES.

The jurisdiction of a court, where the amount involved is controlling, must be determined by the pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 427.]

5. COSTS—AMOUNT OF RECOVERY.

Under the express terms of Code Civ. Proc. §§ 1022, 1024, where plaintiff's good faith in bringing a replevin suit in the superior court for a sum exceeding $300 is not questioned, the only penalty for a recovery of less than that jurisdictional amount is the loss of costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 47, 48.]

6. APPEAL — REVIEW — CONCLUSIVENESS OF FINDINGS.

Findings on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983–3989.]

7. SAME.

Where evidence invokes an application of the rule falsus in uno, etc., the trial court's exercise of discretion in applying the rule will not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983–3989.]

8. SAME—INSUFFICIENT RESERVATION OF OBJECTION.

Where there is no specification that the decision is against the law in the statement of the case, and that was not made a ground of the motion for a new trial, it is doubtful whether, on appeal by defendant in replevin, the appellate court can review an objection that the decision was against the law, because the court failed to find upon the issue whether defendant was in possession of the property when suit was brought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2939–2942.]

9. REPLEVIN—FINDINGS—NECESSITY.

It is only necessary to find on material issues and those directly made by the pleadings, and, where a complaint in replevin alleged that defendant had the property when suit was brought, an answer that "prior" to the suit he parted with possession, and denying that he at any time "wrongfully or unlawfully" had possession, raised no issue as to defendant's possession when suit was brought, so as to require a finding thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, §§ 360–365.]

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by E. W. Pratt against A. P. Welcome. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

M. C. Hester and H. H. Roser, for appellant. F. G. Hentig, for respondent.

TAGGART, J. This is an action of claim and delivery to recover possession of a mare alleged in the complaint to be of the value of $500, and for $200 damages. Judgment was for plaintiff for $1 damages, for the possession of the mare, or, in case delivery cannot be had, for her value, fixed at $300, and for costs of suit. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

The errors relied upon for a reversal of the judgment appear to be such only as property should be considered on the appeal from the order denying the motion for a new trial: Insufficiency of the evidence to justify the decision of the court, that the decision is against law, and errors of law occurring at the trial. There are no exceptions presented to any rulings of the court which come under the latter head.

It is contended that there is no evidence to sustain the finding that the value of the mare is $300, and therefore the superior court was without jurisdiction to try the cause because the "value of the property in controversy" does not amount to $300. Const. art. 6, § 5. We do not agree with appellant's view either of the law or the fact. The action was begun May 31, 1905, and the witness Williams testified that in the month of May, 1905, the mare was worth $500. The witnesses of defendant valued her at only $200. While it is true that no witness stated her value at exactly $300, the court is not bound to find in the precise figures stated by any witness, but is at liberty to estimate and fix such a valuation on the property as all the evidence taken together warrants. No objection was made to the competency of the witness Williams to testify to the value of the mare at the time his testimony was given. This objection was made for the first time on the hearing of the motion for a new trial, and, no objection or exception on this ground appearing in the record, there was nothing upon which that court could act in this connection. Objections to a witness' qualification to testify on matters of opinion must be made at the time the testimony is offered, or they will not support a motion for a new trial, or be considered by an appellate court. The reasons for the rule have been stated too often to need repetition. It is the demand, and not the finding of value, which fixes the jurisdiction of the court. Dashiell v. Slingerland, 60 Cal. 655; Lord v. Goldberg, 81 Cal. 596, 22 Pac. 1126, 15 Am. St. Rep. 82. The jurisdiction of the court, where the amount involved is the question to be considered, must be determined on the pleadings. Any other rule would be fraught with uncertainties and mischiefs beyond the power of anticipation. Rodley v. Curry, 120 Cal. 541, 52 Pac. 999. Where no question is made of the good faith of the plaintiff in bringing the suit for a sum exceeding $300, the only penalty for recovery of less than the jurisdictional amount is the loss of the costs. Code Civ. Proc. §§ 1022, 1024; Greenbaum v. Martinez, 86 Cal. 459, 25 Pac. 12.

The principal question involved in the trial of this case was whether a sale made by the plaintiff to the defendant of the animal in dispute was absolute or conditional, and the findings claimed to be inadequately sustained by the evidence are of probate facts which tended to support one of these contentions. There is evidence to sustain either theory, and the findings so made upon conflicting evidence will not be disturbed by an appellate court. This is true of all the findings complained of, and it is unnecessary to distinguish them in detail. The evidence called for a judicious application of the rule falsus in uno, etc., and the trial court evidently made it, and the exercise of its discretion in this regard will not be reviewed by an appellate court.

It is also urged, in support of the appeal, that the decision of the court is against law, in this, that the court failed to find upon a material issue, to wit: Was defendant in possession of the mare at the time of the commencement of the action, and did he wrongfully withhold such possession from plaintiff? It is doubtful whether this matter is before us on the record. There is no specification that the decision is against law in the statement of the case, and this is not made one of the grounds of the motion for a new trial. Haight v. Tryon, 112 Cal. 6, 44 Pac. 318; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828. When a court renders its decision without making findings upon all the material issues presented by the pleadings, there has been a mistrial. The decision having been thus rendered before the case has been fully tried, it is "against law," and should be reviewed on a motion for a new trial. This rule, however, is applicable only to issues which are material, and to those directly made by the pleadings. Brison v. Brison, 90 Cal. 328, 27 Pac. 186. For a stronger reason it cannot be applied to cases in which findings are rendered unnecessary because the allegations of the complaint are not denied, or the facts are admitted by the pleadings. Pomeroy v. Gregory, 66 Cal. 572, 6 Pac. 492, 493; Taylor v. Cent. Pac. R. R. Co., 67 Cal. 615, 8 Pac. 436; Gregory v. Gregory, 102 Cal. 52, 36 Pac. 364. The complaint here alleges that the mare was in the possession of defendant at the time of the commencement of the action, and that he unlawfully withheld possession of her from plaintiff. Defendant alleges "that prior to the commencement of said action he sold (said mare) and parted with the possession thereof." Non constat that the mare was not in his possession when the action was commenced. He also denies "that at any time he wrongfully or unlawfully held or retained possession of said mare." This is only the denial of a conclusion and raises no issue as to the possession. The allegations of the complaint in this respect not being denied, no finding was necessary.

No error appearing in the record, the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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6 Cal. App. 524

DUNKER v. FIELD & TULE CLUB. (Civ. 390.)

(Court of Appeal, Third District, California. Oct. 2, 1907. Rehearing Denied Nov. 1, 1907.)

1. INJUNCTION—TRESPASS—GAME PRESERVE—TITLE.

Where plaintiff, as lessee of certain tule land, had an exclusive right to hunt thereon and use it as a game preserve, it was not necessary to his right to maintain an injunction to restrain trespassers from hunting on the land to show title in fee, but it was sufficient to show bona fide possession under claim and color of right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 77–81, 98–101.]

2. SAME—IRREPARABLE DAMAGE.

Where plaintiff held the exclusive right to hunt on certain land under a lease limited to that privilege, acts of trespass operating to destroy the value of such privilege established a case of irreparable damage sufficient to sustain an injunction.

3. SAME—MULTIPLICITY OF SUITS.

Where plaintiff was the exclusive lessee of the hunting privilege on certain land which was being seriously damaged by numerous persons, who were members of defendant club, individually committing acts of trespass of a continuing nature by hunting on the land, and threatened to continue such acts, plaintiff was entitled to an injunction to prevent a multiplicity of suits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 18.]

4. SAME—IRREPARABLE INJURY.

An injury is irreparable, so as to authorize an injunction, where it consists of a serious change of, or is destructive to, the property it affects, either physically or in the character in which it has been held and enjoyed, or when the property has some peculiar quality or use, so that its pecuniary value will not fairly recompense the owner for the loss thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 14, 98.]

5. SAME—DEFENSES—DEFENDANT IN POSSESSION.

Where defendant, a sporting club, and its members, were trespassers with reference to the shooting rights on certain land exclusively leased to plaintiff, and the acts of the members of the club were such as to cause irreparable injury to plaintiff's rights under the lease, it was no defense to plaintiff's suit for injunction that defendant was in actual possession, and that plaintiff had not been in possession except for the purpose of posting the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 19, 77–81.]

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Action by Chris. Dunker against the Field & Tule Club. From a decree in favor of plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Bell & Straus, for appellant. Harvery & Goodman, for respondent.

CHIPMAN, P. J. Action to restrain defendant from trespassing upon certain land. Plaintiff had judgment, from which, and from the order denying its motion for a new trial, defendant appeals.

The complaint avers: That on and prior to February 2, 1903, one McMaster was the owner of the land in question, and on said day plaintiff and McMaster entered into a lease, whereby the latter leased said land to plaintiff for the term of five years from November 1, 1904, "for hunting purposes only"; that plaintiff entered into possession of said land on November 1, 1904, and still is in possession, "and has, under said lease, the right of possession of same"; that on April 4, 1903, McMaster conveyed the land to one Goosen, subject to and with notice of said lease, and on that day McMaster assigned to Goosen "all his rights and privileges under said lease"; that during the term of said lease defendant, "its servants, agents, and employés, at various times and on numerous occasions have interfered with plaintiff's quiet and peaceable possession and enjoyment of said leased land, and has attempted and threatens to further interfere with plaintiff's quiet and peaceable possession and enjoyment of said property"; that, during the term of said lease, defendant, its servants, employés, and agents, have without plaintiff's consent entered upon said premises for the purpose of hunting and shooting thereon, and have wrongfully hunted and shot large numbers of wild geese and wild ducks on said premises and threaten to continue so to do, thus interfering with plaintiff's use for the purposes for which he leased said premises; that, if plaintiff is permitted to carry out its said threats, it "will render the said premises valueless to this plaintiff as a hunting and shooting ground and preserve, and cause great and irreparable damage to this plaintiff." Damages are alleged in the sum of $1,000. Defendant denies most of the material averments of the complaint, and alleges that at all times mentioned in the complaint "defendant has been in the occupation, possession, and enjoyment of the premises under a lease from the owner thereof, and that the plaintiff has never at any time been in the quiet or peaceable possession or enjoyment of said leased premises, but has attempted at various times and on various occasions to interfere with the quiet or peaceable possession and enjoyment of defendant."

The court found the facts substantially as averred in the complaint; also, that plaintiff entered into possession of the land on November 1, 1904, under his said lease, "and went upon said land and posted notices warning all persons not to trespass thereon; that said land is inclosed, and was leased for and is used for hunting purposes; that plaintiff has been and still is in possession of said leased land and occupying same for the purposes and under the conditions set out in said lease"; that "during the term of the lease defendant, its keeper, servants, agents, and employés, hunted upon said land, against the will and consent of plaintiff, and shot and killed large numbers of wild geese, wild ducks, and wild game which gather upon said land during the winter season; that defendant's keeper tore down the notices posted by plaintiff on said land; * * * that this action was commenced on the 11th day of November, 1904, by the plaintiff to protect his rights on said land, and the said defendant, its servants, agents, and employés, continued to go upon said land thereafter and during the whole of the hunting season of the winter last past; [the cause was tried in May, 1905] * * * that the hunting of said defendant * * * disturbed the quiet and peaceable enjoyment of said land by plaintiff for the purposes for which said land was leased." It is further found "that the said land is tule land and is used during the winter season as a hunting and shooting preserve, * * * and, if said threatened acts are permitted, it will render said premises valueless to plaintiff as a hunting and shooting ground or preserve, and cause great and irreparable damage to plaintiff; * * * that plaintiff, in order to maintain his rights under the terms of said lease, will, unless defendant's acts are restrained, be obliged to bring a large number of actions against said defendant." The court also finds damages to plaintiff in the sum of $150. As a conclusion of law the court found that plaintiff was entitled to the injunction prayed for.

It appeared that on February 2, 1903, the then owner of the land, McMaster, leased it to plaintiff to take effect November 1, 1904, the date of the expiration of the prior lease made by him; that on April 4, 1903, he sold the land to Goosen, who took with actual knowledge of plaintiff's lease; that on November 1, 1904, plaintiff employed Goosen to post notices, signed by plaintiff, at several places on the land, which he did, reading: "Take Warning! No shooting. Trespassers will be prosecuted to the full extent of the law." Plaintiff did not go personally upon the land to take possession otherwise than in this manner, but sent Goosen, who testified to having posted these notices at plaintiff's direction. He also testified that he notified defendant of plaintiff's lease before it took effect, i. e., prior to November 1, 1904. By instructions of defendant's president these notices were torn down and destroyed, and defendant, through its officers and agents, took possession and used the premises for shooting game thereon during the then open season. Defendant claimed under a lease dated June 10, 1901, and terminating June 10, 1905, with right of renewal for five additional years, made by Goosen to defendant, embracing several tracts, and among them tract No. 4, as to which the lease read: "It is understood, and agreed, however, that this lease shall be operative as to tract No. 4 only for such length of time as the parties of the first part, or either of them, shall control said tract No. 4 by lease or otherwise." This lease was for the "exclusive right to hunt, shoot, and fish, and to occupy for that purpose all those certain lots," etc. The president of defendant corporation testified that tract No. 4 belonged to McMaster when defendant's lease was executed, and was included in the lease to Goosen which expired November 1, 1904, and "that at the time the lease (defendant's lease) was executed Mr. Goosen expected to obtain a renewal of that lease from Mr. McMaster, but, being a little afraid of him from having had a litigation with him about that time, we took the precaution to insert that clause so that in case he failed us on that tract by lease or otherwise we were to hold until the expiration of nine years from the date of the lease," presumably as to the balance of the land. This witness also testified that defendant entered into possession of the premises on June 10, 1901, and has continuously occupied the same, and that plaintiff has never "been in possession of those premises, nor has gone upon this land for the purpose of hunting and shooting, while defendant has occupied the same." Plaintiff testified that the reason he did not go on the land to hunt was because of the acts of defendant, and that he refrained from going onto the land to shoot until his suit was decided, which he commenced November 11, 1904, shortly after his right of possession for the purposes of the lease accrued.

Defendant contends for the following propositions: (1) Injunction is not the proper method to evict a person from the actual possession of land. (2) Injunction will not lie where its effect is to take possession from the defendant, if the complainant's title has not been established by law. (3) Injunction will not lie against a defendant claimed to be in the wrongful possession who is not doing irreparable damage, since the remedy at law by ejectment is ample and complete.

Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74, was a case quite similar to this, and arose in the same county out of a lease of tule land for hunting purposes. The difference between the two cases is that in the case cited the plaintiff, as trustee of the shooting club, was in possession by keepers, while in the present case plaintiff was not in actual possession when he brought the action. He was, however, entitled to possession, and had by his agent posted the notices above stated, of which defendant had knowledge, and which it defied by tearing them down. Among other principles established in Kellogg v. King were the following: That an injunction will lie in favor of a trustee of a hunting club (and, of course, we may add, of the club itself if capable of suing) which has an exclusive right of hunting upon a game preserve, under a lease from the owner; that it is not necessary to show title in fee, but that it is enough to show bona fide possession of the invaded premises under claim and color of right; that injunction may be invoked to restrain acts or threatened acts of trespass, in any instance, where such acts are, or may be, an irreparable damage to the particular species of property involved; and that the destruction of a hunting privilege, which is the very substance of the property right held under the lease, makes out a case of irreparable damage, which will sustain an injunction. It was further decided that injunction will also lie to prevent a multiplicity of actions where, as here, numerous persons are members of defendant club and are individually committing acts of trespass of a continuing nature by hunting upon the land, and where they threaten to continue such acts, in which case no adequate relief could be had at law by plaintiff without bringing suit against each individual. We can add nothing of value to the reasoning in that opinion. See Bishop v. Owens (Cal. App.) 89 Pac. 844, for a discussion of the equity jurisdiction to restrain trespass.

It seems to us that the only question in the present case not disposed of by Kellogg v. King, is the one principally urged, namely, that injunction will not lie to enjoin the commission of a trespass when plaintiff is not in actual possession and the defendant is in possession. To this proposition defendant cites Felton v. Justice, 51 Cal. 529, claiming further that courts never enjoin a defendant in possession from mere use of the premises, citing 5 Pomeroy's Equity Jurisprudence, §§ 504, 507. In discussing the question it must be borne in mind that in Kellogg v. King the court held that "the property right which is here the subject of inquiry is of a peculiar and exceptional character," and that "the sole value of the invaded premises to the plaintiff is as a game preserve, by reason of its feature as a resort for wild game," which by the acts of defendant "is being taken from it, and its value largely, if not wholly, destroyed." And the court further held that this showing "makes out a case of irreparable damage from the destruction of the very substance of the property right which plaintiff holds under the lease." We have before us the case of an injury, amounting to the destruction of the very substance of the property right under circumstances which, in the opinion of the court in the Kellogg Case, make out a case of irreparable damage. The question, then, is not whether the rule in ordinary cases applies, but whether the rule in this particular kind of a case is as claimed by defendant. Mr. Pomeroy, with his usual clearness, in his Equity Jurisprudence (volume 5, c. 23, §§ 493–511), shows how and when the English chancellors broke through the ancient rule that chancery refused to interfere and restrain any trespasser. He divides into four classes the many cases in which trespassers to realty are enjoined, where: (1) The legal remedy is inadequate because the injury is irreparable in its nature. (2) The legal remedy is inadequate because the trespass is continuous, or because repeated acts of wrong are done or threatened, although each of these acts, taken by itself, is not destructive. (3) Insolvency of the defendant. (4) The legal remedy is inadequate in a miscellaneous class of cases because the courts for one reason or another cannot give any or, at best, not accurately estimated or sufficient damages, though damages would be a perfectly adequate kind of remedy. The essential features, marking an injury as irreparable are: (1) That the injury is an act which is a serious change of, or is destructive to, the property it affects, either physically or in the character in which it has been held and enjoyed. (2) That the property must have some peculiar quality or use such that its pecuniary value, as estimated by a jury, will not fairly recompense the owner for the loss of it. Id. § 495. In Kellogg v. King these essential features were found to exist, and they exist in the present case. The jurisdiction of equity to restrain continuous or repeated trespasses rests upon the ground of a repetition of similar actions, and this class of cases is comprehended in the broader jurisdiction of equity to prevent multiplicity of suits. This was one of the distinct grounds upon which the decision in Kellogg v. King was placed. Among the nonclassified cases is Watson v. Sutherland, 5 Wall. (U. S.) 74, 18 L. Ed. 580, where the court gave the following criterion of jurisdiction: "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity."

We come, then, to the specific question of a defendant, an admitted trespasser, in possession without right, with knowledge of plaintiff's right, and acting in defiance of it. In the leading English case of Lowndes v. Bettle, 33 L. J. Ch. 451, it was said: "Where a defendant is in possession, and a plaintiff claiming possession seeks to restrain him from committing acts similar to those here complained of (cutting timber, ornamental trees, and shrubs, and sods), the court will not interfere unless, indeed (as in Neale v. Cripps, 4 Kay & J. 472), the acts amount to such flagrant instances of spoliation as to justify the court in departing from the general principle. * * * But where the person in possession seeks to restrain one who claims by an adverse title, the tendency of the court will be to grant the injunction, at least where the acts either do or may tend to the destruction of the estate." Commenting upon the opinion in this case, and to the point that it seems to imply that the class of acts which lead to an injunction in the one case usually will have the same effect in the other, Mr. Pomeroy says (section 503): "In other words, the fact of possession in the defendant is regarded as strong evidence of title in him, and the plaintiff must therefore make a stronger case to justify an interference with him. The logical effect of this reasoning is that the plaintiff should be granted an injunction either if he produce stronger evidence of title than would otherwise be required of him, in order to offset the inference of title which defendant's possession raises, or if (as suggested in the passage above cited) he shows that defendant is committing 'flagrant instances of spoliation'; that is, more than ordinarily destructive acts. The actual effect is that some courts either grant the injunction only in the latter case, or else lay down the hard and fast rule that no injunction will issue where the defendant is in possession under claim of title, till the plaintiff has established his ownership in an action brought for that purpose. The weight of authority, however, has now come to be that even in this case a temporary injunction will issue if, pending litigation, there will otherwise be such serious acts of trespass that damages will not be an adequate remedy"—citing a large number of cases, among which is Williams v. Long, 129 Cal. 229, 61 Pac. 1087, where plaintiff out of possession as against defendant, rightfully in possession, was held to be entitled to an injunction to prevent waste pending the trial of the action in ejectment. In Hicks v. Michael, 15 Cal. 107, 115, the action was to restrain defendants from cutting and removing timber from land claimed by plaintiff. It was objected to the complaint that it appears that the defendants are in possession of the property, and that no action has been brought for the purpose of testing the legal rights of the parties. Plaintiff alleged title, and that the possession of defendants is forcible and unlawful, and that an action for a forcible entry has been commenced by plaintiff and is still pending. The court said: "In looking into the cases of this character in which courts of equity have interposed by injunction, we do not find that the jurisdiction has ever been questioned upon the ground that no action at law had been brought to try the title. It has been frequently decided that, where the title of the plaintiff is disputed by the answer, an injunction could not be granted until the final hearing of the cause; but there is no case in which it has been held that a legal determination of the question of title, or the pendency of a suit for that purpose, was essential to the equitable jurisdiction of the court. The usual practice has been to ask the assistance of equity in such cases in aid of the law; but there are many cases in which a different course has been pursued, and the powers of a court of equity invoked in the first instance. * * * The jurisdiction in such cases rests upon the ground of irreparable mischief, and the policy of preventing a multiplicity of suits; the remedy at law being entirely inadequate as a means of redress."

To the point that equity will not enjoin a defendant in possession from the mere use of the premises (citing 5 Pom. Eq. Juris. § 504), a casual examination of the cases on which the text rests will show their inapplicability. Snyder v. Hopkins, 31 Kan. 557, 3 Pac. 367, opinion by Brewer, justice, is a fair illustration of this fact. In enumerating the uses of a farm, in which the defendant should be permitted to continue undisturbed, the learned judge speaks only of such uses as pertain to the ordinary cultivation of the soil and the harvesting of crops, pasturing the land, and the like, and adds: "In short, he should be permitted to use the farm in an ordinary way, as such a farm is used, with the single limitation that he commit no waste, and make no substantial and injurious change in its condition." Trespassing sportsmen have, in a number of instances, felt the restraining hand of a court of equity. In Lamprey v. Danz, 86 Minn. 317, 90 N. W. 578 plaintiff was the owner of certain swamp land, the chief value of which was the shooting opportunities it offered. Defendant and his friends were in the habit of shooting on this land from a place of concealment on defendant's land, thus interfering with the feeding, roosting, and breeding of ducks and impaired the value of plaintiff's land. The court enjoined defendant from continuing this conduct. In Simpson v. Moorhead, 65 N. J. Eq. 623, 56 Atl. 887, where the defendant intruded upon plaintiff's tide land, it was held that the injury suffered by the owner, in lessening the quantity of game, increasing the danger of accidental shooting, and interfering with his exclusive shooting rights, is not adequately remediable in damages. To like effect is Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686, 8 L. R. A. 578, 21 Am. St. Rep. 828. We quote from the syllabi: "Equity may be at once resorted to for appropriate relief, where numerous acts of trespass are being committed, and their continuance threatened under claim of right, and when the injury arising from each act is trifling, and the damages recoverable therefor inadequate as compared with the expense necessary to prosecute separate actions at law." See extended note, upon the subject of injunction against trespass on realty, reported in Moore v. Halliday, 99 Am. St. Rep. 724 (43 Or. 243, 72 Pac. 801). See, also, valuable note to the leading case of Jerome v. Ross, 7 Johns. Ch. (N. Y.) 315, reported in 11 Am. Dec. 484. We invite attention, also, to Fabian v. Collins, 3 Mont. 215, where Felton v. Justice, supra, and Raffetto v. Fiori, 50 Cal. 363, on which the former rests, relied upon by appellant, are dealt with. Suffice for us to say that the principle announced in these cases has no application to, nor should it control, the case we have here. Impotent, indeed, would be the most valuable arm of the law if equity could in no case, however flagrant, be invoked against a trespasser, in aid of the owner or one entitled to the possession, to protect his estate from destruction, simply because he happens to be out of actual possession. It ought not to be, and we think it is not the rule.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

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PEOPLE v. SILVERS. (Cr. 42.)

(Court of Appeal, Third District, California. July 2, 1907. Rehearing Denied by Supreme Court Aug. 28, 1907.)

1. CRIMINAL LAW—APPEAL—MOTION FOR NEW TRIAL—AUTHENTICATION.

Supreme Court Rule 29 (78 Pac. xii) provides that in all cases of appeal from orders the papers and evidence used on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law. *Held*, that where a motion for a new trial by accused was contained in the transcript, and not in the bill of exceptions, it could not be reviewed.

2. SAME — EVIDENCE — CONFESSIONS — VOLUNTARY CHARACTER.

A confession procured by a prosecuting officer, or one in official authority over the prisoner by means of promises or threats, is involuntary per se.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1163–1174, 1202–1206.]

3. SAME.

Defendant, who was employed by a corporation, having been arrested for arson, was interviewed by A., one of his employer's officers, who informed the district attorney that defendant desired to make a confession. A stenographer was then called, and defendant was left by the sheriff in charge of the district attorney in company with A. and the president of the corporation, a Pinkerton detective, and defendant's brother. When informed that the district attorney understood he desired to make a confession, defendant said nothing, but tears came into his eyes, and A. told him to brace up, that it would be better for defendant to tell everything he knew. He still hesitated, and the district attorney, to relieve him, asked him his name and how to spell it, whereupon defendant admitted that he fired the building because, in a state of inebriety, he had an irresistible impulse to "see things burn." *Held*, that A.'s statement urging defendant to confess being made in the presence of the district attorney, and not contradicted, may well have been construed as a promise of favor if he confessed, rendering the confession not voluntary, though the district attorney informed defendant that he need tell only what he desired to.

4. SAME—TRIAL—OBJECTIONS—WAIVER.

Where accused objected to parol evidence of his confession given by the district attorney, on the ground that the confession was taken and transcribed by a stenographer, and that the transcription was the best evidence, and did not object that the showing that the confession was voluntary was insufficient until after he had persisted in getting the entire statement from the district attorney, and then introduced the written statement "for all purposes for which it might be used," the objection that the confession was not voluntary was waived.

5. SAME—BEST EVIDENCE—REFRESHING RECOLLECTION.

Where a confession made by accused to the district attorney was taken down by a stenographer in the presence of the district attorney and transcribed, the district attorney's testimony of the confession was the best evidence thereof; the transcription being available only as a memorandum from which he was entitled to refresh his recollection, if necessary, in which event, Code Civ. Proc. § 2047, requires its production and authorizes the adverse party to read it to the jury.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Walter Silvers was convicted of arson, and he appeals. Affirmed.

A. H. Hewitt, for appellant. U. S. Webb, Atty. Gen., for the People.

HART, J. The defendant was convicted of the crime of arson, and presents this appeal from the judgment and the order denying his application for a new trial. The Attorney General, however, objects to the consideration by this court of any questions except such as are reviewable upon an appeal from the judgment, because there is nothing in the bill of exceptions showing that a motion for a new trial was made. There appears in the transcript, but not in the bill of exceptions, a paper purporting to be a motion for a new trial and the grounds thereof. Under rule 29 of this court (78 Pac. xii), and the decisions expounding its scope and effect, any points, therefore, which may be considered by this court only upon an appeal from the order we have no authority to review. People v. Ruiz, 144 Cal. 251, 77 Pac. 907; People v. Durand, 1 Cal. App. 71, 81 Pac. 672.

The principal as well as the most serious point upon the merits presented for consideration by the record, and which is reviewable upon the appeal from the judgment, concerns and involves the ruling of the court admitting proof of an alleged confession of guilt of the appellant. The defendant, it appears, had been employed for some time by a concern known as the "Armsby Preserving Company," at Yuba City, and had lodgings at the Windsor Hotel of that place. On the morning of the 7th of July, 1906, a few minutes after midnight, a fire was discovered in the "sitting room" of said hotel by the son of the landlord. The fire, after some effort, was extinguished; no great amount of damage having been sustained. The defendant aided to some extent in the work of the extinguishment of the fire. Later in the same day the defendant was arrested by the sheriff upon suspicion of having set the hotel on fire and was confined in the county jail. On the 10th day of July, one Aitken, superintendent of the Armsby Preserving Company, called upon the district attorney and stated to that official that the defendant desired to make a confession, or admit his guilt of the crime of arson. The district attorney thereupon called in a stenographer, and then sent for the defendant, who was brought by the sheriff to the office of the prosecuting officer. The sheriff placed the defendant in charge of the district attorney and immediately thereafter left the latter's office. The defendant then made a statement, admitting his sole responsibility for the fire, explaining, however, that he started the fire, not because of any malicious feeling against the landlord or any other person occupying apartments in the hotel, but because, when in a state of inebriety, which he claimed to be his condition that evening, he seemed to possess an irresistible and unconquerable impulse to "see things burn." Besides the district attorney, there were present, when the defendant made the statement, said Aitken, a Mr. Stone, president of the Armsby Preserving Company, a Pinkerton detective, and a brother of the defendant. The defendant not only admitted starting the fire in the Windsor Hotel, but declared that he had previously set a number of other buildings in Yuba City on fire, among which was a structure belonging to the Armsby Preserving Company. At the trial, after proof of the corpus delicti, the district attorney himself took the witness stand for the purpose of giving testimony relative to the defendant's admission of his participation in the crime. Preliminarily to giving evidence of the confession, the district attorney undertook to show, as it was incumbent upon him to do, that the same was free and voluntary, or without threats or other intimidation, or promises of favor or other inducements, and further testified: "When Walter Silvers came in, I said to him that I understood he desired to make a confession. He said nothing at that time, but tears came to his eyes, and Mr. Aitken told him to brace up, saying: "Brace up, old man, and it will be better for you, and tell everything you know.' He still hesitated for a moment, and, to relieve him until he regained his composure, I asked him what his name was, and how he spelled it." The district attorney, after stating that there were no inducements held out to the defendant to make a statement, proceeded to state: "In fact, I said to Silvers before he started to talk that if he did not want to make a statement he need not, but I understood he did and was there for that purpose, or words to that effect; that if he did not want to make it, all right, and he thereupon made a statement confessing to this alleged offense." Objection was thereupon interposed by the attorney for the appellant to evidence of the confession upon the ground that, it appearing that a stenographer had taken and transcribed the declarations of the defendant, the writing or stenographer's transcription was the best and only competent evidence of the alleged confession, and, after some little discussion between court and counsel, objection was also made that the confession was not shown to have been voluntarily made. The court overruled the objections, and the district attorney then proceeded to give testimony of the alleged confession, confining himself to the statements of appellant regarding the particular offense charged in the information. It may here be parenthetically stated that Mr. Aitken, who, it will be remembered, gave the district attorney information of the desire of the defendant to make a statement, did not testify in the case, and there is therefore nothing in the record to indicate the circumstances under which Aitkin was authorized by the defendant, if at all, to impart the information to the prosecuting officer that appellant wished to make a statement.

A distinction is made by many cases in this country and in England between confessions induced by one having no authority or control over the prisoner, and those induced by persons who have such authority, as constables, prosecutors, and the like. "But the cases seem to hold the owner of the goods stolen to stand in this relation.' People v. Smith, 15 Cal. 411. The circumstances of each particular case must, however, serve as the sole criterion of whether an admission of guilt by an accused person is a voluntary confession or otherwise, where such confession is obtained through promises or threats by a party having no official authority over the case. A confession thus procured by a prosecuting officer, or one in official authority over the prisoner, is no doubt involuntary per se. In the case at bar, we know of no reason to entertain the slightest doubt that the alleged confession, obtained under the circumstances as detailed by the district attorney, was not only not voluntary, but was extorted from the defendant either through a feeling of fear with which, by some means on some occasion, he had been inspired, or through hope of clemency or mitigation of punishment. The defendant had been employed by and worked under Aitken, who took an active part in securing the statement, and there is enough in the record to warrant the inference that he had, previously to making the alleged confession to the district attorney, admitted to said Aitken that he was responsible for the incendiary burning of a building belonging to the company of which Aitken was the superintendent. According to the testimony of the district attorney, when he appeared before that official in his office for the purpose of making a statement, the defendant, upon being told of the purpose of the meeting, hesitated some time before speaking, and, in fact, was shedding tears, and said nothing whatever until after Aitken, evidently in a manner indicating friendship, said, "Brace up, old man. Tell the truth about it, and it will be better for you." While Aitken was not a person "in authority," this suggestion by him to the defendant was, nevertheless, made in the presence of one who was "in authority," and the defendant had a right to assume, as in the nature of things he probably did assume, from the silence of the district attorney when Aitken thus addressed him, that whatever was or might be said by the latter was approved by the prosecuting officer. The statement is not a recital of the circumstances of the acts of the defendant in the form of a narrative, but consists throughout of categorical answers to questions propounded by the district attorney. It is true that the prosecuting officer said to the defendant, speaking of the burning of the hotel: "You might tell us about the other night, if you want to tell the story. If not, do just as you choose about it." But just prior to that suggestion, Aitkin, in addition to what we have already quoted from his remarks to the defendant at the beginning of the interview, and in reply to a declaration of the appellant that "I am not going to tell lies. I am going to give the truth as near as I can tell it"—said: "That is what we want you to do, and it will be a whole lot better for you and everybody concerned." Of course, it may be true that no part of the alleged confession, which was not presented to the court before the decision of the preliminary issue as to whether or not said confession was freely and voluntarily made, should be considered in determining whether the court's ruling in admitting it was erroneous or otherwise. It may be stated, however, that nowhere does it appear in the record that the district attorney cautioned the defendant that the suggestions of Aitken were not indorsed by him, nor would be binding upon him in the prosecution of the case. We think that, under the circumstances, it was the duty of the district attorney to have explicitly explained to the defendant that the matter of making a statement concerning the offense for which, upon suspicion, he was then detained in custody, rested entirely with him; that he could make a statement if he so desired, or not make one if such was his disposition; that, notwithstanding Aitken's repeated suggestions that "it would be better for him to tell all," he would use against him in the prosecution of the case any incriminating declarations the defendant might make.

But, while we think the alleged confession was inadmissible because it was not free and voluntary, we also think that the defendant by his own act foreclosed his right to complain of the ruling of the court admitting it. The only objection made against the introduction of the alleged confession into the record when it was first offered was based upon the ground that the statement as taken and transcribed by the stenographer was the best evidence of the declarations of the defendant. The attorney for the defendant seemed to be persistently insistent on getting the entire statement before the jury until the court suggested that the preliminary issue to be determined was whether or not it involved a voluntary confession. At this juncture, the defendant's counsel for the first time made vigorous protest against the reception into the record of any evidence of the alleged confession upon the ground that no proper foundation had been laid for its admission. After the district attorney had been permitted by the court to state that the defendant had admitted setting the hotel on fire, counsel for appellant cross-examined him at length, bringing out fully the part which Aitken had taken in the interview, as already indicated, and then moved to strike out all the testimony of the witness as to the alleged confession because the same was not voluntary. The court denied the motion. Here the people rested their case, and thereupon the following proceedings were had: "Mr. Hewitt (Counsel for Appellant): I now offer in evidence the confession of the defendant as actually made in the presence of the officers of the court. Mr. Schillig (District Attorney): Very well. If you admit that is the confession of the defendant made on the 10th of July, 1906, I am willing it should go in evidence. Mr. Hewitt: I wish it to appear in the record of the case. The Court: You cannot introduce just to have it appear in the record. It must have some purpose. Mr. Schillig: I want it read to the jury. Mr. Hewitt: So do I. The Court: You may introduce it for all purposes for which it may be used. Mr. Hewitt: I so introduce it." Thereupon Mr. Hewitt read the entire confession to the jury, and it was marked "Defendant's Exhibit A." It will thus be observed that, although vigorously objecting to the admission of the confession into the record when offered by the people, appellant's counsel himself offered and had it received in evidence as a part of his defense "for all purposes for which it may be used." And in so doing, the appellant surrendered all advantage which accrued to him by reason of the error in the ruling of the court admitting the confession at the behest of the prosecution. We are, we must confess, at a loss to understand why the defendant offered and insisted upon the admission of the complete statement of the defendant in evidence. It constituted all the evidence, so far as the record before us discloses, introduced or offered on behalf of the defendant. The written statement thus given to the jury through appellant's own act contained not only an admission of the commission of the specific offense for which he was on trial, but also a confession that he had a short time previously committed several other similar offenses in Yuba City. The district attorney, when testifying to the confession, expressly stated that he desired and intended to restrict his testimony to the declarations of the defendant involving only the particular crime charged in the information. If the defense had sought to show that the accused was insane, or was for some other reason temporarily irresponsible at the time of the perpetration of the act, there might have been some reason, for aught that we can discern to the contrary, for the introduction of the whole statement of the defendant as a part of his case. But, as seen, there was no such defense interposed, nor in fact any other evidence offered in his behalf. If counsel for the defendant could see any purpose, beneficial to the defendant, for giving the statement in its entirety to the jury, he could have succeeded in so doing without injury to his client, had he pursued the course laid down in clear terms by the code. His objection to the testimony of the confession upon the ground that the written report thereof by the stenographer was the best evidence of what the defendant had said was not well taken. A witness is required to rely upon his recollection of the facts to which he is called to testify, but if he made a written memorandum of the facts at the time that they occurred, or at a time when they were fresh in his memory, or if such a memorandum has been made under his direction, and he is unable to detail the facts from his independent recollection of them, he may then resort to such writing for the purpose of refreshing his memory respecting such facts. In the event he finds it necessary to thus refresh his memory, the writing so used must be produced and "may be seen by the adverse party, who may cross-examine the witness upon it, and may read it to the jury." Section 2047, Code Civ. Proc. This rule is, of course, applicable where the evidence is, as was the fact at the particular stage of the case with which we are now dealing, addressed solely to the court upon the question of the admissibility of the alleged confession, and the full statement could then have been upon appellant's motion read to the court, and its purpose limited to an explanation, elucidation, or amplification of the circumstances under which the same was obtained from the defendant, in order the better, perhaps, to enable the court to decide the point to which the evidence was addressed. It is therefore plain to be seen that the entire statement could have thus reached the jury, by an indirect course, it is true, yet with equal force and effect of a direct presentation of it to the triers, and, at the same time, without involving the sacrifice of the only point upon which the defendant could rely and hope for a reversal of the judgment against him. But it seems that counsel preferred to adopt a course which made him an indorser, not alone of everything contained in the statement of the defendant concerning the crime of which he was adjudged guilty, but of the circumstances under which that statement was secured, for he not only admitted it to be the confession of his client, but offered it himself as evidence in the case "for all the purposes for which it may be used." The defendant has no conceivable ground upon which to complain of testimony prejudicial to him which he himself pressed to the attention of the jury.

There are some other alleged errors specified, but they do not merit attention.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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6 Cal. App. 507

CALIFORNIA PACKERS' CO. v. MERRITT FRUIT CO. (Civ. 263.)

(Court of Appeal, First District, California. Oct. 2, 1907. Rehearing Denied Oct. 30, 1907; Denied by Supreme Court Nov. 29, 1907.)

1. APPEAL—TIME FOR TAKING—REVIEW OF EVIDENCE.

Where an appeal from a judgment on the judgment roll with a bill of exceptions was not taken within 60 days after judgment rendered, the sufficiency of the evidence to justify the findings and decision cannot be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1888.]

2. EVIDENCE—WRITTEN INSTRUMENT—PAROL EVIDENCE.

An instrument signed by plaintiff acknowledged receipt of a specified sum in full payment of all claims then or previously existing in favor of plaintiff and against defendant, and contained a covenant to hold defendant free from all liability on account of any claim made by a fruit association against defendant based on any contract, between such association and defendant, of date prior thereto, plaintiff to defend at its own cost against any such demands. *Held* that, while the clause by which plaintiff agreed to save defendant harmless, etc., was a contract, the balance of the instrument was a mere receipt, subject to explanation by parol proof showing that the instrument was intended only as a settlement of all matters between the parties pertaining to certain dried fruit business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1829–1842.]

3. COMPROMISE AND SETTLEMENT—SCOPE.

Where a receipt executed by plaintiff to defendant in full settlement "of all claims and demands then or theretofore existing by plaintiff against defendant" was shown by parol proof to pertain to certain transactions in dried fruits between the parties, and to have had no relation to defendant's liability as a stockholder for unpaid stock subscriptions, such receipt was no defense to defendant's liability for calls subsequently made on such stock for which defendant had subscribed prior to the execution of the receipt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Compromise and Settlement, §§ 54–74.]

4. PLEADING — ADMISSIONS — RELEASE — EXECUTION—DENIAL.

Code Civ. Proc. § 448, provides that, when a defense is founded on a written instrument and a copy is contained in the answer, the genuineness and due execution thereof are admitted unless plaintiff files an affidavit denying it. *Held* that, where the execution of a receipt pleaded by defendant as a discharge was not so denied, plaintiff only admitted that the receipt was genuine and duly executed, and could still prove by parol what demands were included therein, or that it was executed through fraud or mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 871.]

Appeal from Superior Court, Santa Clara County; A. L. Rhoades, Judge.

Action by the California Packers' Company against the Merritt Fruit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. R. Leppo, for appellant. Jos. R. Patton, for respondent.

COOPER, P. J. The complaint alleges that the defendant in September, 1900, subscribed for 125 shares of the capital stock of plaintiff at the par value of $10 per share, the same to be paid for upon call, with the exception of the first payment of 25 cents per share, and that the said shares were issued and delivered to defendant; that in March, 1904, plaintiff duly issued a call upon its stockholders for $6 per share upon every share of its capital stock, the call upon defendant amounting to $750, which it refused and neglected to pay, and for which sum judgment is prayed. The answer denies the principal allegations of the complaint and alleges affirmatively that in January, 1903, defendant paid to plaintiff the sum of $4,648.22 in full payment and satisfaction of the said indebtedness and of all demands of every kind and nature, and that thereupon the plaintiff executed and delivered to defendant a release and discharge of said indebtedness.

The instrument claimed to be a release or discharge is set forth in the answer, and is as follows: "San Jose, Cal., Jan. 10th, 1903. The California Packers' Company, a corporation, has this day received from the Merritt Fruit Company, a corporation, the sum of forty-six hundred forty-eight 22/100 ($4,648.22), being in full payment, satisfaction and discharge of all claims and demands of every kind and nature now or heretofore existing in favor of said the California Packers' Company, or in favor of the California Cured Fruit Association, a corporation, against the said the Merritt Fruit Company; and in consideration of said payment above mentioned the said the California Packers' Company covenants and agrees to hold safe and harmless and free from all liability and expenses of every kind on account of any claim or demand made or to be made by the said California Cured Fruit Association against the said the Merritt Fruit Company growing out of or based upon any contract, dealing, transaction or act of any kind by or between the said California Cured Fruit Association and the Merritt Fruit Company, of date prior hereto, and said the California Packers' Company further covenants and agrees to defend and protect in any and all courts, or otherwise, at its own cost and expense, the said the Merritt Fruit Company, from any and all such above mentioned claim or claims, demand or demands. In witness whereof, the said the California Packers' Company, by resolution of its board of directors, has caused this instrument to be subscribed by its president and secretary, and its corporate name, with corporate seal, the day and year first above written. California Packers' Co., by W. M. Griffin, President, by R. W. Hersey, Secretary." [Seal.] Findings were filed, upon which judgment was entered for plaintiff as prayed. This appeal is from the judgment on the judgment roll with a bill of exceptions, but, as the appeal was not taken within 60 days after the rendition of the judgment, we cannot, under the well-settled rule, consider the sufficiency of the evidence to justify the findings and decision. We must therefore consider the findings final as to the facts.

The case turns on the construction of the instrument herein set forth as to whether or not it is a contract or a receipt, and as to whether or not parol evidence was admissible to explain it and show the circumstances under which it was given. The court below, under defendant's objections, received evidence of the facts and circumstances under which it was given, and for the purpose of explaining it. It found that at the time of giving the instrument the plaintiff and defendant had an adjustment of certain controversies growing out of demands and cross-demands, relating to the handling, disposal, sale, and storage of certain dried fruits of the crop of 1900, and upon such settlement defendant agreed to pay and did pay the sum of $4,648.22 in full payment of its liabilities to plaintiff, "growing out of or connected with the said sale, disposal, handling and storage of said dried fruits, and upon such payment by defendant to plaintiff, the plaintiff then and thereupon and in pursuance thereof executed and delivered to defendant the instrument set forth and described in defendant's answer." The court further found that the said settlement did not include, nor was it intended to include, "defendant's obligation and liability to pay plaintiff said defendant's unpaid portion of the subscription price upon its 125 shares of plaintiff's capital stock, or any portion thereof, or any call or demand therefor made or to be made by plaintiff's board of directors." Notwithstanding the fact that we must regard the findings as true upon the record before us, we have examined the evidence, and it supports the findings. In fact, there is no conflict. Of course, if the instrument is a contract which, by its terms, settled all claims between plaintiff and defendant, the court erred in admitting evidence to explain it, and to show the circumstances under which it was given, but it is not such contract. It was as to defendant a mere receipt for money. The fact that it stated that the money received was in full of all claims and demands must be held to mean the claims and demands for which the money was given in satisfaction. A receipt may always be explained, and even the amount of money stated in the receipt to have been paid may be shown by parol evidence to have been a different sum. If the amount or sum mentioned in the receipt may be contradicted by parol, there is no reason why the words "all claims and demands" may not also be contradicted or explained. One word in a receipt is no more sacred than another. A receipt is not intended to be an exclusive memorial, and for this reason the authorities all hold that the facts may be shown. A receipt is only a written admission of a transaction independently existing, and, like other admissions, it is not conclusive. It is evidence—and often very convincing evidence—against the party who gives it, but it is not conclusive. Being only evidence of a fact, it cannot be held to destroy any existing right in no way connected with it.

Now, applying the above principles to the facts of this case, the defendant was indebted, or had incurred an obligation by which it might become indebted, to the plaintiff on a call for subscription for capital stock. The liability or indebtedness so existing could be discharged by the payment of the amount of such indebtedness. The fact of payment would extinguish the indebtedness, but certainly the giving of a receipt of itself would not have that effect. Here the defendant said in effect: "I paid you the amount of the call of $6 per share." The plaintiff in answer said: "You did not." The defendant replies: "Here is a receipt for $4,648.22 in payment of all claims of every kind and nature." The plaintiff offered evidence to show that the receipt was for a settlement and adjustment of certain dealings in regard to dried fruits; that the amount that might become due upon a call for a subscription to the capital stock of plaintiff was in no way considered or mentioned; that the items going to make up the sum named in the receipt were all in connection with drying fruits; that the call for the $6 had not even been made, and there was nothing due upon it at the time the receipt was given. Defendant objected, and in effect said: "Oh, yes; what you say is true, but I have your receipt, and your receipt is a contract, and you cannot dispute it by parol." It is true that there are cases in which what is called a receipt is held to be a contract notwithstanding its name; but in all such cases we apprehend it will be found that the receipt was a settlement of the matters and things for which it was given, and that it was intended to be final. There is a clause in the instrument at bar by which the plaintiff, in consideration of the said payment, agreed to save defendant harmless from all liability or claims of the "California Cured Fruit Association." That part of the instrument is a contract, but it is a contract in consideration of the $4,648.22 pertaining to the fruit-drying business, and evidently connected with the handling, sale, and storage of dried fruits of the crop of 1900. In other words, the receipt was in full for the claims of plaintiff and the California Cured Fruit Association in regard to the drying and handling of fruit for either. We may hold the instrument to be a contract and a settlement in full of all matters pertaining to the handling, sale, storage, and disposal of the dried fruits of the crop of 1900. That was what the parties intended, and the court so found.

As to the claim that might arise upon a future call for defendant's subscription to plaintiff's capital stock, the instrument was not a contract. Such liability was not in the mind of the parties. It was not even spoken of during the settlement. Now, a contract is an agreement, upon sufficient consideration, to do or not to do some particular thing. What particular thing did the plaintiff agree to do? It certainly did not agree to cancel all liabilities of defendant by reason of its subscription to the capital stock. It did not make any agreement of any kind as to the liability in controversy. If it did, what is the consideration? It could not be the amount of money that was paid to plaintiff, because that amount was the amount agreed upon and fixed as a settlement for the fruit transactions. To hold this instrument to be a contract in regard to the subject-matter of this suit would be to hold that an agreement was made as to a thing that was never mentioned, and the money that was paid for and in regard to a different transaction a consideration for such agreement.

In Hawley & Co. v. Bader, 15 Cal. 44, it was held in a suit upon an account against B. & S. as a firm, a receipt to B. alone signed by plaintiff "in full of all accounts and demands due us at this date" might be shown by parol evidence to cover firm as well as individual indebtedness. In Snodgrass v. Parks, 79 Cal. 56, 21 Pac. 429, it was held that parol evidence was admissible to show that a receipt for a certain sum of money, which recited that the money was paid on a contract of purchase, was in fact, given and received as payment of rent. In the late case of Jersey Island Dredging Co. v. Whitney, 149 Cal. 269, 86 Pac. 509, 691, it was held that in an action for services rendered after the date of a bill rendered for prior services, the amount of which was disputed, and subsequently settled for a less sum "in full satisfaction of all claims," the plaintiff was entitled to show by parol that but one item in the bill was disputed, that there was no discussion as to anything else than the settlement and satisfaction of that bill. The case was decided the other way, and the receipt held to be a contract by the district court of appeal for the first district. A petition for a rehearing was filed in said district court, and two of the justices of said court voted for a rehearing. The case was then ordered up to the Supreme Court, and the decision is by the court in bank. The court there said: "Assuming that the writing relied on constituted a valid contract or release instead of a mere receipt, the question still remained as to what was released thereby." So in this case the parol evidence was admitted for the purpose of showing what claims and demands were included in the settlement for which the receipt was given.

Defendant contends that its motion for judgment on the pleadings should have been granted. This contention is based upon the fact that the answer contained a copy of the instrument, and the plaintiff did not comply with section 448 of the Code of Civil Procedure by filing an affidavit denying the same. The section relied upon provides that when the defense is founded upon a written instrument and a copy of such instrument is contained in the answer thereto, the genuineness and due execution of such instrument are deemed admitted unless the plaintiff file an affidavit denying it. The admission by reason of the failure to file this affidavit does not go beyond the language of the statute. It was thus admitted in this case that the receipt was genuine and duly executed. Plaintiff did not in any manner attempt to prove anything to the contrary. Because the instrument was genuine and duly executed, the plaintiff was not prevented from offering parol evidence as to the surrounding circumstances, and for the purpose of showing what demands were included in the receipt. Plaintiff had the right to controvert the instrument by evidence of mistake or fraud, or to show that it had no connection with the demand sued upon. Newson v. Woollacott, (Cal. App.) 91 Pac. 347; Moore v. Copp, 119 Cal. 429, 51 Pac. 630.

This disposes of the material questions in the case. The judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

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6 Cal. App. 558

MONTIJO et al. v. ROBERT SHERER & CO. et al. (Civ. 393.)

(Court of Appeal, Second District, California. Oct. 4, 1907. Rehearing Denied by Supreme Court Nov. 29, 1907.)

1. APPEAL—BILL OF EXCEPTIONS—REVIEW—PRESUMPTION.

In the absence of a bill of exceptions to a ruling refusing to admit a record of certain motions into the statement, it will be assumed on appeal that the reasons for the ruling were sufficient.

2. FORCIBLE ENTRY AND DETAINER—ISSUES AND PROOF.

Where, in forcible entry, plaintiff alleged damages to certain lots by defendant's blasting operations, but his testimony failed to connect the property on which he claimed defendants entered with that described in the complaint, he could not recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forcible Entry and Detainer, § 130.]

3. EVIDENCE—WEIGHT AND SUFFICIENCY—NEGATIVE TESTIMONY.

Evidence that witness had never seen certain things with reference to an alleged forcible entry on land in controversy, though he had lived "right there adjoining the property" for 15 years, justified a presumption that he would have seen them had they occurred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2432–2434.]

4. APPEAL—FINDINGS—CONFLICTING EVIDENCE—REVIEW.

A finding by the trial court on conflicting evidence will be sustained on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983–3989.]

5. FORCIBLE ENTRY AND DETAINER—TITLE—EVIDENCE.

In an action for forcible entry, evidence of plaintiff's ownership was inadmissible; title not being involved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forcible Entry and Detainer, §§ 137, 138.]

6. PROPERTY—REALTY—PROOF OF TITLE—PAROL EVIDENCE.

Title to land cannot be established by parol evidence.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Manuel Montijo and others against Robert Sherer & Co. and others. From a judgment for defendants and from an order denying plaintiffs' motion for a new trial, they appeal. Affirmed.

See 91 Pac. 261.

Wm. Crawford, for appellants. Bicknell, Gibson, Trask, Dunn & Crutcher (Edward E. Bacon, of counsel), for respondents.

TAGGART, J. An action of forcible entry. Plaintiffs allege ownership and actual possession of lots designated as 44, 45, 46, 47, and 48 of a certain subdivision in the city of Los Angeles, and the forcible entry of defendants upon lots 44 and 45 at divers times on February 2, 1906, and at other times between that date and February 14, 1906, and that defendants blasted and tore up and carried away large portions of the soil of said lots. The prayer of the complaint is for damages only. Judgment was for defendants, and plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

It is stated in appellants' brief that they made a motion to strike out the answer and moved for a judgment on the pleadings on the ground that the answer did not state facts sufficient to constitute a defense, but that the court denied both motions. The question is presented in the argument, although it appears from the brief that the court refused to admit a record of these motions into the statement. No bill of exceptions on this ruling appears in the transcript, and, in the absence of any showing, we are bound to assume that the reasons of the trial court for refusing to embody these matters in the "statement" were valid and sufficient. The grounds of the motion for a new trial, as stated in the notice, are: Insufficiency of the evidence to justify the decision of the court, and that the decision of the court is against law. The specifications of error in the statement on motion for a new trial do not cover the latter ground, but specify an error of law occurring during the trial by a ruling of the court striking out a statement made by the plaintiff Manuel Montijo when a witness on the stand. The particular in which the evidence is claimed to be insufficient to support the decision of the court is addressed to the finding that the plaintiffs were never in either actual or constructive possession of the property forcibly entered.

The testimony of plaintiff Montijo failed entirely to connect the property on which he said the defendants entered with that described in the complaint. The only deduction the court was able to make, as stated by it, was that "the blasting was 50 feet away from his house and at the end of the hill." Thereupon, by consent of the parties, the court visited the premises, and upon returning into court the judge made a statement in open court of his observations taken on the premises. From this statement it appeared that the buildings and improvements of plaintiff were on lots 46, 47, and 48, and that none of them were on the lots in question, 44 and 45. It also appeared that none of the lots were inclosed. This statement is corroborated by one of the witnesses for defendants, an engineer who surveyed the property, who testified to the conditions existing for a period of three years previous to the alleged entry of defendants. The negative testimony of the witness Maloney that he never saw certain things, although he lived "right there adjoining the property" for 15 years, is corroborative evidence, as, had the things mentioned been there, the court was entitled to presume that Maloney would have seen them, such were his opportunities for observation. There was abundant evidence to support the finding complained of, even though it be conceded that the testimony of plaintiffs will bear the construction given it by appellants. It then becomes a question of a conflict in the evidence, in which case the findings of the trial court must be sustained. The decision is not against law, and there was no error in striking out the testimony of plaintiff Montijo as to his ownership. His title was not involved, and, if it were, could not be established by parol evidence.

We find no error in the record, and the judgment and order of the trial court are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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6 Cal. App. 492

PEOPLE v. COLLINS. (Cr. 75.)

(Court of Appeal, First District, California. Oct. 2, 1907. Rehearing Denied Oct. 30, 1907; Denied by Supreme Court Nov. 29, 1907.)

1. PERJURY — INDICTMENT — ASSIGNMENT OF PERJURY.

An indictment for perjury alleged that defendant, etc., did willfully, etc., contrary to his oath, state as true that on a specified date, at a church described, a marriage ceremony was performed between defendant and one A. N. by a clergyman named, in the presence of persons named, etc.; that such testimony was false, and was known by defendant to be false at the time it was so given, willfully and knowingly; that on the said date specified and at the church described, a marriage ceremony was not performed between defendant and A. N., etc.; that the truth was that on the date specified and at the church described a marriage ceremony was performed between defendant and C. N., etc. *Held*, that though the allegation that on the date and at the place specified, etc., a marriage ceremony was not performed between defendant and A. N. be regarded as a negative pregnant, there being no allegation of the substantive fact that a marriage was performed between defendant and A. N. at a certain time and place, but an allegation that defendant falsely so testified, the indictment contained a sufficient assignment of perjury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 90–94.]

2. SAME—CONSTRUCTION OF INDICTMENT.

Where an indictment for perjury is objected to as not containing a sufficient assignment of perjury, the entire indictment must be read and considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 90–94.]

3. SAME—MATERIALITY.

An averment in an indictment for perjury that the testimony alleged to have been perjured then and there given by defendant was material to the action and the trial described, in which the testimony was given, and material to the issues therein, etc., was a sufficient allegation of materiality, unless it affirmatively appeared from other averments that the testimony was immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 82–89.]

4. SAME—DEFINITION.

False testimony circumstantially material, or supporting or giving credit to a witness, or discrediting him with respect to the main facts in issue, is perjury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 38–54.]

5. SAME—OATH—AUTHORITY TO ADMINISTER.

Pen. Code, § 966, provides that, in an indictment for perjury, it shall be sufficient to set forth in what court and before whom the false oath was taken, and that the court or the person before whom it was taken had authority to administer it, etc. *Held*, that under Code Civ. Proc. § 2093, providing that a deputy county clerk is ex officio clerk of the superior court, and has power on the trial of actions therein to administer oaths to witnesses, an indictment for perjury alleging that in a certain action in the superior court having jurisdiction, defendant was called as a witness, and that then and there one M. was a duly appointed, qualified, and acting deputy clerk and an officer authorized by law to administer oaths, and authorized to administer an oath to defendant, and did in such trial administer an oath to defendant in due form of law, etc., sufficiently charged that such officer had authority to administer the oath.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 76–79.]

6. SAME—FORM OF OATH.

An indictment for perjury charging that defendant was sworn to testify to the truth, the whole truth, and nothing but the truth, though not precisely in the form prescribed by Code Civ. Proc. § 2094, was nevertheless sufficient, under Pen. Code, § 121, declaring that it shall be no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 80.]

7. SAME—SUBSTANCE OF CONTROVERSY.

An indictment for perjury charging that defendant was duly sworn in a certain case then and there at issue, giving the title of the case and setting out defendant's testimony therein, with the averment of its materiality, sufficiently alleged the substance of the controversy in respect to which the offense was committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 72–75.]

8. CRIMINAL LAW — INDICTMENT — DEFECTS — APPEAL—PREJUDICE.

Where an indictment for perjury was sufficient to fully inform defendant of the charge against him, and none of the alleged defects were prejudicial to his substantial rights, they were immaterial, and not ground for reversal of a conviction, under Pen. Code, § 1258, providing that, after hearing the appeal, the court must give judgment without regard to technical errors or defects not affecting the substantial rights of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3101.]

9. PERJURY—VERDICT—EVIDENCE.

In a prosecution for perjury, evidence *held* to sustain a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 117–124.]

10. SAME—EVIDENCE—MATERIALITY.

Where an issue was presented, in an action against defendant for support, as to whether defendant married C. N. on May 15, 1889, and he was charged to have falsely testified that a marriage ceremony was performed at such time and place between himself and A. N., the evidence in a prosecution for perjury that in connection with such testimony defendant also testified that he and A. N. had previously entered into a marriage contract, and that the ceremony so testified as having been performed was performed out of deference to her religious scruples, was inadmissible to show that, as the ceremony succeeded the contract, it was of no legal effect, and therefore the testimony was immaterial on the question of marriage.

11. CRIMINAL LAW — APPEAL — RECITALS OF TRANSCRIPT—CONCLUSIVENESS.

A recital in a transcript in a criminal case that the trial jurors for 1905 were duly selected by the judges of the superior court, and their names duly, regularly, and legally deposited in the trial jury box on February 14, 1905, was conclusive as to the regularity of the original selection of trial jurors for that year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2894–2896.]

12. JURY—CHALLENGE—GROUNDS.

Under the rule that a challenge to the panel can be founded only on a material departure from the forms in respect to the drawing and return of the jury in civil actions, accused could not challenge the panel on the ground that the jurors were drawn from a panel whose term had expired, as their being required to serve longer than the law required did not affect the regularity of their drawing or return.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 391, 543.]

13. CRIMINAL LAW—APPEAL—COMPETENCY OF JUROR—REVIEW.

The findings of the trial judge as to the competency of a juror, based on conflicting statements concerning his qualifications, will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3056, 3074.]

14. PERJURY—JURISDICTION—EXAMINATION OF OFFENSES.

That the grand jury which had indicted defendant for perjury had previously indicted him for bigamy, and that both charges involved the fact that defendant married a certain woman on a specified date, did not deprive the court of jurisdiction to try such perjury indictment, so as to make it impossible for accused to have committed perjury on the trial of the perjury indictment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 27–35.]

Appeal from Superior Court, City and County of San Francisco; Albert G. Burnett, Judge.

George D. Collins was convicted of perjury, and he appeals. Affirmed.

See 86 Pac. 895.

Geo. D. Collins, in pro. per. Attorney General Webb, for the People.

HALL, J. The defendant was charged by indictment with the crime of perjury, and upon trial was convicted. He moved for a new trial, but his motion was denied, and judgment pronounced. He thereupon appealed to this court from the order denying his motion for a new trial and from the judgment. As all the matters that could be urged for a reversal of the order denying the motion for a new trial, upon the record before us, are equally available to the defendant on the appeal from the judgment, the arguments have been directed especially to the appeal from the judgment.

The transcript as originally filed in this court contained no demurrer to the indictment, but subsequently, on suggestion of diminution of the record, appellant was allowed to file in this court a certified copy of such demurrer, subject to the objection of respondent that this court could not consider the same, for the reason that there is no exception presented by bill of exceptions to the ruling of the court thereon. Inasmuch, however, as we think that the action of the court in overruling the demurrer should be sustained, we have not deemed it necessary to pass upon the question of practice involved in the objection of respondent, but have preferred to pass upon the questions presented by the demurrer. The demurrer is both general and special, and much the greater portion of defendant's brief is devoted to a discussion of the points raised by his demurrer. The principle objections to the indictment grow out of the contention that the indictment contains no sufficient assignment of perjury, and it is this contention we shall first consider.

The indictment is quite lengthy, occupying about 18 folios of closely printed matter in the transcript, and we do not deem it necessary to set it forth in full. After setting forth the various formal matters and matters of inducement, and the pendency of an action in a competent court, and the administration of the oath and the like, it is charged "that the said George D. Collins * * * did then and there * * * willfully, unlawfully, corruptly, falsely, and feloniously, and contrary to the said oath by him, the said George D. Collins, then and there taken, testify and swear, and state the truth to be in substance as follows, and did then and there state as true the following matters and things, to wit: That on the 15th day of May, 1889, at a church then situate on Eddy street, between Octavia and Laguna streets, in the city and county of San Francisco, a marriage ceremony was performed between the said George D. Collins and one Agnes Newman by a clergyman named Rev. M. D. Connolly, and that at said time and place, by said Rev. M. D. Connolly, said ceremony was performed in the presence of Thomas E. Curran and Charlotta E. Newman, and that then and there, in the presence of said parties, the said marriage ceremony was performed as follows, to wit:" (here follows a statement of testimony giving details of a marriage ceremony between said Collins and Agnes Newman). Further on the indictment proceeds as follows: "That the said testimony then and there given by the said George D. Collins was false and untrue, and was known by the said George D. Collins to be false and untrue at the time the same was given as aforesaid, and the same was so given by the said George D. Collins willfully and knowingly. That on the said 15th day of May, 1889, at a church then situated on Eddy street, between Octavia and Laguna streets, in the city and county of San Francisco, a marriage ceremony was not performed between the said George D. Collins and one Agnes Newman by a clergyman named Rev. M. D. Connolly, or by any other person. That at said time and place, neither by said Rev. M. D. Connolly, nor by any other person, was said ceremony so testified to performed in the presence of Thomas E. Curran and Charlotta E. Newman" (and here follows a negation of the testimony of the details of said ceremony). Then follows this allegation, to wit: "That the truth and the facts were that on the 15th day of May, 1889, at a church situated on Eddy street, between Octavia and Laguna streets, in the city and county of San Francisco, a marriage ceremony was performed between said George D. Collins and one Charlotta E. Newman by the said Rev. M. D. Connolly, and that at said time and place—[here follows a statement of the details of a marriage ceremony between George D. Collins and Charlotta E. Newman similar in all respects to the details of the ceremony set forth in the said testimony of defendant, save that Charlotta E. Newman is substituted in place of Agnes Newman], * * * all of which the said George D. Collins well knew at the time he so testified, as aforesaid; and, so knowing, the said George D. Collins did then and there willfully, unlawfully, falsely, knowingly, and contrary to his said oath, and knowing his said testimony to be false, testify as hereinbefore specifically set forth, and he, the said George D. Collins, did then and there and thereby swear falsely and feloniously commit willful perjury. * * *"

The objections to this indictment, based on the contention that it does not contain a sufficient assignment of perjury, seem to be fully answered by People v. Ennis, 137 Cal. 263, 70 Pac. 84. The scope of the demurrer attacking the indictment in the Ennis Case does not clearly appear from the report of the case, but we have before us a copy of the demurrer as well as of the indictment in that case, from which it appears that the demurrer was both general and special, and attacked the indictment much the same as does the demurrer in the case now before us. While the indictment in the Ennis Case does not contain as long a statement of perjurous matter as is contained in the indictment in the case at bar, it does set forth at least two distinct statements. It is alleged that Ennis testified "that he, the said Arthur Ennis, was not at any time on the 8th day of January, 1901, or on the 9th day of January, 1901, down to Sargent's corral, in said San Joaquin county, with anybody, and that he, the said Arthur Ennis, never had assisted anybody in removing a hog from Sargent's corral in said San Joaquin county." It thus appears that two statements were alleged to have been made by Ennis. In discussing the objection, made to the indictment in the Ennis Case, that it was not sufficiently alleged that Ennis testified falsely, the court said: "There was a sufficient averment that appellant testified falsely. The averment in the first part of the indictment that he did 'willfully, unlawfully, feloniously, and contrary to said oath' make certain statements, seems to be all that is required by section 118 as to the falsity of the statements, the language of said section simply being 'willfully and contrary to such oath'; but in a subsequent part of the indictment, after an enumeration of the said statements, it is averred that 'said statements so made, as aforesaid, by said defendant, were then and there and are false and untrue, and were, at the time of the making thereof by the said defendant, Arthur Ennis, known by the said defendant to be false and untrue.' The language just quoted really makes it unnecessary to discuss the sufficiency of the other averments of the falsity of the statements, and appellant's knowledge thereof, which are asserted to be insufficient because each is preceded by the word 'whereas,' the contention being that what follows is mere recital." It is thus seen that in the Ennis Case the court strongly intimated that, in averring the falsity of the testimony, it is sufficient to allege that it was given falsely and contrary to such oath, and it is distinctly held that it is sufficient to aver that the statements so made then and there were and are false and untrue. The indictment in the case at bar contains the averment that "the said George D. Collins * * * did then and there * * * willfully, unlawfully, corruptly, falsely, and feloniously and contrary to said oath * * * state as true the following matters and things, to wit"; and, after setting forth his testimony, it is averred "that the said testimony then and there given by the said George D. Collins was false and untrue, and was known by the said George D. Collins to be false and untrue at the time the same was so given, as aforesaid." In other words, the indictment now under consideration follows the form of the indictment in the Ennis

Case in the particulars now being discussed.

It is, however, urged by appellant that the general statement that the testimony set forth is and was false and untrue is followed by a particular negation of the testimony set forth containing a negative pregnant; that the averment of the indictment, "that on the said 15th day of May, 1889, at a church then situate on Eddy street, between Octavia and Laguna streets, in the city and county of San Francisco, a marriage ceremony was not performed between the said George D. Collins and one Agnes Newman by a clergyman named Rev. M. D. Connolly, or by any other person," etc., is a negative only that such marriage ceremony took place at said time and place. But, conceding this to be so, we do not see that this affects the sufficiency of the indictment. This is not a case of the denial of allegations of substantive facts where such a denial would be a negative pregnant, and would therefore admit the substance of the allegation, and the time and place would be immaterial. There is no allegation of the substantive fact that a marriage ceremony was performed between Collins and Agnes Newman at a certain time and place, but an allegation that he so testified, followed by an averment that such testimony was false and untrue, and that no such ceremony took place between the said Collins and Agnes Newman at such time and place. If it be conceded that this is not a denial that such marriage may have taken place at some other time or place, it certainly is a denial of the truth of the testimony alleged to have been given by Mr. Collins. It is a denial of the truth of the testimony that such marriage took place at said time and place.

Testimony as to the time and place may be and often is material. By way of illustration, let us assume that an action was pending wherein Charlotta E. Collins (née Newman) sought a divorce from George D. Collins, and alleged that she and he intermarried on the 15th day of May, 1889, and that by his answer he denied the same in due form; that at the trial she, to prove the marriage, introduced evidence to the effect that on the 15th day of May, 1889, at a certain church, by a certain priest, a marriage ceremony was performed between herself and George D. Collins; that thereupon he should testify that at the time and place, and by the priest mentioned by her, and with all the other attendant circumstances testified by her, a marriage ceremony was performed between himself and Agnes Newman. It is quite plain that such testimony would be material in its entirety, and that his testimony as to the time and place would be especially material and vital, for, if accepted as the truth, it would contradict her testimony and defeat her cause of action. Furthermore, in determining the meaning of this indictment, the entire indictment must be read and considered. From the reading of the entire indictment, we think that a person of common understanding would know that the gist of the charge against defendant was that he falsely and knowingly testified that a certain marriage ceremony, which in truth was actually performed between himself and Charlotta E. Newman, was performed between himself and Agnes Newman. It is not only averred that he falsely and contrary to his oath testified that, at a certain time and place, a certain marriage ceremony was performed by a certain minister between himself and Agnes Newman, etc., but it is averred that said testimony was false and untrue, and this is followed by a negation of his testimony in the manner and form as given. It is then immediately averred "that the truth and the facts were" that at the time and place and by the minister specified in the testimony of defendant a marriage ceremony with the same attendant circumstances was performed between the said Collins and Charlotta E. Newman, concluding with the averment "all of which the said George D. Collins well knew at the time he so testified, as aforesaid: and, so knowing, the said George D. Collins did then and there willfully, falsely, knowingly and contrary to his said oath, and knowing his said testimony to be false, testify as hereinbefore specifically set forth." Reading these statements in their proper relation to one another, it is apparent to the common understanding that the narration of the fact concerning the ceremony between the defendant and Charlotta E. Newman was intended to be a statement of the truth, as contradistinguished from the testimony alleged to have been given by said Collins. In other words, the gist of the charge is that defendant falsely testified that a certain marriage ceremony, that in truth was performed between defendant and Charlotta E. Newman, was performed between him and Agnes Newman.

It is next urged that it affirmatively appears that the testimony alleged to have been given was immaterial. The indictment contains the averment "that the said testimony then and there given by the said George D. Collins was material to the said action and the said trial hereinbefore described, and material to the issues of the said action and trial, and was material to the issues tendered in said cause, and in so testifying as aforesaid the said George D. Collins testified in a matter material to the said trial and said action and the issues therein." Such averment is sufficient, unless it affirmatively appears from the other averments that it was immaterial. People v. Ennis, supra; People v. Rodley, 131 Cal. 250, 63 Pac. 351; People v. De Carlo, 124 Cal. 462, 57 Pac. 383; People v. Brilliant, 58 Cal. 214; People v. Ah Bean, 77 Cal. 12, 18 Pac. 850. In no aspect of the indictment does it affirmatively appear that the testimony charged to have been given was immaterial. "If the matter falsely sworn to be circumstantially material or tends to support and give credit to the witness in respect to the main facts, it is perjury. And it is equally perjury if the false evidence tends to discredit the witness." People v. Barry, 63 Cal. 62. "The materiality of alleged false testimony does not always appear upon its face, or when simply compared with the indictment it may be material on account of certain other testimony which had been previously introduced on the trial of a cause." People v. Lem You, 97 Cal. 224, 32 Pac. 11. But we have already practically disposed of this contention by what we have said upon the question of the assignment of perjury.

It is claimed that it does not appear that the officer who administered the oath had authority to do so. It appears from the indictment that a certain designated action was on trial before the superior court of the city and county of San Francisco, which said court had jurisdiction to try and determine, and that said George D. Collins, upon said trial in said court, offered himself as a witness in his own behalf, and duly appeared, and was called as a witness therein in his own behalf; "that then and there one J. B. Martin was a duly appointed, qualified, and acting deputy county clerk of the said city and county of San Francisco, state of California, and an officer authorized by law to administer oaths, and then and there duly authorized and empowered by law to administer an oath to said George D. Collins; and the said J. B. Martin did then and there * * * in the said trial and action * * * administer an oath to said George D. Collins in due form of law * * * and the said oath so administered and so taken was that he, the said George D. Collins, would testify to the truth, the whole truth and nothing but the truth on said trial and said action; that the said J. B. Martin then and there had power, authority, and jurisdiction to administer said oath." This, we think, fully complies with the law. Pen. Code, § 966. A deputy county clerk is ex officio a clerk of the superior court, and as such has power upon the trial of an action in such court to administer oaths to witnesses upon such trial. Code Civ. Proc. § 2093. From this indictment it clearly appears that defendant was a witness upon the trial of the action before the court, and was then and there sworn to give true testimony on said trial, by one who, it is alleged, had authority to administer such oath, and who, under the law, had such authority under the circumstances disclosed by the indictment. The indictment in this respect is quite sufficient. State v. Shope, 16 Iowa, 36, 85 Am. Dec. 490; State v. Townley, 67 Ohio St. 21, 65 N. E. 149, 93 Am. St. Rep. 636; State v. Maxwell, 28 La. Ann. 361; Masterson v. State, 144 Ind. 240, 43 N. E. 138. The case of People v. Cohen, 118 Cal. 79, 50 Pac. 20, is not in point. In that case the proceeding in which the alleged perjury was committed was before a superior judge, sitting as a committing magistrate, and what is there said concerning the administration of an oath by a deputy county clerk has no reference to a case where such clerk administers an oath to a witness in a trial before a superior court.

The form of the oath set forth in the indictment is not precisely the same as that given in the statute (Code Civ. Proc. § 2094), and this is criticised by appellant. But the oath set forth is in substance the same as that specified in the statute, and, besides, "it is no defense to a prosecution for perjury that an oath was administered or taken in an irregular manner." Pen. Code, § 121; People v. Parent, 139 Cal. 602, 73 Pac. 423; Ex parte Carpenter, 64 Cal. 271, 30 Pac. 816.

It is also objected that the substance of the controversy in the case in which the alleged perjury occurred is not given. But the allegation in this regard is precisely like that which was held sufficient in People v. Ah Bean, 77 Cal. 13, 18 Pac. 815.

Some other minor criticisms and objections are urged to the form of the indictment, but we find no merit in any of them. As was said in People v. Ennis: "By the indictment in the case at bar the appellant was fully informed of the charge against him, and none of the alleged defects of the indictment tended to his prejudice as to any of his substantial rights; and the case is one to which the provision of section 1258 of the Penal Code peculiarly applies." We think that the demurrer was properly overruled.

Appellant urges that the verdict is not supported by the evidence. In support of this contention, it is said that the record shows that in the case in which it is alleged the perjury was committed defendant did not testify that a marriage ceremony was performed between himself and Agnes Newman on the 15th day of May, 1889, but that he repeatedly stated that he could not fix the day of the month. But, even if this be so, we do not think the evidence fails to support the charge made by the indictment. As we have before said in discussing the demurrer, the indictment, when read as a whole, clearly shows that the gist of the charge is that defendant falsely and contrary to his oath testified that a ceremony, which was in fact performed between himself and Charlotta E. Newman, was performed between himself and Agnes Newman. There is evidence in the record sufficient to show that on the 15th day of May, 1889, a marriage ceremony was performed as set forth in the indictment between defendant Collins and Charlotta E. Newman, by the Rev. M. D. Connolly, at a church situated on Eddy street, between Octavia and Laguna streets, in the city and county of San Francisco, in the presence of Thomas E. Curran and Agnes Newman, and that no marriage ceremony was ever performed between defendant and Agnes Newman. The evidence clearly shows that the testimony that defendant gave in the action in which it is alleged the perjury was committed (which we shall hereafter designate as action "No. 16,130") was of and concerning this same ceremony, and a careful reading of the evidence, as to what he did testify to in action No. 16,130, shows that he testified in all respects as set forth in the indictment, save that he did not in words say that the ceremony took place on the 15th day of May, 1889, but in words said that he could not fix the day of the month. This we think fully sustains the indictment in the respect now under consideration. Further, while he did say in words that he could not fix the day of the month, he did testify in action No. 16,130 that the marriage ceremony took place on the day following the day of the issuance of his marriage license, and identified this license as being marked in said action as "People's Exhibit O in Evidence." This same license bears date May 14, 1889. It thus appears that defendant in action No. 16,130 in effect testified that the ceremony took place on May 15, 1889.

Defendant also makes the point that the evidence does not show the perjurous testimony to have been material in action No. 16,130. The record shows that action No. 16,130 was an action by the people of the state of California against the said defendant George D. Collins for perjury alleged to have been committed in an answer sworn to and filed by the said George D. Collins, in an action brought by Charlotta Eugenie Collins against him for the support of herself and the minor children of herself and defendant. It is alleged in this indictment, which is in evidence in this case, that defendant, in his said answer, and on his oath did falsely swear, among other things, that the said Charlotta Eugenie Collins and the said George D. Collins did not on the 15th day of May, 1889, or at any other time, intermarry. It is further averred in said indictment, among other things, that said Charlotta Eugenie Collins and the said George D. Collins did intermarry on the 15th day of May, 1889. To this indictment defendant pleaded not guilty. It thus appears that in action No. 16,130 a distinct issue was presented as to whether or not Charlotta Eugenie Collins and defendant George D. Collins intermarried on the 15th day of May, 1889. The record in this case shows Charlotta Eugenie Collins and Charlotta E. Newman to be one and the same person. From this indictment alone and the plea of not guilty thereto it is apparent that any evidence to the effect that a marriage ceremony was performed on the 15th day of May, 1889, between Charlotta E. Collins (née Newman) and the defendant would be material. It is equally true that evidence tending to show that no such ceremony took place would be equally material. The record in this case shows that upon the trial of action No. 16,130 the people introduced testimony and rested, and that thereupon witnesses were examined on behalf of defendant, and that he himself testified. The record does not show fully the condition of the evidence at the time the defendant gave the testimony set forth in the indictment in this case, but it does show that the people had introduced in evidence in case No. 16,130 a license for the marriage of George D. Collins and Charlotta Eugenie Newman, and a certificate of marriage bearing the signature of the Rev. M. D. Connolly, to the effect that on the 15th day of May, 1889, he united in marriage George D. Collins and Charlotta E. Newman. This appears in that part of defendant's testimony in action No. 16,130 which was introduced by himself in this action. It thus appears that not only did the indictment in action No. 16,130 allege that defendant and Charlotta Eugenie Collins (Newman) intermarried on the 15th day of May, 1889, but the people had introduced evidence directly tending to prove such allegation before defendant gave the testimony that the marriage ceremony, about which the people had given such evidence, was performed between himself and Agnes Newman. The testimony of defendant concerning the performance of the marriage ceremony between himself and Agnes Newman tended to disprove the averment of the indictment that on the 15th day of May, 1889, he and Charlotta Eugenie Collins (Newman) intermarried, and to contradict the evidence contained in the license and certificate supporting the averment of the indictment. We think the evidence fully supports the verdict and every material averment of the indictment.

Appellant complains of the action of the court in refusing to admit evidence offered by defendant that in action No. 16,130 he testified, in connection with the testimony that he gave of the marriage ceremony between himself and Agnes, that he had previously been married to her by a contract marriage, and the ceremony was only performed out of deference to the religious scruples of Agnes; his argument being that the ceremony was of no legal effect, and therefore testimony in regard thereto could not be material upon the question of marriage. His argument upon this question, though ingenious, is utterly specious. What we have already said about the materiality of the alleged perjurous testimony practically covers this question. A distinct issue was presented in action No. 16,130 as to whether or not defendant and Charlotta Eugenie Newman intermarried on the 15th day of May, 1889. The usual way of intermarrying is by a marriage ceremony. Evidence had been given tending to prove a marriage ceremony between defendant and said Charlotta. His testimony that that ceremony was between himself and Agnes tended to prove that no marriage ceremony had been performed between himself and Charlotta, and that no marriage had taken place between them. The materiality of such testimony could not be affected by the fact that such ceremony did not effectuate a marriage between defendant and Agnes. If his testimony that the ceremony was performed between himself and Agnes was true, there was no ceremony or marriage between himself and Charlotta, whether or not there had ever been any prior marriage to Agnes. The learned judge who presided at the trial in the lower court properly refused to allow the offered testimony.

The court did not err in overruling defendant's challenge to the panel. The panel in attendance upon the court at the calling of this case for trial had been drawn from the list prepared for the year 1905. The transcript shows that the trial jurors for 1905 were "duly and regularly selected by the said judges of the superior court, and their names duly, regularly, and legally deposited in the trial jury box on the 14th day of February, 1905." This is conclusive as to the regularity of the original selection of the trial jurors for 1905. It appears that the panel in attendance upon the court had been, under the order of said court, drawn from the trial jury box for 1905, and was on the 8th day of January regularly returned and impaneled by said court for the trial of causes therein. Thereafter a list of trial jurors for the year 1906 was selected and prepared by the judges of the superior court, and said list filed in the county clerk's office on said 21st day of January, 1906. This action came on for trial February 9, 1906. At this time the names of jurors selected for the year 1906 had not been placed in the jury box, and no panel had been drawn from such list of names selected for 1906. Defendant, as a further ground of challenge to the panel, objected that the panel for the year 1905 expired by limitation of law upon the listing of the trial jurors for the year 1906. But a challenge to the panel "can be founded only on a material departure from the forms in respect to the drawing and return of the jury in civil actions. * * *" This panel had been regularly and properly drawn and returned from the names constituting the trial jury list when they were drawn and returned. The purpose of the law, in allowing a challenge to the panel, is to protect the defendant against any improper selection of the panel of jurors from which a jury may be selected to try his case, and not to protect the jurors from too long attendance upon court. The ground of challenge refers to the drawing and return of the panel. The panel is drawn and returned when the names are drawn from the jury box, and they are summoned, and return thereof made by the proper officer. That they serve longer than the law requires does not affect the regularity of their drawing or return.

We cannot disturb the ruling of the trial judge who heard the examination of the juror Dooley. It simply presents a case of conflicting statements, from which different minds might draw different conclusions as to the juror's impartiality and fitness to serve as a juror. People v. Scott, 123 Cal. 435, 56 Pac. 102. Defendant at the trial offered to prove that the grand jury that indicted him in action No. 16,130 had previously indicted him for bigamy, and that both charges involved the fact that defendant married Charlotta E. Newman on the 15th day of May, 1889; his contention being that under those circumstances the superior court had no jurisdiction to try cause No. 16,130, and that, therefore, no perjury could be committed upon the trial thereof. The statement of the contention is its own refutation. The court properly sustained the objection to the offered testimony.

Other points are raised by appellant concerning the rulings of the court in rejecting and admitting testimony. We have examined the various questions thus presented, and find no prejudicial error in any of such rulings.

The questions raised by the defendant as to the instructions are in effect the same as he has raised in regard to the indictment and the sufficiency of the evidence to support the verdict. What we have said upon these questions covers the questions raised by the instructions.

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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MARX v. RALEY & CO. (Civ. 387.)

(Court of Appeal, Second District, California. Sept. 30, 1907.)

1. PLEADING — VERIFICATION — NECESSITY — FAILURE—EFFECT.

A letter set out in the answer, which does not purport to contain a contract or obligation, but refers to certain written communications not set out, and only gives a construction thereof, is not a written instrument whose execution is admitted by failure to deny under oath, under Code Civ. Proc. § 448, as an instrument upon which the defense rests.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 864–879.]

2. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

No prejudice results from the admission of immaterial testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153–4160.]

3. CORPORATIONS — CORPORATE EXISTENCE — EVIDENCE—SUFFICIENCY.

The record showed that defendant represented in a letter to plaintiff's assignors that it was a corporation. *Held* sufficient to support the finding of the corporate character of defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 111.]

4. ASSIGNMENTS—CAUSE OF ACTION — SUFFICIENCY.

M. and R. sold and delivered to defendant a car of fruit. The right of action for the proceeds was assigned to plaintiff. Part of the goods shipped were furnished by others than M. and R.; but it was clear that their right to the proceeds was through M. and R., with whom alone defendant contracted and to whom alone defendant was liable. *Held*, that an assignment by M. and R. was sufficient to transfer the entire cause of action.

5. SALES—INTEREST.

Under Civ. Code, § 3287, providing that every person entitled to recover damages as of a certain date is entitled to interest thereon from the same date, the seller is entitled to interest on price of goods sold from date of sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 499.]

6. APPEAL—RECORD—REVIEW.

Where the exact date of a sale is not shown by the record on appeal, the appellate court cannot say that it was error for the trial court to find by implication that the sale was on a certain date.

Appeal from Superior Court, Tulare County; H. C. Austin, Judge.

Action by Clementine P. Marx against Raley & Co. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

C. D. Wright and Robert M. Wright, for appellant. Charles G. Lamberson and Frank Lamberson, for respondent.

ALLEN, P. J. Action for the price and value of personal property sold and delivered. Judgment for plaintiff. Order denying a new trial. From the judgment and order, defendant appeals.

The unverified complaint alleges the sale and delivery by plaintiff's assignor to defendant, a corporation, of a car of oranges and pomelos at a guaranteed price of $2.25 per box, nonpayment of which is averred. The answer comprises a general denial and a special defense that the goods were shipped to defendant to be sold on commission, and alleges a full compliance upon defendant's part and a tender to plaintiff's assignor of the proceeds, less certain expenses. And in the answer it is averred that the goods were received and shipped pursuant to a letter alleged to have been sent by defendant and deposited in the United States mail on December 9, 1904, before the shipment of said car. This letter was set out in the answer in hæc verba, and, omitting date and address, is as follows: "In our letter to you a few days ago referring to price on the car of oranges you are to ship for Xmas trade, at $2.25 per box, the said price means consignment basis, same as all the shipments we handled for you, freight, commission, and drayage to be deducted from this amount. If you understand it this way ship the car as per our order; if not, don't ship it, as we are certain this is the very highest price that can be obtained this month. * * *" Upon the trial the court admitted testimony upon the part of plaintiff that no letter as set out in the answer had ever been received; and, the evidence being satisfactory that the shipment was under an express contract to pay the price alleged in the complaint, judgment was accordingly rendered for plaintiff.

The principal contention of appellant is that the letter set out in the answer was a written instrument upon which its defense was based, and its execution was not denied under oath. Hence, under section 448, Code Civ. Proc., no proof was admissible controverting its due execution. If the paper set out is an instrument upon which the defense rests, its execution, which comprehends delivery, is admitted, and it is immaterial how this delivery was effected, whether personally or by mail. In our opinion, however, the letter embodied in the answer is not an instrument upon which the defense is founded in contemplation of the Code. Heath v. Lent, 1 Cal. 411, declares: "It is clear that the statute does not extend to any other parties than those who are alleged to have signed the instrument." In this case, as in that, it would be unreasonable to say that the plaintiff was bound to know the genuineness of the signature of the defendant. In addition, the letter set out does not purport to contain any contract or obligation on the part of plaintiff, but refers to certain written communications not set out and undertakes only to give a construction thereof as intended by the writer. In other words, it is merely explanatory of the language used in a former letter which, by inference, may be said to contain the original terms of the contract, and which original letter appears in the record and is susceptible of no such construction or intendment. Further, the explanatory letter set out in the answer referred to another letter, dated several days prior to December 9th, while on December 9th, as is shown by the record, a written proposition to guarantee $2.25 per box for both kinds of fruit was sent to plaintiff, and on the faith of which, as an original promise and as ratifying previous personal negotiations by telephone, the goods were shipped. The previous letters and the explanatory letter were then immaterial, and no prejudice resulted from the admission of such testimony, were the error even conceded.

It is suggested that no proof of defendant's incorporation was made. It does appear, however, in the record that defendant represented in one of its letters to plaintiff's assignors that it was a corporation, which is sufficient to support the finding of the corporate character of the defendant.

Certain of the goods shipped were furnished by parties other than Marx & Rice, plaintiff's assignors, but it is clear that whatever rights those persons acquired to the proceeds when sold were through Marx & Rice, with whom alone defendant contracted and to whom alone defendant was liable. The assignment of Marx & Rice was sufficient to transfer to plaintiff the entire cause of action. Treating the contract, as shown by the record, to be one guaranteeing $2.25 per box, and not a contract promising to pay that sum upon delivery of the fruit, nevertheless it was a guarantee that, when sold, the defendant would pay at least $2.25 per box therefor. It appears that before January 14, 1905, the goods had been sold, and under the contract the right of plaintiff to receive at least the price guaranteed became fixed, and from the date of sale plaintiff, as assignee of Marx & Rice, was entitled to interest, under section 3287, Civ. Code. Lane v. Gluckauf, 28 Cal. 295, 87 Am. Dec. 121. The exact date of the sale not being shown, we cannot say that the court was in error when it found, by implication, that such sale was made December 21, 1904.

We find no error in the record, and the judgment and order are affirmed.

We concur: TAGGART, J.; SHAW, J.

152 Cal. 282

DAVIS v. DONOHOE-KELLY BANKING CO. (S. F. 4,395.)

(Supreme Court of California. Nov. 13, 1907.)

BAILMENT—OWNERSHIP OF PROPERTY—DELIVERY BY BAILEE.

Insolvent, who was the servant of B., delivered a tin box, on which was painted B.'s name, containing valuables, to defendant for safe-keeping. On the wrapper was written a direction that it was not to be delivered to any one except B. or insolvent. The box remained in defendant's possession until after certain creditors had obtained an order against insolvent and an injunction prohibiting the transfer of any of her property, when B. called on defendant for the box, and it was delivered to her, after which insolvent's receiver, having demanded the box and been refused, sued defendant to recover its value. *Held* that, the box having been properly delivered to B., who was the owner, plaintiff could not recover, under the rule that the bailee cannot dispute the title of his bailor nor show who the real owner of the property is.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bailment, §§ 32, 107–109.]

Department 2. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by W. H. Davis, as assignee of the estate of Mary E. Pleasant, an insolvent debtor, against the Donohoe-Kelly Banking Company. From a judgment for defendant, plaintiff appeals. Affirmed.

H. V Morehouse and J. E. Alexander, for appellant. Galpin & Bolton, for respondent.

McFARLAND, J. This action was brought by the assignee in insolvency of Mary E. Pleasant to recover a certain tin box and its contents, or the value thereof, alleged to have been deposited by said Pleasant with defendant in the year 1898. The case was tried without a jury, and the court made findings and rendered judgment for defendant. From the judgment the plaintiff appeals.

The appeal is upon the judgment roll, which consists of the pleadings, findings, and the judgment. There is no bill of exceptions, and, of course, no question as to the sufficiency of the evidence to support the findings, or as to any error committed during the trial. The claim of appellant for reversal rests only upon the contention that the findings do not support the judgment, and that upon their face the judgment should have been for appellant.

The material findings of the court are these: In the year 1896 the said insolvent Pleasant gave to the defendant at its banking house the tin box locked, upon which was painted in large letters the name "Teresa P. Bell," and on a wrapper inclosing the box was written, "Not to be delivered to any one except Mrs. T. P. Bell or Mrs. M. E. Pleasant." It contained jewels and precious stones to the value of $15,000. The defendant kept the box for about three years, no one during that period having demanded it; and on or about April 1, 1899, the said Teresa P. Bell demanded the box of the defendant and the latter then delivered it to said Mrs. Bell. At the time of the delivery of the box to the defendant by Mrs. Pleasant the latter was the servant and agent of Mrs. Bell, receiving from her a monthly salary. She had no ownership of the box or its contents, and acted merely as Mrs. Bell's agent. Mrs. Bell was then and ever since has been the sole owner of said box and its contents. Upon the above facts, considered alone, it is obvious that Mrs. Bell had the right to demand the box, and that the defendant was perfectly justified in delivering it to her; and we do not think that certain other facts relied upon by appellant at all affect the obvious conclusion above stated.

The other facts relied upon by appellant are these: On March 26, 1898, certain creditors of Mrs. Pleasant filed in the proper court a petition in involuntary insolvency, praying that she be adjudicated an insolvent debtor. Upon the filing of said petition the court made the usual order that she appear and show cause, etc., and also prohibiting the payment of any debts or the transfer of any property by her. She appeared and contested the inslovency proceedings, and after the contest she was duly adjudicated an insolvent, and on June 22, 1899, an assignee was elected and qualified, and the clerk executed a written instrument assigning and conveying all of the insolvent's property to the assignee. On January 19, 1902, about three years after the delivery of the box by defendant to Mrs. Bell, the assignee demanded the same of defendant. At the time of the delivery of the box to Mrs. Bell the defendant had knowledge of the filing of said petition in insolvency.

Upon the facts last above stated appellant contends that on the filing of the petition in insolvency the said box, as the property of the insolvent, went into the custody of the law; that thereafter defendant had no right to deliver it to Mrs. Bell, and that after the election of the assignee the said property went into the ownership of the assignee, who ever since has been entitled to recover it from defendant. But during that time the box was the property of Mrs. Bell, not the property of the insolvent, and the ownership of Mrs. Bell was not affected by the insolvency proceedings against Mrs. Pleasant. Appellant says the relation between Mrs. Pleasant and the defendant respecting the box was that of bailor and bailee, and invokes the general rule that a bailee cannot dispute the title of his bailor, and that, therefore, defendant cannot show who the real owner was. This general rule is not of universal application, and has its exceptions, even in the usual case where the contract of bailment arises out of the simple fact that the bailor has deposited the property with the bailee and there are no special circumstances or agreements which modify the presumption that the bailor is the owner. In the case at bar, there are not only the facts that Mrs. Pleasant was not the owner of the property, and that Mrs. Bell was such owner; there was on the property itself indicia of Mrs. Bell's ownership, and an express direction that the box be delivered to her on her demand. Therefore, when Mrs. Bell demanded the property, it was her right to receive it, and it was the duty of defendant to deliver it to her under the express terms of the contract upon which defendant received possession. To now compel defendant to pay to the assignee of Mrs. Pleasant $15,000 for property which she never owned, and which defendant had delivered to the true owner under the express provision of the contract upon which defendant had received it, would be a perversion of justice which could be warranted only by some inexorable technical rule which, in our opinion, is not presented in the case at bar.

Appellant contends that there is no denial in the answer that Mrs. Pleasant was the owner of the property in question, or averment that Mrs. Bell was such owner. We do not think there is any merit in this contention. It is true that some little confusion is created by the reference in the answer to more than one tin box deposited with defendant; but we think there is a clear denial of Mrs. Pleasant's ownership and an averment of Mrs. Bell's ownership of the particular tin box and its contents which are the subject of this action.

The judgment appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

152 Cal. 279

CRIM et al. v. CITY & COUNTY OF SAN FRANCISCO. (S. F. 4,387.)

(Supreme Court of California. Nov. 13, 1907.)

1. MUNICIPAL CORPORATIONS—CLAIMS—PRESENTATION.

A claim for damages against the city and county of San Francisco, which accrued before its charter went into effect, is not defeated because not presented to the board of supervisors within six months of the occurrence of the damages, as required by the express provisions of that charter (article 2, c. 2, § 8).

2. SAME.

A claim for damages against the city and county of San Francisco, accruing after its charter went into effect, in that sewage was discharged from a sewer on premises owned by it so as to render impassable the street in front of plaintiffs' premises and to wash away the soil of such premises, not presented to the board of supervisors within six months of the occurrence of the damages, is barred by its charter (article 2, c. 2, § 8), requiring, as a condition of recovery, that all claims for damages be so presented to the board.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1796.]

3. LIMITATION OF ACTIONS—TIME FOR BRINGING—TRESPASS ON REAL PROPERTY.

A discharge of sewage so as to render impassable the street in front of premises of others, and so as to wash away the soil of such premises, is not a trepass within Code Civ. Proc. § 338, subd. 2, permitting an action for trespass on real property to be brought within three years of the accrual thereof.

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by George S. Crim and others against the city and county of San Francisco for injuries to real property. Judgment for defendant, and plaintiffs appeal. Affirmed.

Edward C. Harrison, for appellants. Percy V. Long, City Atty., and Luther Elkins, Asst. City Atty.

McFARLAND, J. Defendant interposed a general demurrer to the complaint. The demurrer was sustained, and, plaintiffs declining to amend, judgment was entered for defendant. From this judgment the plaintiffs appeal. In its demurrer the defendant also pleaded the two-year statute of limitations. Section 339, Code Civ. Proc.

It is averred in the complaint that during the times therein mentioned plaintiffs were the owners of certain land situated in the city and county of San Francisco, and partly bounded by a street called J street; that from about the month of January, 1897, until about the month of January, 1902, the defendant was the owner of certain land in the vicinity of plaintiffs' said land, and known as the Almshouse tract; that during said period defendant maintained a sewer over and across the Almshouse tract of land, but did not connect the same with any main sewer having a proper outlet until a short time before the commencement of the action; that, for want of a proper outlet, the sewer conducted and conveyed all the sewerage and drainage of said Almshouse tract and from all the buildings thereon, "to and at a point immediately north of said J street between Tenth and Eleventh avenues in said city and county, and that from about the month of January, A. D. 1897, until about the month of January, A. D. 1902, the discharge from said sewer was continuously washing and carrying away the soil from the said point of discharge of said sewer through a gully or bed which it made for itself westerly along said J street and through and upon the said properties of said plaintiffs fronting thereon and hereinbefore described; that the said discharge from said sewer has washed and carried away large quantities of the soil from the said properties of said plaintiffs hereinbefore described and from said J street where it passes in front of, and between the same, and has rendered said J street impassable in front of and between the said properties; and that, in consequence of the destruction of said street at that point so caused by the said sewer and by the aforesaid devastation and washing and carrying away of said plaintiffs said lands thereby caused as aforesaid, said plaintiffs have been damaged in the sum of $3,000 in United States gold coin."

Defendant makes several points in support of the ruling sustaining the demurrer and of the judgment; but it is necessary to notice only one of said points, namely, that plaintiffs do not allege that the claim for damages alleged therein was presented to the board of supervisors for payment previous to suit brought as required by section 8, c. 2, art. 2, of the charter of said city. See Merchants' & Mechanics' Bank v. City of Los Angeles (Cal. Sup.) 91 Pac. 795. Said section 8 of the charter provides as follows: "All claims for damages against the city and county must be presented to the board of supervisors and filed with the clerk within six months after the occurrence for which damages are claimed to have arisen; otherwise there shall be no recovery on any such claim." The plaintiffs say that the charter did not go into effect until January 8, 1900, and therefore could not apply to that portion of the damages claimed by plaintiffs which are alleged to have occurred before the charter went into effect. It is true that, if plaintiffs have any claim for damages not barred by the statute of limitations which accrued before the charter went into effect, they could not be deprived of such claim because the charter afterwards provided that a demand must be made within six months of the time of the occurrence of the alleged damages. Whether it was not the duty of the appellants to have presented their claims after the charter went into effect, need not be considered, because all of their claims occurring prior to the time when the charter went into effect were barred by the statute of limitations, and as to the damages alleged to have occurred after that date the presentment to the board should have been made. Plaintiffs contend that the two-year statute of limitations does not apply, but that the question of the limitation of this action is governed by subdivision 2 of section 338 of the Code of Civil Procedure, which provides that "an action for trespass upon real property" shall be brought within three years. It is clear, however, that the wrongful acts alleged against defendant in the case at bar do not constitute trespass upon real property. That was definitely settled by this court in Hicks v. Drew, 117 Cal. 305, 49 Pac. 189, which raised the same question as is presented here, and in which the court said: "If the damage does not come directly from the act, but is simply an after result from the act, it is essentially consequential and no trespass." For the wrongful acts alleged in the case at bar the remedy at common law would have been "an action on the case," and, although the old forms of actions are abolished, the facts which constitute "trespass on real property" still govern. (It may be noticed that, even if the three-year limitation applied, the ultimate result would be the same; for this action was not commenced until the 13th of January, 1903, which was three years after the charter went into effect.)

The judgment appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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152 Cal. 271

In re BUMP'S ESTATE. (S. F. 4,569.)

(Supreme Court of California. Nov. 12, 1907.)

1. WILLS—COSTS—DISCRETION OF COURT.

Code Civ. Proc. § 1720, providing that in probate proceedings the superior court may in its discretion order costs to be paid out of the assets of the estate, applies to one contesting a will, and the discretionary power includes the case of an unsuccessful contestant, though only extreme cases will justify the court in ordering that the costs of an unsuccessful contestant be paid out of the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 876-878.]

2. APPEAL—REVIEW—DISCRETION OF COURT.

Under Code Civ. Proc. § 1720, the court may order that the costs of the widow unsuccessfully contesting the will of her deceased husband shall be paid out of the estate, and refuse to give the proponents judgment for their costs against the contestant, and, in the absence of a showing to the contrary, the court on appeal will presume that the court properly exercised its discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3881-3888.]

Department 1. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

In the matter of the estate of Nelson Bump, deceased. From so much of an order as charged the estate of the deceased with the costs of the contestant in a will contest, and which prevented the proponents from recovering their costs against the contestant, J. H. Thomas and another, proponents, appeal. Affirmed.

R. H. Countryman, for appellants. Clark & Clark and R. Clark, for respondent.

SHAW, J. The will of Nelson Bump, deceased, was offered for probate by Jesse H. Thomas, the executor, and Sarah Angelene Dean, the executrix, named in the will. Sarah L. Bump, the widow of deceased, filed a contest thereto. After a trial the contest was denied and the will admitted to probate. The bill of exceptions states that in the order admitting the will to probate "said court did order that the costs of said contest be taxed against said estate." The record contains no copy of the order and no further statement of its provisions in regard to costs. Thereafter, in due time, the proponents of the will filed a cost bill in the sum of $1,701.70 and the contestant filed a cost bill claiming the sum of $168.20 as her costs in prosecuting the unsuccessful contest. The proponents and beneficiaries under the will appeal from "so much of the order and that portion of the order * * * as charges said estate with the costs of said contestant, or which allows or permits said contestant to recover her costs of said contest as against said estate, or prohibits or prevents said proponents from recovering their costs as against said contestant." The quotation is from the notice of appeal.

It has been held that, when there is a successful contest after probate, the court, in its discretion, may allow to the executors, out of the estate, their reasonable costs and expenditures in endeavoring to uphold the will of which they had been appointed the executors (Estate of McKinney, 112 Cal 447, 44 Pac. 743); also that where there is a successful contest before probate, and the legatees or executors acted in good faith and upon probable grounds in proposing the will for probate, the court may, in its discretion, allow to the unsuccessful proponents their ordinary costs incurred in endeavoring to establish the will, and make the same a charge against the assets of the estate (Estate of Olmstead, 120 Cal. 452, 52 Pac. 804). Section 1720 of the Code of Civil Procedure provides that in probate proceedings in general the superior court "may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require." We can conceive of cases in which the duty of a widow, or other person entitled to administration of an estate in case of intestacy, to contest the probate of an alleged will, might be as plain and urgent, under the circumstances known to such person, as would be the duty of an executor already appointed, or one nominated as executor, in a will offered for probate, or a legatee thereunder, to oppose a contest and endeavor to establish such will. The provision of the Code above quoted is very general in its terms, and applies as well to a party contesting a will as to one proposing it. It puts the entire matter of costs within the sound discretion of the court, and we think it must be held that such discretionary power extends to and includes the case of an unsuccessful contestant. It is proper to say, however, that such cases must be rare and the circumstances must be peculiar indeed to justify such an order in favor of a contestant who has failed, and that, as this court under its rules is sometimes compelled to sustain a discretionary order where it has grave doubts of its propriety, the trial court should use great caution and make such orders only in very extreme cases presenting great hardship, and where it appears that the contestant has acted in the utmost good faith throughout the proceeding.

There is here no attempt to set forth the circumstances and have this court decide whether or not the discretion was abused. The case is presented upon the proposition that the power does not exist in any case, or under any circumstances, to make the costs of an unsuccessful contest payable out of the assets of the estate. The presumptions are all in favor of the action of the court below. The power exists, and in the absence of any showing to the contrary we must presume that it was properly exercised.

The same reasons extend to the proposition that the court erred in refusing to give the proponents judgment against the contestant for their costs. As a mere matter of discretionary power the court could do this, and, as no attempt is made to show an abuse of discretion, the order must stand. If the estate had been insolvent, perhaps it would have been an error to refuse such judgment for costs; but it is not claimed that the assets are not ample, or that the estate is not solvent.

It is not claimed that the cost bill of the contestant is erroneous or excessive. Nothing in this opinion is to be understood as an intimation that the filing of the cost bill by the proponents, and the failure of either party to object thereto, will constitute an adjudication that the costs they claim are all properly chargeable under the order.

The part of the order appealed from is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

152 Cal. 274

In re BUMP'S ESTATE. (S. F. 4,756.)

(Supreme Court of California. Nov. 12, 1907.)

1. Executors and Administrators—Allowance to Surviving Wife.

A widow is entitled to an allowance out of the estate of her deceased husband for her support during administration, though she has property of her own out of which she may support herself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 651.]

2. Constitutional Law — Due Process of Law—Notice of Judicial Proceedings.

Code Civ. Proc. §§ 1464–1468, inclusive, are not unconstitutional on the ground that they deprive the heirs, devisees, or legatees of a decedent of their property, in so far as they authorize the making of orders setting apart exempt property and a homestead to the widow and for the payment of money to her out of the estate for her support, without notice to the heirs, devisees, or legatees, since the notices prescribed by sections 1303, 1304, and 1373, relating to notices in proceedings for the administration of estates, constitute due process of law and are sufficient to give the court jurisdiction to make all the subsequent orders in the proceeding, as to which special additional notice is not required.

3. Descent and Distribution — Nature of Succession—Statutory Provisions.

The right of inheritance and testamentary disposition is the creation of statute, and heirs, devisees, and legatees take the property subject to such burdens as the Legislature may impose, and the Legislature may make the property of a decedent subject to the maintenance of the widow and family pending the administration, and to the liability to have such charges enforced by orders made without notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, §§ 1–6.]

4. Executors — Allowance to Surviving Wife.

Under Code Civ. Proc. §§ 1465, 1466, authorizing the court to set apart for the surviving wife the property exempt from execution and to make allowances out of the estate for her support, a widow who refuses to abide by the will of her deceased husband is entitled to an allowance for support pending the administration, though the will specifically provides that, if the widow shall make any claim for a homestead or for an allowance, the same shall be given to her out of the property given by the will, which gives her the homestead, household furniture, and $2,000, and the fact that in pursuance of previous orders she has received allowances aggregating more than $2,000 is immaterial, except in determining the reasonableness of subsequent allowances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 696.]

5. Wills—Election—Gifts to Wife.

One may so frame his will that his widow cannot have the benefits thereby given her and those of the statute also, and she will then be put to her election; but where she repudiates the will she is entitled to her statutory rights as if there had been no will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 2077–2090.]

6. Executors — Allowance to Widow—Application—Evidence.

On an application by a widow for an allowance from her husband's estate pending administration and the probate of the will, evidence, opposing the application, that she had wrongfully appropriated money of her husband to her own use during his lifetime, was wholly irrelevant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 651, 719, 720.]

7. Appeal — Review — Discretion of Trial Court—Allowance to Surviving Wife.

Where the allowance to the surviving wife pending administration was not so excessive as to constitute an abuse of discretion on the part of the trial court, the court on appeal will not disturb it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 3881, 723.]

8. Judgment—Res Judicata.

A dismissal at the request of a widow of her application for an allowance for support out of the estate of her deceased husband pending administration is not a bar to her subsequent application therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1165.]

Department 1. Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

In the matter of the estate of Nelson Bump, deceased. From an order allowing the widow of the deceased a specified sum for her support during the pendency of the administration, the executors and the heirs and devisees of the deceased appeal. Affirmed.

R. H. Countryman, for appellants. Clark & Clark and R. Clark, for respondent.

SHAW, J. This is an appeal by the executors of the estate of Nelson Bump, deceased and by the heirs and devisees of the deceased from an order allowing the widow of the deceased the sum of $100 a month out of the estate for her support during the pendency of the administration. The fact that the widow may have had property of her own, out of which she could have supported herself without aid from the estate is immaterial. Estate of Lux, 100 Cal. 593, 603, 35 Pac. 341, 345. A large part of the evidence appears to have been devoted to an attempt to prove this immaterial fact.

The contention is made that the provisions of sections 1464 to 1468, inclusive, of the Code of Civil Procedure, in so far as they authorize the making of orders setting apart exempt property and a homestead to the widow and for the payment of money to her out of the estate for her support, without notice to the heirs, devisees, or legatees, are in conflict with the fourteenth amendment of the Constitution of the United States, and with the state Constitution, because they would operate to deprive such heirs, devissees, or legatees of their property without due process of law. The proposition is groundless. The making of such orders without notice is a part of the statutory proceeding for the administration of the estate, which is initiated by the giving of a general notice as prescribed in sections 1303, 1304, and 1373 of the Code of Civil Procedure. These notices constitute due process of law, and are sufficient to give the court jurisdiction to make all the subsequent orders in the proceeding, as to which special additional notice is not required. The right of inheritance and testamentary disposition is entirely the creation of the statute, and the heirs, devisees, and legatees take the property subject to such burdens as the Legislature has seen fit to impose upon it, among which is the burden of supporting the widow and children of the deceased, whenever the court having jurisdiction of the administration of the estate shall make an order to that effect. The Legislature had full power to provide that a part of the estate should thus be subject to the order of the probate court without notice, other than the general notice of the application for administration thereon. While it is true that the descent is cast and the property of the decedent vested in the devisees and legatees, or in the heirs, at the moment of the death of the deceased, it is also true that they take the property subject to the payment of the expenses of administration and subject to the charges which the law fixes upon it for the support, maintenance, and comfort of the widow and family of the deceased, and subject to the liability to have these charges enforced by orders of the court made without notice in pursuance of the statute. Estate of Huelsman, 127 Cal. 276, 59 Pac. 776; Estate of Lahiff, 86 Cal. 153, 24 Pac. 850. The enforcement of these charges in the authorized mode is not a violation of any constitutional right of the heir, devisee, or legatee.

The will of the deceased gave to the widow the house and lot on which she and the testator resided at the time of his death, all the household furniture contained therein, and $2,000 in money. It further provided that if the widow should make any claim for a homestead, or for exempt personal property, or for a family allowance, the same should be given to her out of said property given by the will, and not otherwise, or, if given out of other property, then the amount should be deducted from the property devised and bequeathed to her, and the amount given by will lessened to that extent, and, further, that if she contested the will in any way she should forfeit its benefits. These provisions of the will are wholly immaterial upon the present appeal. The court below found as a fact that the widow refuses, and at all times has refused, to abide by the terms of the will, and has not elected to take thereunder, but is contesting the probate thereof. It is provided in the Code of Civil Procedure that upon the return of the inventory, or afterwards, the court, of its own motion, may set apart for the use of the surviving wife all the property exempt from execution (section 1465), and that, if the same is not sufficient for the support of the widow and children, or either, the court must make such reasonable allowance out of the estate as may be necessary for their support, according to their circumstances (section 1466). The right of a widow, who was a member of the family of the deceased and entitled to his support, at the time of his death, to have such allowance from the estate as may be reasonably necessary for her support during the settlement of the estate, is thus fixed by statute. It is not within the power of the husband by any provision of his will to deprive her of this right, or to in any wise limit the power of the court, in the exercise of its proper discretion, to fix the amount to be allowed. Sulzberger v. Sulzberger, 50 Cal. 387; Estate of Walkerley, 77 Cal. 642, 20 Pac. 150; Estate of Lux, 100 Cal. 603, 35 Pac. 341; Estate of Davis, 69 Cal. 458, 10 Pac. 671; Estate of Lahiff, supra; Eproson v. Wheat, 53 Cal. 719; Estate of Huelsman, supra; Estate of Levy, 141 Cal. 652, 75 Pac. 301, 99 Am. St. Rep. 92. "The power of testamentary disposition of property, as conferred and defined by statute, is not paramount, but is subordinate, to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child, or children, as well as for the payment of the debts of the estate." Sulzberger v. Sulzberger, supra; Estate of Davis, supra.

The deceased may, indeed, so frame his will that his widow cannot have the benefits thereby given her and those of the statute also, and she will then be put to her election which she will take. Estate of Lufkin, 131 Cal. 293, 63 Pac. 469; Eproson v. Wheat, supra. But, when she repudiates the will, she is entitled to the benefit of her statutory rights as fully and completely as if there had been no will. It follows, also, from these considerations, that the fact that in pursuance of previous orders of the court she had previously received allowances for support for the period preceding the time to which order here in question relates, and that the sums so received for past support aggregated more than the $2,000 given her by the will, does not defeat or affect her right to an allowance for subsequent maintenance during the settlement of the estate, except that the amounts previously received may be considered, in connection with all the other circumstances, in fixing the allowance for the subsequent support. The provisions of the will attempting to limit the allowance are immaterial, where she has repudiated it.

The appellants attempted to show that the widow had, during the lifetime of the deceased, wrongfully appropriated his money to her own use. This, at most, could create but a mere debt from her to the estate, or a trust with respect to her property, and could have no bearing on the question of her right, nor upon the amount reasonably necessary for her support. Objections to such evidence were properly sustained.

The amount of the allowance was not so excessive as to constitute an abuse of discretion on the part of the court below. We would not go so far as to say that it was too large, under the circumstances shown.

With regard to the claim that there was a former adjudication of her right, it appears that a previous application was filed by her and dismissed at her request. It does not appear that it was ever tried, submitted, or decided on the merits. Such dismissal does not constitute a bar. Pyle v. Piercy, 122 Cal. 384, 55 Pac. 141; Jacob v. Day, 111 Cal. 579, 44 Pac. 243.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

In re BUMP'S ESTATE. (S. F. 4,757.)

(Supreme Court of California. Nov. 12, 1907.)

Department 1. Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

In the matter of the estate of Nelson Bump, deceased. From an order setting apart to the widow the exempt personal property of the estate, the beneficiaries under the will appeal. Affirmed.

R. H. Countryman, for appellants. Clark & Clark and R. Clark, for respondent.

SHAW, J. This is an appeal by the beneficiaries under the will of the deceased, and the executors thereof, from an order setting apart to the widow the exempt personal property of said estate. The parties interested and the facts and questions involved are practically the same as in the case of Estate of Bump (S. F. No. 4,756) 92 Pac. 643, involving an order in the same estate providing an allowance for the support of the widow. The points decided in that case are controlling in this case, and upon the authority of that decision the order appealed from is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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152 Cal. 286

HIBERNIA SAVINGS & LOAN SOCIETY v. WAYMIRE. (S. F. 4,878.)

(Supreme Court of California. Nov. 13, 1907.)

1. APPEAL—RIGHT TO APPEAL—JUDGMENT BY CONSENT.

An appeal from a consent order or decree will be dismissed on motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 882, 883.]

2. SAME—DEFENSE.

Where defendant, when sued for possession of certain real property, stipulated, without fraud on plaintiff's part, that judgment might be entered for plaintiff with a 30 days' stay and that defendant waived his right to appeal, it was no answer to plaintiff's motion to dismiss an appeal subsequently taken by defendant that he signed the stipulation with the understanding that he might still purchase the property for the unpaid portion of the original price, and that after the entry of judgment he was informed that if he purchased he must pay an increased price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 882, 883.]

In Bank. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Hibernia Savings & Loan Society against James A. Waymire. From a judgment for plaintiff, defendant appeals. On motion to dismiss. Granted.

Welles Whitmore, for appellant. H. L. Breed and Tobin & Tobin, for respondent.

ANGELLOTTI, J. This is a motion to dismiss an appeal taken by defendant on August 19, 1907, from a judgment made and entered against him on May 7, 1907, on the ground that such judgment was rendered and entered in pursuance of an express written stipulation of the parties, which stipulation contained an express waiver by defendant of his right to appeal.

The action was one for the recovery of the possession of certain real property, and costs of suit. The prayer of the complaint was: "Wherefore plaintiff demands judgment against defendant for the immediate possession of said real property and the whole thereof, and for costs of suit." The record before us shows a written stipulation dated and filed in the cause March 12, 1907, signed by the attorney for the plaintiff and by the defendant in propria persona, providing that the cause be continued to March 22, 1907, at 10 o'clock a. m., and that at said time "judgment may be rendered and entered in favor of plaintiff and against defendant as in plaintiff's complaint prayed for, and it is further stipulated that defendant may have 30 days' stay of execution of the judgment so rendered." The stipulation contained a further provision as follows: "Defendant hereby waives his right to appeal from such judgment." The record further shows that on March 22, 1907, the court filed its decision in writing, expressly based on said stipulation, directing judgment for plaintiff for the immediate possession of said property and costs, a stay of execution for 30 days being granted, and that on May 7, 1907, the judgment appealed from, which is in precise accord with the terms of the stipulation, was entered by the clerk pursuant to such written decision. The judgment as entered by the clerk contains certain recitals to the effect that the cause was tried by the court, that witnesses were sworn and examined, and that the evidence being closed, the cause was submitted to the court for consideration and decision, but it fully appears from the other recitals that the judgment was entered solely in pursuance of the written decision and order filed on March 22, 1907, which decision and order are expressly referred to and made the basis of the judgment.

It is the universal rule that a judgment or order will not be disturbed on an appeal prosecuted by a party who expressly consented to the making thereof. This doctrine is established in this state by a long line of decisions. See Imley v. Beard, 6 Cal. 666; Meerholz v. Sessions, 9 Cal. 277; Brotherton v. Hart, 11 Cal. 405; Coryell v. Cain, 16 Cal. 572; Mecham v. McKay, 37 Cal. 158; La. Soc., etc., v. Beardslee, 63 Cal. 160; Haskins v. Jordan, 123 Cal. 162, 55 Pac. 786; Estate of Lorenz, 124 Cal. 495, 57 Pac. 387; Pacific Paving Co. v. Vizelich, 1 Cal. App. 283, 82 Pac. 82. It is also settled in this state that, where a party who has expressly consented to and stipulated for the making of a certain judgment or order attempts to appeal from the judgment or order so agreed to and made in pursuance of the consent and stipulation, the appellate court will not consider the appeal at all, but will dismiss it on motion made in that behalf. This was done in Erlanger v. Southern Pacific R. R. Co., 109 Cal. 395, 42 Pac. 31, where the stipulation for judgment was practically the same as here, and also in Oullahan v. Morrissey, 73 Cal. 297, 14 Pac. 864. In Savings Union v. Myers, 72 Cal. 161, 13 Pac. 403, a motion to dismiss on this ground was entertained, and the motion was denied solely because the record was held not to show a consent judgment. See, also, Oliver v. Blair (Cal.) 5 Pac. 917.

The affidavit of defendant presented in answer to the motion does not state any facts that would warrant us in disregarding the stipulation. It appears therefrom that there had some time previously been an agreement between him and plaintiff under which he was to be allowed to purchase the property for $18,000, and on which he had paid $1,200. This agreement, so far as appears, was no longer in force at the time of the commencement of this action. Defendant says in effect in his affidavit simply that he "signed the stipulation for judgment with the understanding" that he could still purchase the property from plaintiff for the unpaid portion of the $18,000, viz., $16,800, and that not until after the entry of judgment was he informed that he could not have the property for that price, or for anything less than $22,500. Even if the stipulation entered into could be so attacked on an appeal from a judgment given by consent in pursuance thereof when it was never assailed in the lower court, which is not conceded, there is nothing in the matters stated in the affidavit that would justify a court in setting it aside. The mere mistaken opinion of the defendant at the time of signing the stipulation for judgment as to the price for which the plaintiff would thereafter sell the property, induced by no fraud of the plaintiff, would not warrant any relief from the judgment in any proceeding.

We can perceive no good answer to the motion to dismiss.

The appeal from the judgment is dismissed.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; McFARLAND J.; HENSHAW, J.

152 Cal. 289

BROBECK v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 4,859.)

(Supreme Court of California. Nov. 13, 1907.)

1. INDICTMENT—EVIDENCE—REVIEW.

An indictment being a record of the action of a judicial body, and no method having been provided for reviewing it, it cannot be set aside on the ground that there was no evidence offered before the grand jury to show that defendant was guilty of a public offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information. § 57.]

2. PROHIBITION—SCOPE OF WRIT—INDICTMENT.

Prohibition will not lie to restrain a superior court from proceeding with the trial of petitioner on an indictment alleged to have been found by the grand jury without evidence to show that petitioner was guilty of a public offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition. § 15.]

In bank. Petition for writ of prohibition against the superior court for the city and county of San Francisco and others. Writ denied.

Frank D. Nicol, A. F. Morrison, and Bishop & Hoefler, for petition. W. H. Langdon, Dist. Atty., and Wm. Hoff Cook, Asst. Dist. Atty. (Charles W. Cobb, of counsel), for respondents.

PER CURIAM. This is an application for a writ of prohibition to restrain the superior court from proceeding with the trial of petitioner upon an indictment found by a grand jury. In addition to the point made in Halsey v. Superior Court (Cal. Sup.) 91 Pac. 987, petitioner claims that there was absolutely no evidence produced before the grand jury tending to show him to be guilty of any public offense. His contention is that an indictment found and presented without any evidence to warrant it is a nullity, and that the superior court is without jurisdiction to proceed thereon. It is, however, settled that an indictment may not be assailed on this ground. This question was fully considered in Re Kennedy, 144 Cal. 634, 78 Pac. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117. The court there said, speaking through Mr. Justice McFarland: "An indictment is a record of the action of a judicial body, and such action is final when there is no appeal therefrom and no other method provided for reversing it; and there is no method for revising it on the ground that there was not sufficient evidence to support it." That was a proceeding in habeas corpus, but there is no distinction material here between habeas corpus and prohibition. We are satisfied that the Kennedy Case correctly states the law upon this matter, and that the rule there declared is applicable here. It follows that, so far as this proceeding is concerned, it is immaterial that there may have been no evidence introduced before the grand jury tending to show petitioner guilty of a public offense.

The application must be denied, and it is so ordered.

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6 Cal. App. 578

PEOPLE v. BARRETT et al. (Civ. 301.)

(Court of Appeal, Second District, California. Oct. 7, 1907.)

1. Criminal Law—Appeal—Undertakings—Construction—Discharge of Sureties.

An undertaking on appeal by a person fined and sentenced to imprisonment, which provides that, in case the judgment be affirmed or modified, defendant will render himself to the court in execution of the sentence of imprisonment, is invalid because more onerous than required by Pen. Code, § 1273, subd. 2, relating to bail after conviction, and providing that, where a defendant has been sentenced to imprisonment, he may be admitted to bail pending appeal upon an undertaking that he will surrender himself in execution of the judgment upon its being affirmed or modified, etc., since under the bond defendant must render himself in execution of the original sentence.

2. Same.

The fact that the original sentence was affirmed in its entirety, and defendant did not render himself in execution, does not affect the sureties' right to question the bond's validity.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the people against J. S. Barrett and others on an undertaking on appeal. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Jones & Weller, for appellants. U. S. Webb, Atty. Gen., J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Dep. Dist. Atty., for the People.

ALLEN, P. J. Action upon an undertaking. Judgment for plaintiff, from which defendants appeal.

It appears from the record that Barrett was convicted of a misdemeanor by a magistrate and adjudged to pay a fine of $500 and be imprisoned for 30 days, and, in default of payment of such fine, that he be imprisoned at the rate of $1 a day for each dollar of fine. From this judgment he appealed, and the undertaking sued on in this action was given, which undertakes and promises on the part of defendant that in case said judgment be affirmed or modified, or the appeal be dismissed by said superior court, Barrett will pay the fine and render himself to said justice in execution of said judgment of 30 days' imprisonment, and to obey all orders and processes of said justice's court in fulfillment of said judgment, or, in case the judgment be set aside and a new trial ordered by said superior court, that defendant will appear in said superior court and submit himself, etc. This undertaking was given pursuant to section 1273 of the Penal Code, which provides for admission to bail after conviction: "First—If the appeal is from a judgment imposing a fine only, on the undertaking of bail that he will pay the same, or such part of it as the appellate court may direct, if the judgment is affirmed or modified, or the appeal is dismissed. Second—If judgment of imprisonment has been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that in case the judgment be reversed, and that the cause be remanded for a new trial, that he will appear in the court to which said cause may be remanded, and submit himself to the orders and process thereof."

Appellants' contention is that the undertaking is void as being more onerous than the statute requires, in this: that under its terms the penal sum is payable even though the judgment be modified in respect of the fine or imprisonment. That portion of the bond which refers to the payment of the fine may be disregarded. The fine, while fixed, was subject to payment at defendant's election by imprisonment. The second subdivision of section 1273 is the one to be considered in determining the effect of the bond. People v. Cabannes, 20 Cal. 526. The undertaking was therefore given in the sum fixed to insure the submission of defendant to the judgment and orders of the superior court in execution of the sentence of imprisonment. From "the character of the act to be performed and the impossibility of measuring the damages upon a default by any pecuniary standard, there can be no difficulty in deciding that it was intended by the parties, and is valid and may be enforced, as a simple undertaking to pay the sum specified." People v. Love, 19 Cal. 683. Treating the undertaking, then, as one given alone under subdivision 2, we are led to inquire whether it is more onerous than by such section provided. The undertaking promises that, in case the judgment be affirmed or modified, the defendant will render himself to said justice's court in execution of said sentence of 30 days' imprisonment, while the statute only requires the condition that he will surrender himself in execution of the judgment upon its being affirmed or modified. In other words, under the conditions of the bond, the liability attached unless the defendant rendered himself in execution of the original sentence, even though the appellate court may have so modified the sentence as to remit such imprisonment. It is true that it appears from the record that the judgment was affirmed in its entirety, and defendant did not render himself in execution; but, notwithstanding this, the sureties may question the validity of the bond. It is insisted by respondent that, reading the statute into the bond, it becomes apparent that the sureties were only obligated to an amount equal to that of the principal and the bond was only to cover the principal's obligation as it was fixed by the appellate court. This might be said were a bond given conditioned to secure the payment of a fine; but is it true where it is given in a penal sum where the defendant is obligated to serve a sentence which may be entirely remitted, and, if so remitted, the penal sum remain enforceable against the sureties under the letter of the bond? We think that the conditions of the bond set out in the complaint are much at variance with those contemplated by the statute in bonds of this character, and that the undertaking is therefore invalid, and the court erred in overruling the demurrer to the complaint.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

We concur: SHAW, J.; TAGGART, J.

6 Cal. App. 533

CASTROVILLE CO-OPERATIVE CREAMERY CO. v. COL. (Civ. 386.)

(Court of Appeal, First District, California. Oct. 3, 1907.)

1. TRADE-MARKS—INFRINGEMENT—ACTIONS — DEFENSES—FRAUD OF PLAINTIFF.

Where a manufacturer of butter who had built up a trade based upon the high grade of his product had for several years and until within less than two months before action was begun allowed another to wrap a different butter in his wrapper, and sell it as his butter, he cannot, after the registration of its wrapper as a trade-mark, recover for the infringement thereof, since a person seeking protection against the fraud of another must himself be free from fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 94.]

2. PRINCIPAL AND AGENT—PRINCIPAL LIABLE FOR AGENT'S ACTS.

The fact that plaintiff's agent, without authority of his principal, permitted the use of plaintiff's butter wrappers upon another dealer's butter, would not relieve the principal from responsibility for the deception, since at common law and under the express provisions of Civ. Code, § 2338, the principal is bound by its agent's acts within the scope of the agency, even if the acts are wrongful.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 590, 600.]

Appeal from Superior Court, Santa Clara County; Hiram D. Tuttle, Judge.

Action by the Castroville Co-operative Creamery Company against A. G. Col. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

V. A. Scheller and O'Neal & Richardson, for appellant. Dougherty & Dougherty and W. A. Johnston, for respondent.

KERRIGAN, J. This is an action for the infringement of a trade-mark. The appeal is from a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial.

Among other things the court found that for more than six years respondent had been engaged in the manufacture and sale of a superior quality of butter at Castroville, Cal., sold in wrappers bearing a certain label; that respondent had built up a good trade for the butter sold in wrappers bearing this label, and that on February 1, 1904, it caused said label to be registered as a trade-mark, pursuant to section 3197 of the Political Code; that at all the times mentioned in the complaint the appellant was engaged in selling in the city of San Jose butter of a quality inferior to that of respondent, and that appellant, with the fraudulent intent to mislead the public into purchasing his butter as the butter of respondent, grossly imitated the latter's trade-mark. The court further found: "That an officer of plaintiff, to wit, the 'manager' thereof, prior to the said registration of its trade-mark with the Secretary of State of California, permitted the use of its butter wrappers on butter other than its own by its customer in San Jose, Cal., during a time of year when butter was scarce, but that said permission and use were unauthorized by the board of directors of said corporation, and said permission was revoked, and said use forbidden by said manager, prior to the filing of plaintiff's said trade-mark."

The last finding is based on testimony substantially as follows: L. Griffin, the manager of the respondent, called on its behalf, said: "About three-quarters of the output of respondent's creamery is shipped to Mr. Renzel at San Jose, who sells it there. He sells the butter, and accounts to us for a certain price that we make to him. During the past seven years there have been consignments of wrappers to Renzel so that he could wrap butter not respondent's in respondent's wrappers, and sell it as Castroville butter. This was done each year to the extent of 10 or 15 boxes, and during certain seasons when butter was scarce. Castroville butter is sold for 5 or 10 cents a square higher than other butter. We knew that the purchaser was getting something that he did not bargain for, and permitted that to go on under the designation of Castroville Creamery. Our reputation was partly acquired under these conditions. The understanding was that Renzel should wrap only first-class butter. We suffered this to be done up to the time of the trade-mark. This we stopped because we heard of appellant's wrapping it. I cannot say that the board of directors knew that we were shipping wrappers to Renzel. I guess they did not. The company never authorized me to do it. At the time we got the trade-mark I notified Renzel not to use any more of the wrappers." William Horstman, called on behalf of appellant, said: "I worked for Renzel at San Jose for about six months prior to September, 1903. During that time Renzel got quite a little butter from the Castroville Creamery part of the time, and some of the time he did not get hardly any. During the time I wrapped I think there was a good deal more wrapped than what came from Castroville. They wrapped more than they got in all the time that I was there, I think. This was subsequently marketed as Castroville butter, and a good deal of it was sold in the city of San Jose."

The respondent has come into a court of equity complaining of the fraudulent methods of appellant, while respondent each year from the inception of its business down to within a short time of the commencement of this action had itself been guilty of deceiving the public. The rule is well settled that the party claiming protection against the fraudulent conduct of another must himself be free from the imputation of fraud. Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706; Joseph v. Macowsky, 96 Cal. 518, 31 Pac. 914, 19 L. R. A. 53; Prince Mfg. Co. v. Price Metallic Co., 135 N. Y. 38, 39, 31 N. E. 990, 17 L. R. A. 129; Paul on Trade-Marks, § 315; Hesseltine on the Law of Trade-Marks and Unfair Trade, p. 118. In Manhattan Medicine Co. v. Wood, supra, Mr. Justice Field said (quoting from the opinion of Chief Justice Duer in Fetridge v. Wells, 4 Abb. Prac. [N. Y.] 144): "Those who come into a court of equity, seeking equity, must come with clean hands and a pure conscience. If they claim relief against the fraud of others, they must themselves be free from the imputation. If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that, by fraudulent rivalry of others, their own fraudulent profits are diminished." In Prince Mfg. Co. v. Price's Metallic Co., supra, it is said: "Any material misrepresentation in a label or trade-mark as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity. * * * And, although the false article is as good as the true one, 'the privilege of deceiving the public, even for its own benefit, is not a legitimate subject of commerce.'"

The respondent, about 51 days before this action was begun, learned that appellant was imitating its label, and, realizing the weakness of its position, revoked the permission to practice the deception. The cessation came too late. In Seabury v. Grosvenor, 14 Blatchf. (U. S.) 262, 21 Fed. Cas. (No. 12,576) a plaintiff had fraudulently advertised "capcine" as a vegetable principle of great value, when in truth there was no such substance. Before bringing suit, however, plaintiffs had omitted the fraudulent and deceptive language from their circulars. But the court says this does not help the plaintiffs. In the opinion in that case it is said: "Although they may have omitted the fraudulent, deceptive, and untrue language from their circulars before this suit was commenced, yet, if they have any property in the trade-mark which they claim title to, they have acquired such property by the use, for a considerable time, of such language in the circulars which accompanied the articles they sold, and in respect to which the trademark is claimed." There is no merit in the point urged by respondent that the permission given by Griffin to Renzel was unauthorized. According to well-established rules of law, the principal is bound by the acts of its agent committed in the transaction of the business of the agency, even if the acts are wrongful. Civ. Code, §§ 2330, 2338; Stockton, etc., Works v. Ins. Co., 98 Cal. 557, 577, 33 Pac. 633; Bank of Cal. v. W. U. T. Co., 52 Cal. 280.

The judgment and order appealed from are reversed.

We concur: COOPER, P. J.; HALL, J.

6 Cal. App. 563

ROCKWELL v. LIGHT et al. (Civ. 368.)

(Court of Appeal, Second District, California. Oct. 4, 1907.)

1. MECHANICS' LIENS — CONTRACT FOR IMPROVEMENT—CONSTRUCTION—FILING—TIME.

Where the specifications in a contract for painting certain cottages called for two coats on the trimmings, and the evidence in a suit to enforce a mechanic's lien was sufficient to sustain a finding that trimmings included porch floors and steps, the owner's superintendent having testified without contradiction that he would not have accepted the work had only one coat been put on the porches, a lien filed within 90 days after the last work was done, which consisted of giving a second coat of paint to the porch floors and steps, was in time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 195–201.]

2. SAME—VARIANCE.

Where a contract alleged to sustain a mechanic's lien provided for painting four cottages on a certain lot for $40 each, evidence that the agreement was that the four houses should be painted, and that another house should be painted for $80, did not constitute a fatal variance, the contract being divisible, under the rule that where a contract expressly apportions the price to each item to be performed, or where it embraces several undertakings, each supported by a distinct consideration, it is severable.

3. Appeal—Scope of Review—Appeal from Order Denying New Trial—Amount of Judgment.

Objections to the amount of the judgment cannot be reviewed on an appeal from an order denying a motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3476.]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by W. M. Rockwell against J. E. Light and others. From a judgment for plaintiff and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Henry M. Willis, for appellants. Eugene C. Campbell, for respondent.

SHAW, J. Action to foreclose a mechanic's lien. Judgment went for plaintiff, and defendants appeal from the judgment and an order denying their motion for a new trial. The appeal from the judgment was upon motion of the respondent disposed of by an order of this court dismissing the same.

Appellants contend the notice of lien was not filed in time. The contract was for the material and labor required in painting four cottages situated on one lot in the city of Redlands, at the agreed price of $40 each, being a total of $160 for the entire work. The specifications for the work called for one coat on the exterior of each of said cottages, "except the trimmings, which were to have two coats of paint." The last work done was on January 27, 1905, when a second coat of paint was placed upon the porch floors and steps of all the cottages. The claim of lien was filed on April 21, 1905, and, if the painting of these floors was within the terms of the contract, the lien was filed within the statutory time; otherwise, it was filed too late. The contention of appellants is that the term "trimmings" as used in the contract, and which under the terms of the contract were to receive to coats of paint, did not include porch floors and steps, and hence the painting of the same was not within the terms of the contract. While there is a conflict of evidence as to the meaning of the term "trimmings" as used in the contract, it is nevertheless sufficient to justify the court in holding that it included such porch floors and steps, and fully supports the finding that the lien was filed within 90 days after the completion of the work upon each of said cottages. In addition to this, however, is the fact that the superintendent of the work, representing the owner of the cottages, testified, without contradiction, that he, as such superintendent, would not have accepted the work had only one coat of paint been put on the porches. The parties themselves mutually interpreted the contract to include the porch floors, which, under his agreement, the contractor was required to paint with two coats of paint. "When the meaning of the language of a contract is considered doubtful, the acts of the parties done under it afford one of the most reliable clews to the intention of the parties." Hill v. McKay, 94 Cal. 5, 29 Pac. 406; Mulford v. Le Franc, 26 Cal. 108; Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298.

It is next contended there is a fatal variance between the allegations of the complaint and the evidence offered in support thereof. The contract alleged was to paint, according to specifications, four cottages situated upon a certain lot for $40 each, whereas, the proof shows that there was included in the contract an agreement to paint, according to different specifications, a fifth house situated on a different lot for an agreed price of $80. J. E. Light, the appellant, referring to the time of making the contract, testifies: "I wanted those [cottages] figured by the job, and it was not certain at that time whether there would be three or four." And again he says of the contract: "You might state either of the two ways—one contract of five parts or five contracts. It was made with one agreement and one negotiation and one estimate, with different prices for the different houses. That is to say, one house was to be $80 and the others $40 each." He further states: "With reference to the division of the work—that is, four cottages in one lien, and the large house in the other lien—that division was agreed on at the time I made the contract." The contract apportioned a specific price for the material and labor required in painting each of the houses, and, as appellant himself says, it was either five contracts or one contract of five parts. At all events, it was a divisible contract, and the fact that the proof showed an agreement made at the same time to paint a fifth house for $80 does not constitute a variance between the contract to paint the four cottages at a cost of $40 each and the evidence offered in support thereof. "Where the contract expressly apportions the price to each item to be performed, or where it embraces several undertakings, each supported by a distinct consideration, the contract is severable." 7 Ency. of Law (2d Ed.) p. 95; Norris v. Harris, 15 Cal. 226; Pierson v. Crooks, 115 N. Y. 554, 22 N. E. 349, 12 Am. St. Rep. 831. Objections to the amount of the judgment cannot be reviewed upon an appeal from an order denying a motion for a new trial. Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558.

Our conclusion renders it unnecessary to pass upon respondent's motion to dismiss the appeal.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

6 Cal. App. 547

NICHOLSON et al. v. AUBURN GOLD MIN. & MILL. CO. (Civ. 365.)

(Court of Appeal, Third District, California. Oct. 3, 1907.)

1. PARTNERSHIP—ACTIONS BY FIRM—STATUTORY DEFENSE—FAILURE TO FILE CERTIFICATE STATING NAMES OF PARTNERS—PLEADING.

Under Civ. Code, § 2466, requiring partnerships transacting business under a designation not showing the persons interested to file with the clerk a certificate stating the names in full of all the members of the partnership, and to publish it once a week for four weeks, etc., and section 2468, providing that persons doing business as partners contrary to the provisions of the article shall not maintain an action until they have filed the certificate and made the publication therein required, where an action is brought by a partnership, the firm name of which does not indicate all the partners, failure to file the required certificate is matter of defense, and must be set up in the answer by way of abatement.

2. SAME—TIME OF COMPLIANCE WITH STATUTE.

If the requirement as to filing and publication are complied with before the defense is interposed, it will be sufficient, even though the publication was not completed at the time the action was commenced.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by James Nicholson and another, copartners, etc., against the Auburn Gold Mining & Milling Company. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Frank & Mansfield and T. P. Tuttle, for appellant. S. J. Pullen and L. L. Chamberlain, for respondents.

CHIPMAN, P. J. Action for the value of certain goods, wares, and merchandise. A general demurrer was overruled, and defendant answered, averring, among other things, that plaintiffs should not be permitted to maintain this action because they are a partnership transacting business in this state under a designation not showing the names of the persons interested as partners, as required by sections 2466 and 2468 of the Civil Code. The complaint was filed November 7, 1905. The first publication of the certificate of copartnership was on November 4, 1905, and was repeated thereafter November 11th, 18th, 25th, and December 2d. The certificate was filed with the county clerk November 7, 1905. The answer, pleading the statute in abatement, was filed December 19, 1905. Plaintiff had judgment, from which and from the order denying its motion for a new trial defendant appeals.

The statute reads as follows: "Persons doing business as partners contrary to the provisions of this article shall not maintain any action * * * until they have first filed the certificate and made the publication herein required." The failure to file the required certificate is matter of defense, and must be set up in the answer by way of abatement. Byers v. Bourret, 64 Cal. 73, 28 Pac. 61; Sweeney v. Stanford, 67 Cal. 635, 8 Pac. 444; Carlock v. Cagnacci, 88 Cal. 600, 26 Pac. 597; Cook v. Fowler, 101 Cal. 89, 35 Pac. 431. In the first of the above cases it was also said: "The commencement of the action is a part of maintaining it. In this case it was incumbent on the plaintiff to have shown that the certificate has been filed, and published once a week for four successive weeks before the commencement of the action." The facts in that case were that the trial of the issue was on December 15, 1882, and on the same day findings were filed and a judgment rendered for plaintiffs, but that the certificate of partnership was not filed with the clerk until December 7, 1882, and the publication thereof had been made once only before the trial. A similar provision to that in section 2468 is found in section 299 of the same Code, which provides that "any corporation failing to comply with the provisions of this section (i. e., as to filing its articles of incorporation) shall not maintain or defend any action * * * until such articles * * * shall be filed," etc. In California Sav. & L. Soc. v. Harris, 111 Cal. 133, 138, 43 Pac. 525, section 299 was pleaded in abatement of the suit. It was there shown that matter in abatement of the plaintiff's action must exist at the time of filing the plea, and that pleas of this character are not favored, and are to be strictly construed. There is no substantial difference in the provisions of the two sections, and it seems to us they should have uniform application. In the case just cited the court said: "The defense which is authorized by section 299 does not confer any right upon the defendant, and is authorized for the purpose of enforcing a compliance by the plaintiff with a statutory requirement. It is limited by its terms 'until' such compliance has been had, and, when its object is effected, its terms prescribing a penalty should be strictly construed and in favor of the corporation." Referring to Byers v. Bourret, supra, it is shown that to maintain an action is not the same as to commence an action; that "the verb 'maintain' in pleading has a distinct technical signification. It signifies to support what has already been brought into existence (Moon v. Durden, 2 Ex. 30)." It is then pointed out that the expression in Byers v. Bourret, to the effect that the provision of section 2468 must be complied with before the commencement of the action, was not involved in the case then before the court, as it clearly was not.

In the present case the plea in abatement was not interposed until after the publication had been completed, while in Byers v. Bourret the publication was not completed until after the trial of the case and judgment entered therein. Furthermore, we think the statute was sufficiently complied with though the publication was not completed before the commencement of the action.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

6 Cal. App. 581

BUTT v. MAIER & ZOBELEIN BREWERY et al. (Civ. 377.)

(Court of Appeal, Second District, California. Oct. 7, 1907. Rehearing Denied Dec. 5, 1907.)

1. LANDLORD AND TENANT — CONSTRUCTION OF LEASE—EXPIRATION OF TERM—SURRENDER OF POSSESSION.

A lease of premises for a five-year term contained the usual printed covenants as to payment of rental, etc., followed by a typewritten provision that the lessee might make improvements, etc., if it desired, and, if the lessor should demand the termination of the lease and surrender of the premises at the end of the term, she should pay for the improvements, etc. This was followed by the usual printed covenant to surrender at the expiration of the term, which was followed by a typewritten provision that, at the expiration of the lease, the lessee should have the prior right to a lease for a further five-year term at an agreed rental, but, in such case the lessor should not be required to pay for any improvements, etc., at the end of the second term, but then at the option of the lessor, the premises should be surrendered with all improvements. *Held*, that in the first typewritten clause there was no covenant, express or implied, on the part of the lessee to surrender on demand or to waive the right to renew the lease.

2. SAME—CONFLICTING CLAUSES.

The printed provision to quit and surrender at the end of the term was controlled by the second typewritten provision granting the option of renewing the lease.

3. SAME—RIGHT TO RENEWAL—USE OF WORD "PRIOR."

The word "prior" in the second typewritten clause did not qualify the right of renewal.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5564–5565.]

4. SAME—AMBIGUITY—STATUTORY PROVISIONS —CONSTRUCTION AGAINST LESSOR.

Under Civ. Code, § 1654, providing that the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist, and that the promisor is presumed to be such party, a lessor is the promisor, and any ambiguity in a lease will be construed against him.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Allen D. Butt against the Maier & Zobelein Brewery, a corporation, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Gray, Barker & Bowen and R. L. Horton, for appellant. Edw. F. Wehrle and Frank James, for respondents.

SHAW, J. The appeal is from the judgment and an order denying plaintiff's motion for a new trial.

The sole question involved is the interpretation to be given to the provisions of a lease whereby appellant's grantor leased the property in question to Maier & Zobelein Brewery, a corporation, which is one of the respondents. Other respondents were joined as defendants in the action by reason of their having an interest in the lease as subtenants or assignees of said lessee. The lease was prepared upon a printed form, the blank spaces as to duration of the term (fixed at five years from May 1, 1901), the rental, and the manner of payment thereof, being filled by writing the necessary words therein. After setting forth the usual covenants as to payment of the agreed rental, and right of reentry in case of default, there is then inserted the following typewritten provision: "Said second party is authorized to make such improvements and erect such buildings on the said premises as it may desire. It is further agreed that if the said first party shall demand the termination of this lease and surrender of the premises at the end of said term, that then said first party will pay for improvements made and buildings erected, at their reasonable value. If the value of said improvements cannot be agreed upon by the parties hereto, then the value thereof shall be determined by three appraisers, one appointed by first party, one by second party, and one elected by the first two named appraisers, whose appraisement of said premises shall be final between the parties hereto." For more convenient consideration, we will designate this provision as "clause 1." The lease next contains the usual printed covenant on the part of the lessee to quit and surrender the premises at the expiration of said term. There is next inserted a typewritten provision as follows: "At the expiration of this lease the said second party shall have the prior right to lease the same, said premises, for a further term of five years, for the rental sum of $3,000 for the full term, payable at the rate of $50 per month on the first of each and every month of said term. Provided, however, that if the said second party shall avail itself of that privilege, that then and in that event, the said first party shall not be required to pay for any improvements at the end of said second term of five years, but that then, at the option of said first party, the said premises shall be surrendered to her with all improvements thereon." This provision will be referred to as "clause 2." Both prior to and at the expiration of the term of five years a notice of the termination of said lease, and demand for surrender of the premises, and an offer to pay for improvements made by the lessee at their reasonable value, was served upon all parties in interest. On April 12, 1906, Maier & Zobelein Brewery, the lessee, gave notice in writing to the lessor and her grantee, the appellant herein, that it was its intention, in the exercise of its option, to lease the property for a further term of five years from May 1, 1906, upon the terms and conditions set forth in clause 2 of said lease, and at the same time tendered a lease executed by said corporation and drawn in accordance with the provisions of said clause 2, and requested each of the parties upon whom said notice was served to execute the same. Neither the sufficiency nor service of these documents is questioned. The corporation, as lessee, and its assignees, the other respondents herein, refused to surrender possession of the premises, claiming the right to hold, under the provisions of clause 2 of the said lease, for an additional term of five years, commencing May 1, 1906. Whereupon this action was brought for the restitution of the property and for damages. Judgment went for the defendants, from which, and an order denying plaintiff's motion for a new trial, he prosecutes this appeal.

Clause 1 contains no covenant of any kind on the part of the lessee. The corporation, as lessee, is authorized to make improvements and erect such buildings as it may desire; but it cannot be contended that the lessee, by reason of being so authorized, was thereby obligated to make any improvements or erect any buildings on the property. It is further agreed that, if the lessor demands the termination of the lease and surrender of the premises, the lessor will pay the reasonable value of such buildings and improvements; but there is nothing contained in said clause 1 which can be construed into a promise, covenant, or agreement on the part of the lessee that it will surrender upon such demand or waive the right to lease the property for a further term of five years, as provided in clause 2 of the lease, and we cannot read into this clause a covenant so to do any more than to construe the right given to erect buildings to be an obligation requiring the lessee to erect them. It is true there is, as before stated, the usual printed covenant in the lease whereby the lessee covenants that it will, at the expiration of said term, quit and surrender the premises. "Said term" as here used, refers to the term expiring May 1, 1906; but this covenant to surrender is qualified by the provisions of clause 2, and is subject to the right therein conferred upon the lessee "to lease the said premises for a further term of five years." There is no ambiguity or uncertainty as to the provisions of said clause 2. It clearly, and without qualification or reservation, gives the lessee the right to renew the lease for a further term of five years, for the term rent of $3,000, payable in equal monthly installments, in addition to which the lessor shall not be required to pay for any improvements made by the lessee. At the end of this last term, the lessee covenants, at the option of the lessor, to surrender the premises with all the improvements thereon. It is unnecessary to determine the effect of this provision, which is the only option in the lease which seems to have been reserved by the lessor.

The word "prior," as used in clause 2, does not qualify the right of renewal. The right given the lessee to lease for a further term of five years must necessarily be prior to the right of other parties to lease the property. As we construe the lease, it was optional with the lessee whether it made any improvements or erected any buildings upon the leased premises, or elected to renew the lease for a further term. If it erected buildings and the lessor exercised its option to demand the surrender of the leased property and offered to pay the value of such buildings, it was optional with the lessee to assent thereto, thus waiving its right to renewal, but there was no legal obligation so to do.

Thus construed, there is no ambiguity in the provisions of the lease. If, however, it be conceded that the lease is conflicting in its terms, or uncertain in meaning, then under the provisions of section 1654, Civil Code, it "should be interpreted most strongly against the party who caused the uncertainty to exist." "The promisor is presumed to be such party." In this case, the lessor is the promisor. Keith v. Electrical Engineering Co., 136 Cal. 178, 68 Pac. 598, Laidlaw v. Marye, 133 Cal. 170, 65 Pac. 391.

Counsel for appellant refer to numerous authorities in support of the construction for which they contend. These and the points to which they are cited have been carefully considered. Suffice it to say that, in our judgment, they do not justify their contention.

Judgment and order affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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6 Cal. App. 566

GROGAN v. CHAFFEE. (Civ. 375.)

(Court of Appeal, Second District, California. Oct. 4, 1907.)

SALES — CONTRACT AS TO PRICE — BREACH — COMPLAINT.

Plaintiff, a manufacturer of olive oil, alleged that he sold oil to defendant, a grocer, on condition that defendant, if he retailed the oil, would maintain plaintiff's fixed retail price, and that, if he sold at wholesale, he would sell subject to the same condition, and that defendant, in violation of such agreement, sold a part of the oil at a less price, and after due notice to desist threatened to continue. *Held* that, as the contract did not fix the wholesale price of the oil, the complaint was fatally defective for failure to allege that the sales made by defendant were not at wholesale.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Charles P. Grogan against H. G. Chaffee. From a judgment for defendant, plaintiff appeals. Affirmed.

Powers & Holland, for appellant. Porter, Sutton & Cruickshank, for respondent.

ALLEN, P. J. Action for damages growing out of the alleged violation of a contract. Demurrer to complaint sustained. No amendment being made or filed, judgment in defendant's favor for costs, from which plaintiff appeals.

The complaint avers that plaintiff is a manufacturer of pure olive oil, sold for food and other purposes; that he has copyrighted certain designs and words which are placed upon every bottle, guaranteeing its purity; that, by reason of extensive advertising and rewards offered to any one establishing its impurity, a large demand has been created for this brand of oil; that attached to every bottle, can, or parcel of said oil offered for sale is the following notice: "The goods contained in this case are sold on the condition which is made a part of the consideration for the sale of these goods, that the purchaser, if he retails these goods, will maintain my fixed retail selling price on them; and that, if he wholesales them, he will sell them subject to this same condition. My fixed retail selling price for Purity olive oil is $1.35 per can for the half gallon size and $2.50 per can for the gallon size"—that defendant, a grocer, purchased of plaintiff a quantity of oil, each bottle whereof bearing plaintiff's label, and was so purchased under an agreement that the purchaser would maintain plaintiff's selling price for such oil, and not sell the same for a price less than as specified in the notice affixed to such bottles; that defendant, in violation of said agreement, sold a part of said oil at the price of $1.20 per can for half gallons, and after notice to desist from sales at such price threatens, to continue the same; that other merchants, having received information of defendant's cut in prices, refused to buy or handle plaintiff's oil, and he has thereby lost many sales which he otherwise could have made but for defendant's acts, to plaintiff's damage in the sum of $1,000, for which he prays judgment. A general demurrer was interposed to the complaint, which the court sustained.

Counsel for both parties discuss in their briefs only questions involving the validity of the contract set out. We are of opinion that, were the contract set out not one in restraint of trade and therefore lawful, the complaint fails to allege any facts from which a violation thereof is established. Under the contract as set out in the complaint, the right to sell at wholesale or retail was given the purchaser, the retail price only being fixed. The sales complained of by plaintiff, for aught appearing in the complaint, may have been at wholesale. If so, there is no limitation as to price, the only condition with reference to such sales being that the seller should incorporate into the contract of resale an agreement that the retail price shall be maintained. No violation of the contract in this regard is claimed. Under the recognized rule that a pleading shall be construed most strongly against the pleader, the defendant is entitled to this construction, and under which no cause of action is stated.

We think the court properly sustained the demurrer, and the judgment is affirmed.

We concur: SHAW, J.; TAGGART, J.

6 Cal. App. 561

PACIFIC LUMBER CO. v. WILSON et al.

(Civ. 365.)

(Court of Appeal, Second District, California. Oct. 4, 1907.)

1. Trial—Trial by Court—Findings—Construction to Uphold Judgment.

In an action to foreclose a mechanic's lien for improvements on certain premises by a purchaser under an executory contract, where the owner, who was absent, did not post the statutory notice disclaiming responsibility therefor, and the court found that the owner had knowledge of the improvements, but did not definitely state when knowledge was obtained, the finding will be construed to mean the knowledge specified in Code Civ. Proc. § 1192, providing that improvements on buildings made with the owner's knowledge shall be held to be constructed at his instance, unless he shall, after obtaining knowledge thereof, give notice that he will not be responsible for them.

2. Principal and Agent—Knowledge of Agent Imputed to Principal.

Where the owner of a building which she had contracted to sell left the business of collecting the money due on the contract, during her absence, in the hands of her son, a business man, his knowledge that the purchaser was making improvements on the premises was the knowledge of the owner.

3. Mechanics' Liens — Judgment — Attorney's Fees.

An attorney's fee of $25, to the lien claimant in mechanic's lien proceedings, *held* improperly allowed.

Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by the Pacific Lumber Company against F. R. Wilson and Esther E. Richmond. From a judgment for plaintiff, and from an order denying a new trial, defendant Richmond appeals. Modified and affirmed.

Purington & Adair, for appellant. M. Estudillo, for respondent.

ALLEN, P. J. Action to foreclose a mechanic's lien. Findings and judgment for plaintiff. Order denying a new trial. From the judgment and order defendant appeals. The undisputed facts are that in September, 1905, defendant Richmond was the owner of the premises involved, subject to an executory contract of sale therefor entered into between defendant Richmond and one Wilson; that no stipulations were contained in said contract with reference to possession, but it appears that Wilson took possession; that defendant was absent from the city of Riverside, where said premises are situate, from September 12th until October 15th; that during such absence Wilson purchased material with which to make certain additions and alterations to a house on said premises, and completed the same on September 20, 1905. Defendant, after obtaining knowledge of such improvements, posted no notice disclaiming responsibility therefor, as provided by section 1192, Code Civ. Proc. Plaintiff's claim of lien was filed December 15, 1905.

The court finds that defendant had knowledge and notice of the repairs, additions to, and alterations of said building. When such notice was given or obtained is not definitely stated.

If appellant's contention be correct that the knowledge mentioned in section 1192, Code Civ. Proc., refers only to knowledge acquired before completion, still under the rule that the findings of the trial court are to receive such construction as will uphold rather than defeat the judgment (Breeze v. Brooks, 97 Cal. 76, 31 Pac. 742, 22 L. R. A. 257), the finding as to knowledge is susceptible of a construction that defendant had knowledge during the progress of the work; and if the evidence supports such finding, thus construed, the judgment is sustained. There is satisfactory evidence in the record that, notwithstanding defendant's absence during the progress of the work, the son of defendant, a business man, was authorized by the defendant to collect the moneys due defendant on the contract as it matured, and to look after the business of the defendant while she was away. This was sufficient authority to constitute the son an agent of the mother. Knowledge of an agent as to matters affecting the property is knowledge of the owner. Clowdis v. Fresno Flume, etc., Co., 118 Cal. 315, 50 Pac. 373, 62 Am. St. Rep. 238. It was in evidence that as early as the middle of September the son had notice by telephone that Wilson was making repairs on the house. This was during the progress and before the completion thereof. While we do not desire to be understood as holding that appellant's contention that want of knowledge at the date of completion absolves the owner from giving the notice specified in the statute, we think a proper construction of the findings, supported by the evidence, renders the decision of that question unnecessary.

We find no error in the record, other than the allowance of an attorney's fee of $25 incorporated in the judgment. This attorney's fee was improperly allowed.

The court below is directed to strike from the judgment that portion thereof allowing attorney's fee to the lien claimant; and, as so modified, the judgment, as well as the order, is affirmed.

We concur: SHAW, J.; TAGGART, J.

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6 Cal. App. 550

PORTER et al. v. COUNTS. (Civ. 372.)

(Court of Appeal, Third District, California. Oct. 4, 1907.)

1. Appeal—Specification of Error—Sufficiency—Review of Evidence.

Specifications that the trial court erred in finding specified facts are sufficient to challenge an examination of the evidence, to determine its sufficiency to support the findings under the requirement of Code Civ. Proc. §§ 648, 659, subd. 3, that "the particulars in which such evidence is alleged to be insufficient" must be specified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3017.]

2. Ejectment — Description of Land — Necessity for Certainty.

Since, in ejectment under the California practice, a judgment on the merits is conclusive as to the ownership of the property, upon the parties and their privies, the premises should be so described that the record will furnish evidence of the limits to which title is established, as well as to point out to the sheriff serving the writ of possession, the extent and location of the land recovered; and hence, where a strip of land along a division line is in dispute, the record is insufficient to sustain a recovery where the location of the line cannot be ascertained therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 355.]

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Ejectment by Robert Porter and another against Andrew J. Counts. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

H. L. Ford and George B. Collins, for appellant. J. H. G. Weaver, for respondents.

BURNETT, J. The action is in ejectment. From the judgment in favor of plaintiffs, defendant has appealed on a bill of exceptions.

The only assignment of error is that the findings are not supported by the evidence, and respondents claim that this question should not be considered because of the insufficiency of the specification. The findings are challenged as follows: "The court erred in finding that on the 1st day of July, 1902, the plaintiffs were and for a long time prior thereto had been the owners in fee entitled to the possession and in the peaceable possession and occupancy of the lands and premises described in the complaint." This is followed by a similar specification as to each of the other findings, and then appellant proceeds to state what "the evidence shows." In support of their position, respondents cite Parker v. Reay, 76 Cal. 105, 18 Pac. 124; Knott v. Peden, 84 Cal. 299, 24 Pac. 160; De Molera v. Martin, 120 Cal. 544, 52 Pac. 825; Kyle v. Craig, 125 Cal. 116, 57 Pac. 791; Taylor v. Bell, 128 Cal. 306, 60 Pac. 853; it must be admitted that in these cases the Supreme Court has construed in harmony with respondents' contention the language: "Must specify the particulars in which such evidence is alleged to be insufficient," found in section 648 and subdivision 3 of section 659 of the Code of Civil Procedure. In the Taylor Case, supra, the specification was: "The court erred in finding [and then follows in exact language the finding of the court], but on the contrary, the court should have found," etc. In the course of the discussion it is said: "These specifications fail to comply with the requirement of section 659 of the Code of Civil Procedure, * * * and in the language of that section the statement was not entitled to be considered by the court at the hearing of the motion. What 'the court should have found' is only another mode of stating what 'the evidence shows,' a form of specification which has been repeatedly held to be insufficient." It will be observed from the foregoing sections of the Code of Civil Procedure that the requirement is the same in a "statement" as in a "bill of exceptions." But the cases cited have been overruled by the subsequent decisions of the Supreme Court. In Drathman v. Cohen, 139 Cal. 313, 73 Pac. 181, specifications somewhat similar to those in the case at bar were held to be sufficient, and the court, through Mr. Justice Shaw, says: "The strongest case, and the one usually cited upon objections to specifications of this character is De Molera v. Martin, 120 Cal. 548, 52 Pac 825. If the decision in that case were followed, perhaps the specifications here in question would be declared insufficient; but experience has proven that the rule then laid down was too strict, and that it has been productive of evil and not good. Perhaps some of the other cases cited may also tend to establish the same rule. But latterly the court has been more liberal in such matters, and the rule now followed is stated in American, etc., Co. v. Packer, 130 Cal. 459, 62 Pac. 744, as follows: "Whenever there is a reasonably successful effort to state the particulars and they are such as may have been sufficient to inform the opposing counsel and the court of the grounds, * * * this court ought not to refuse to consider the case on appeal, and especially where, as in this case, the transcript shows that all the evidence has been brought up." In the case at bar, also, the evidence is all presented in the transcript. The cases of Bell v. Staacke, 141 Cal. 186, 74 Pac. 774, and Harris v. Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58, are directly opposed to respondents' contention, and expressly overrule the earlier decisions. In the latter case it is said: "A specification is sufficient when it points to a particular finding." It must be held, therefore, that the specifications are sufficient to challenge an examination of the evidence to determine its sufficiency to support the findings.

The case is somewhat peculiar. The complaint alleges: "That on the 1st day of July, 1902, the plaintiffs herein were the owners in fee, entitled to the possession and in the possession of that certain tract of land situate, lying and being in the county of Humboldt and particularly described as follows, to wit: The S. E. ¼ of the N. W. ¼ and the E. ½ of the S. W. ¼ of section 19; and the N. E. ¼ of the N. W. ¼ of section 20, township 3 N., range four E., H. B. & M. That the said plaintiffs are now at the commencement of this action the owners in fee of the above described land and entitled to the possession of the same." Then follows the usual allegation of ouster by defendant on the 1st day of July, 1902, and the withholding by said defendant of the possession of "said lands and premises." The answer really raises no issue as to the ownership or right to the possession at any time of plaintiffs of said property or of plaintiffs' possession on the 1st day of July, 1902, or of the ouster or the withholding of possession by the defendant, since the denials are in the form of a "negative pregnant." Defendant also filed a cross-complaint, in which he alleges: "That heretofore, to wit, on the 27th day of November, 1901, the said defendant made homestead entry * * * for lots 2, 3, and 4 of section 19 and lot 1 of section 30, T. 3 N., of R. 4 E., H. M., and within six months thereof established a residence thereon, and ever since has and now does reside upon and cultivate the same, and is entitled to the possession of and is possessed and in the possession of the same and of the whole thereof." Then follows the allegation that plaintiffs have no interest in any part of said property, but that they claim some adverse interest, and the cross-complaint concludes with the usual prayer to quiet title and for general relief. Plaintiffs admit in their answer to this cross-complaint that defendant made the homestead entry, but deny that he ever made settlement or established his residence on said property, or that "he has ever resided or does now reside upon said lands and premises." Plaintiffs do not claim to have any interest in or to said land described in the cross-complaint, nor do they deny defendant's right to the possession of the same. Their answer virtually amounts to a disclaimer, and defendant's answer to the complaint might have been considered an admission of all its material allegations, except as to the rental value and damages which are explicitly denied.

Again, the land described in the complaint does not purport to be the same as that in the cross-complaint. By the pleadings they appear and by the evidence they are shown to be distinct tracts lying one on the west and the other on the east of the center line running north and south through said sections. The sufficiency of the pleadings, however, was not challenged, and the trial proceeded upon the theory apparently that the issue was definitely presented as to the location of this division line between the lands of plaintiffs and defendant, and as to the ownership of a small strip composed of a few acres—the exact quantity of land not being disclosed—adjoining this uncertain division line and including a house and some other improvements placed there by plaintiffs, and of which the defendant took possession on or about the 1st day of July, 1902, and which he was retaining at the time of the trial. The evidence shows without conflict that plaintiffs are the owners and entitled to the possession of the legal subdivisions of the sections described in the complaint, and that defendant has the homestead right in and to the lots as described in the cross-complaint. The difficulty, however, grows out of the fact that said sections 19 and 30 are not complete. Each contains less than 640 acres and a corresponding diminution must be made of the 160 acres claimed by plaintiffs and of the 169 claimed by defendant. This involves the location of the said division line, and the objection urged by appellant is that the line as established by one Elsemore and upon whose testimony plaintiffs rely is not in accordance with the requirement of a legal survey. In other words, it is insisted that he did not determine the location of the division line in the manner provided by the rules and regulations of the General Land Office in reference to the "restoration of lost or obliterated corners and subdivision of sections." We think, however, that his testimony is legally sufficient to support a finding of fact that this division line is some distance west of its location as claimed by defendant, and that said defendant was in possession of a portion of the land of plaintiffs, including the aforesaid improvements. Mr. Elsemore testified that he had been a civil engineer for 15 or 16 years; that he surveyed the land described in the complaint; that at that time he had with him the government field notes; that he located all the corners upon the township line and all the other government corners which he considered necessary to enable him to make the survey. He then describes in detail how he proceeded to locate the line, and he says that he followed the instructions laid down by the department of the interior, that the section contains less than 640 acres, and that there are not 160 acres in the tract belonging to plaintiffs or in that owned by defendant, and that the division line "passes right through a shed or barn and the buildings were, I should judge, 300 or 400 feet east of that, I didn't notice, and the improvements were practically all upon the land in controversy." The court asked the witness this question: "On which side of the line as you draw it would the house, the place of residence of the defendant where he resides, be, on the south, east, or west of that line?" And the answer is: "This is the line dividing it. The house is on the east of the line 300 or 400 feet. I just guess at the distance. There is a shed or barn upon the land, and the line ran right through the window of the barn, through the west side of it. It is a small shed, I suppose 12 by 16, something like that. Most of the corrals are on the east side of the line, but the fence extends west of where the line is I suppose 60 or 75 feet, something like that." He is the only witness who testified to having made a survey of the land, and it is obvious that his testimony does not possess the quality of certainty adequate without additional information or another survey for an accurate description and location of the said division line or of the disputed tract in the possession of defendant. The fence, he says, is on defendant's land, and the residence on plaintiffs', and the line runs through the window of the barn. But these facts are too meager to constitute the basis for a finding and judgment. But, when we turn to the findings themselves, we ascertain that, as far as the settlement of the real controversy between the parties is concerned, they are more uncertain than Elsemore's testimony. In fact, they do not purport to locate the division line at all or to describe the disputed tract so that it can be identified. For all practical purposes the parties are left just where they were at the beginning of the trial, each indisputably the owner of the tract as he has described it in general terms in his pleading, but with the extent of his holding really undertermined because the division line is not definitely located. For instance, the court finds: "That while the plaintiffs were in the possession and occupancy of the lands and premises described in the complaint, to wit, on or about July 1, 1902, the said defendant entered into and upon said lands and premises, and ousted and ejected the plaintiffs therefrom, and ever since has withheld and now withholds the said lands and premises from the possession of the said plaintiffs." Under the peculiar circumstances of this case, such a finding is as uncertain as the one considered in Davis v. Judge, 44 Vt. 500, wherein it is said: "The declaration supposes the defendant to be in possession of land of the plaintiff lying north of and adjoining the defendant's land. But the land which the plaintiff by his declaration claims to own and recover being bounded on the south by the defendant's land, the declaration leaves it uncertain to what extent or to what limit the plaintiff claims. It is true he claims to recover to the division line between the land of the plaintiff and the land of the defendant; but where that line is, is the very question in dispute, and the plaintiff by his declaration does not show where he claims it to be. Hence a verdict and judgment that the plaintiff recover the premises described in the declaration only establishes the plaintiff's title and right of possession of the premises extending south to the defendant's land; but where that boundary is the record furnishes no means of ascertaining." The effect of the finding and judgment in the case at bar is the same, although, as we have seen, the uncertainty is disclosed by the evidence, and not by the description of the land in the pleadings. The extent or limit of plaintiffs' land here depends upon the location of the division line, and from the record it cannot be ascertained where that is.

Under our practice, it is more important than at common law that in ejectment the property be described accurately, because it is more than a mere possessory action. The question of title, as well as of possession, is involved and a judgment upon the merits is conclusive as to the ownership of the property upon the parties and their privies. But, again, said finding is not supported by the evidence, inasmuch as it appears that defendant was in possession of only a small portion of said land described in plaintiffs' complaint. "The general finding, in the language of said complaint, is therefore insufficient. In order to give stability to the judgment, it and the corresponding findings should describe the land or such definite portion thereof as the plaintiffs' proof shows that he is entitled to." Shaw v. Hill, 79 Mich. 86, 44 N. W. 422; Wickersham Banking Co. v. Rice, 137 Cal. 506, 70 Pac. 546. The premises should be so described that the record will furnish evidence of the limits to which title is established by the judgment, as well as to point out to the sheriff who serves the writ of possession the extent and location of the land recovered. Davis v. Judge, supra; Bricken v. Cross et al., 140 Mo. 166, 41 S. W. 735. Respondents say: "Whether the line referred to is a line or the line or 'no line at all' is not material. It was a sufficient determining factor to enable the witness (Elsemore) to state positively that the house and improvements occupied by the defendant were on the lands of plaintiffs, those described in their complaint. The court has so found, and certainly the evidence is sufficient to sustain the finding." But is there any such finding? Certainly it is not so found specifically, and such fact cannot be determined by an inspection of the judgment roll. Extraneous evidence not suggested by the judgment would be required to authorize the sheriff to put plaintiffs into the possession of said improvements. Again, declare respondents in their brief: "The issue was the location of the house and improvements occupied by the defendant—were they situated on the lands described in plaintiffs' complaint? Elsemore testifies that they were, the court found that they were, and this settles the matter." The cause was undoubtedly tried as though that were the issue, but the trouble is that the finding does not correspond with the theory of the trial. In order that the controversy between the parties may be definitely settled, we think the boundary line should be accurately located and the disputed tract described with precision. We see no reason why there should be a complete retrial, but additional evidence should be taken on the points suggested and the finding made explicit in reference thereto.

The judgment is reversed, and the cause remanded for a new trial upon the evidence heretofore submitted, and upon such further evidence on the issue as to the location and extent of the disputed tract as either party may desire to submit.

We concur: CHIPMAN, P. J.; HART, J.

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6 Cal. App. 537

BERNARD v. PARMELEE et al. (Civ. 362.)

(Court of Appeal, Third District, California. Oct. 3, 1907.)

1. MINES AND MINERALS—QUIETING TITLE—ADVERSE CLAIM—PROCEDURE—WHAT LAW GOVERNS.

Rev. St. U. S. § 2326 [2 U. S. Comp. St. 1901, p. 1430], provides that, where an adverse claim to a mining location is filed during publication of notice of an application for a patent, all proceedings, except the publication of notice and the making and filing of the affidavits, shall be stayed until the controversy shall have been decided by a court of competent jurisdiction, or the adverse claim waived, and requires the adverse claimant, within 30 days after filing his claim, to sue in a court of competent jurisdiction to determine the right to possession and prosecute the same to final judgment with reasonable diligence. *Held*, that where, after filing an adverse claim, plaintiff sued in a state court to quiet title thereto, as authorized by Code Civ. Proc. § 738, such suit was governed by the state law, and was not affected by the statutes of the United States.

2. SAME—EVIDENCE—PROCEEDINGS IN LAND OFFICE.

In suit to quiet title to a mining claim in support of an adverse claim filed in the United States land office, the proceedings in the land office are immaterial unless they show title or right of possession in one of the parties.

3. DISMISSAL AND NONSUIT — DELAY — STATUTES—CONSTRUCTION.

Code Civ. Proc. § 581, subd. 7, provides that no action shall be further prosecuted, but shall be dismissed, unless summons shall have been issued within one year, and unless it shall be served and returned within three years after the commencement of the action. *Held*, that such provision does not authorize three years within which to serve and make return of the summons "from the expiration of the one year" within which the summons must be issued, but requires that the summons be served and return made within three years after the commencement of the action.

4. SAME—DISCRETION.

Such section only makes dismissal mandatory in case the summons is not issued, served, or returned within the time prescribed, and does not prevent the court in its discretion from dismissing an action for delay in prosecution, though the summons has been issued and served in time.

5. SAME—FACTS REVIEWABLE.

On an application to dismiss an action to quiet title to a mining location in support of an adverse claim for want of prosecution, the court, as a basis for the exercise of discretion, was entitled to consider that plaintiff's affidavits, showing his adverse claim, were not filed in the land office until the last day of the publication of the notice of defendant's application for a patent, and that the action to quiet title was not brought until the last day of the 30 allowed by Rev. St. U. S. § 2326 [2 U. S. Comp. St. 1901, p. 1430].

6. SAME—DELAY—EXCUSE—EVIDENCE.

On an application to dismiss an action for want of prosecution, facts *held* insufficient to excuse plaintiff's delay or to prevent such dismissal in the exercise of the trial court's discretion.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by F. W. Bernard against Elmer E. Parmelee and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

Solinsky & Wehe and Tuttle & Tuttle, for appellant. John M. Fulweiler, for respondents.

HART, J. The court below, upon the application of the defendants, ordered a dismissal of this action upon the ground that the same had not, after its commencement, been prosecuted with reasonable diligence. The appeal is from said judgment of dismissal upon a bill of exceptions. The bill of exceptions contains the affidavits upon which the defendants presented the motion to dismiss and the counter affidavits filed by the plaintiff in resistance to the motion.

The action is one to quiet title to certain mining property situated in Placer county. The complaint was filed on the 27th day of December, 1905, in the superior court of said county, and on the same day a summons was issued by the clerk of said court and delivered to the plaintiff for service. The summons was not served on the defendants, and on the 3d day of May, 1906, a little over four months after the institution of the suit, counsel for respondents filed a motion and notice thereof to dismiss the action, said motion being noticed for hearing for the 21st day of May, 1906, and said notice and motion, together with the affidavit in support thereof, were served on the attorneys for appellant. On the 19th day of May, 1906, the attorneys for the appellant made a demand on the county clerk for the issuance of an alias summons, alleging in said demand that the original summons had been destroyed by fire in the city of San Francisco on the 18th day of April, 1906. The allegations of the complaint, as stated, call for the relief authorized by section 738 of the Code of Civil Procedure, and the action is therefore purely one for the quieting of title. But from the affidavits filed upon behalf of the respondents on the motion to dismiss, it appears that the case is one of that class arising in the land department of the general government and originating in conflicting claims for a patent for land under a mineral application to purchase the same from the government of the United States. It develops from said affidavits that on the 29th day of September, 1905, the defendants filed in the United States land office, at Sacramento, "their joint application for a mineral patent from the government of the United States, for that certain mining claim or mine called the 'Pacific Slab Consolidated Placer Mine,' and comprising" the property in dispute and described in said affidavits. Said application was received, and an order of publication made, and publication of the notice of said application given, as required by the provisions of the act of Congress providing for the exploration and purchase and occupation and purchase of certain mining lands. Rev. St. U. S. §§ 2319–2340, inclusive [U. S. Comp. St. 1901, pp. 1424–1437]. On the 27th day of November, 1905, "and on the last day of said 60 days of publication" of the notice of application, the plaintiff filed, in said United States land office, at Sacramento, an adverse claim for the land and in opposition to the claim of the defendants. Thereupon, the register and receiver, under the authority of section 2326 of the Revised Statutes of the United States, made an order suspending all further proceedings on the application of said defendants for a mineral patent for said land, and requiring the plaintiff, as an adverse claimant, to commence an action in a "court of competent jurisdiction to determine the respective rights of the said applicants for the patent and said adverse claimant to the mineral lands in controversy."

Section 2326 of the Revised Statutes of the United States (see U. S. Comp. St. 1901, vol. 2, p. 1430) provides, among other things, that where an adverse claim is filed during the period of publication, upon oath of the person or persons making the same, showing the nature, boundaries, and extent of such adverse claim, all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived; and that "it shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim." It is, as we have indicated (according to the affidavits by which the defendants support their motion), because of the quoted provision of the United States Revised Statutes that plaintiff inaugurated this action.

We do not, nor can we conceive any possible reason upon which we could, concede the soundness of the position of counsel for the respondents that the general government has any power to prescribe in any case the rules by which the state courts shall be governed in the disposition of causes coming properly before them. That the jurisdiction of the courts of this state to try or otherwise dispose of cases which, even though they may, like this, originate in the land department of the United States, is not and cannot be derived from acts of Congress, is a proposition so clear and so elementary that its mere statement is conclusive of its soundness. If the Congress had the power to prescribe the limitation of time within which an action might be brought and prosecuted to judgment in the state courts, it certainly could as reasonably claim equal right to prescribe the rules of pleading and practice by which state courts should be guided in trying and disposing of such an action. It could establish rules of evidence different from our own, and, if the case be triable by jury, direct the character of the instructions to be submitted by the court. But these and kindred questions, involving the rights of the states, as contradistinguished from those of the general government, have long since been fought out and definitively settled, and the suggested proposition is only startling because the line of demarcation establishing and distinguishing the respective rights of our dual systems of government has for so many years been sharply and clearly defined and accurately and universally understood. But the action here has no connection with or relation to the proceedings of the land office, in so far as the jurisdiction of the superior court is affected or concerned, nor, as we have suggested, can it have. The action is one of which our state courts have jurisdiction under our own laws, and, as is declared in Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 Pac. 1047, if jurisdiction of such a suit were not conferred by some provision of our own law, it could not be granted to a state court by an act of Congress. In the case just mentioned, arising under circumstances similar to those here, it is said: "Congress could not impose upon the state courts the duty or the labor of determining for the land office who is entitled to purchase from the United States, and it has not attempted to do so. * * * But the contestant is required to test his right to the possession of the mining ground in the local courts. This he must do, if in a state court, by some proceeding authorized by the laws of the state. If we could suppose that there was no mode provided in the state laws for doing this—no action of which the state courts would have jurisdiction in which this could be done—the act of Congress would not confer the jurisdiction which was lacking. This is not an action brought under section 2326 of the Revised Statutes of the United States to determine which of the parties is best entitled to purchase from the United States, but only an ordinary action to quiet title. The proceedings in the land office of the United States are utterly immaterial here, unless they tend to show title or right of possession in one of the parties." See, also, Quigley v. Gillett, 101 Cal. 462, 470, 35 Pac. 1040; Min. Co. v. Bullion Min. Co., 9 Nev. 240.

We are of the opinion, however, that the judgment should be affirmed for other reasons. Subdivision 7 of section 581 of the Code of Civil Procedure provides that no action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and the same shall be dismissed by the court in which it shall have been commenced, "* * * unless summons shall have been issued within one year, and all such actions shall be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action." That there is an inherent discretion in the trial courts to order a dismissal of cases commenced therein for lack of reasonable diligence in the prosecution of the same will not be disputed. The only question here, then, is: Did the court abuse its discretion in dismissing the action?

The affidavits of the respondents disclose the fact (and it is not denied) that the summons was issued and delivered to the plaintiff on the day upon which the complaint was filed. They show that the respondents were, at the time of the commencement of the action, residents of Last Chance, in Placer county, and were often, subsequently to the institution of the suit, at and near Auburn, the county seat of that county; that no effort was made at any time to serve them with the summons. The affidavit of F. J. Solinsky, one of the attorneys of the plaintiff, avers that "at all of said times the said F. W. Bernard resided, and now resides, in the city of Beverly, state of Massachusetts," and that "during all of said times, up to about the 1st day of March, 1906, one Joseph H. Meyers was the agent and representative of the said F. W. Bernard, in the state of California, and as such agent and representative had charge of the operation of the said mining claim and all of the business affairs of said Bernard in the state of California." The affidavit then proceeds to allege that said Meyers, as agent of plaintiff, conducted the transaction involving the purchase of the property in dispute and also inaugurated the contest, on behalf of plaintiff, against the defendants for said land in the land office and later caused the present action to be brought; that said Meyers is fully familiar with all the facts in connection with this suit, and plaintiff is not, and therefore the latter relied solely upon said Meyers for the facts upon which to prosecute the action; that in said month of March, 1906, said Meyers departed from the state of California for parts unknown to affiant or plaintiff; and that said plaintiff since that time had diligently endeavored to learn the whereabouts of Meyers and to find him and so proceed with the prosecution of the case. It is stated that Bernard came to California in the month of March, 1906, and gave affiant the first information of the departure of Meyers from the state and plaintiff's inability to find him. We do not think the facts set forth in plaintiff's affidavits are sufficient to excuse the delay for which the action was ordered dismissed. It is undisputed that the real purpose of the suit was to secure a judicial determination of the rights of the parties with reference to the land in controversy in order to accomplish a final adjudication by the United States land officers of the question as to which of the claimants was entitled to purchase the property from the general government. It is an undisputed fact that the reference of the case to a "court of competent jurisdiction" to settle and decide the controversy had the effect of staying all the proceedings before the register and receiver, except the publication of the notice and the making and filing of the affidavit thereof. The affidavits of the defendants state the fact of the pendency of the proceedings before the land department and the fact of their suspension until a "court of competent jurisdiction"—in this instance, a state court—could decide the controversy, and it was competent for the court below to consider those facts, together with the other facts set out in the affidavits, for the purpose of reaching a conclusion as to whether or not there had been such an absence of diligence in prosecuting the case as to warrant it in exercising its discretion favorably to the motion to dismiss.

It also appears from the affidavits that the attorneys for the appellants in this action acted as such for him in the matter involving the land in dispute before the United States land office, and "prepared the adverse claim and affidavits and survey connected therewith and as filed" in said land office, 'and upon which this action in this court was commenced and depends." It is, of course, certain from the undisputed facts that Meyers, the agent of the plaintiff, as well as the attorneys, knew the purpose for which the case had been referred to the superior court, and equally as a matter of course knew that the order of reference tied the hands of the defendants, in the matter of the further prosecution of their claim before the land office, until the decision of the controversy by the superior court. The summons, as we have seen, was issued and delivered to the plaintiff or his agent the day the complaint was filed. There is no reason disclosed by the record why it should not have been served within a day or two after it was issued, and the trial of the case proceeded with and decided, thus permitting the defendants, if victorious in the court, to press their rights before the land department of the government to final crystallization. The affidavits also show that the adverse claim of appellant was filed in the land office on the last day of the publication of the notice of application by defendants, and that this suit was brought on the last day of the 30 within which, under the Revised Statutes, he was authorized to proceed in the courts in order to prevent a forfeiture of his right to carry on the contest before the land office. These facts the court below, according to its written opinion filed herein, also considered upon the question of diligence, and we think properly so. But counsel for appellant declare "that the lower court clearly erred in paying attention or giving any force or effect to the fact that proceedings were pending on behalf of respondents for a patent, and that in those proceedings appellant had waited until the last day to file his adverse claim," for the reason that "the state court is not concerned as to whether its judgment can be made available in the land office or not." As we have already endeavored to make clear, all the facts, whatever might be the subject to which they related, if relevantly bearing upon the question of diligence, were, of course, proper to be considered by the court. It is no recognition of any power in the federal government to prescribe the rules of practice in the local courts to hold that the court below was justified in considering, upon the question of diligence, the fact that the final determination of the rights of conflicting claimants for a patent for land belonging to the national government was, under the federal laws, contingent upon a precedent determination of those rights by the state courts, and that an order of reference for that purpose by the land officers operated to stay further proceedings in the contest pending before them involving those rights.

Counsel for the appellant, referring to section 51, subd. 7, of the Code of Civil Procedure, say that "the appellants in this action had one year from the 27th day of December, 1905, within which to have summons issued, under the law of the state of California, and had three years from the expiration of the one year within which to serve and return said summons." We are unable to read the language of the section so that it authorizes three years within which to serve and make return of the summons thereon "from the expiration of the one year" within which summons must be issued. We understand the section to say and mean that summons must be served and return thereon made within three years after the commencement of the action. And, under the decided cases, counsel are in error in their contention that a plaintiff may have the full time prescribed by the statute in all cases. As we have before declared, all the cases hold that the court is clothed with the discretion of saying, upon the facts of each particular case, whether there has been reasonable diligence in pressing the cause to issue and trial, and, if there has not been, to dismiss the suit. The dismissal of the cause after the time within which summons may be issued or served and returned would be mandatory, and not an exercise of discretion. "The Code does not mean that the plaintiff may have the full time in all cases. It is still discretionary with the court to dismiss, as before the amendment, even though summons be issued and served within the time." Stanley v. Gillen, 119 Cal. 176, 51 Pac. 183. In Kreiss v. Hotaling, 99 Cal. 386, 34 Pac. 1125, it is said, speaking of subdivision 7, § 581, Code Civ. Proc., that "the discretion of the court to determine whether there has been inexcusable delay within the term of three years still remains, and each case must be determined upon its own particular circumstances." In the last-mentioned case the summons was issued on the day the complaint was filed, November 11, 1889, but was not served until October 12, 1891, more than a year less than the three provided by the section. The judgment of dismissal for inexcusable delay was sustained.

Appellant cites a number of cases in which the judgment of dismissal based upon want of diligence in prosecuting the same was reversed. We have examined the citations carefully, and, as to the facts, find no difficulty in differentiating them from the case at bar. In Ferris v. Wood, 144 Cal. 429, 77 Pac. 1038, which was an action upon a judgment, it appeared from the record on the motion that an effort to compromise that judgment was in progress by the parties after the summons issued, and for that reason plaintiff caused the delay in the service, and the court, speaking through Presiding Justice Chipman, of this court, then a commissioner, says: "To have served the summons pending these negotiations might, as plaintiff feared, embarrass the settlement. It seems to us that the delay was reasonably accounted for and excused, and that the order of the court did not tend to subserve, but rather to impede or defeat, the ends of justice." In Kennedy v. Mulligan, 136 Cal. 556, 69 Pac. 291, in which a motion to dismiss for want of diligence to prosecute was denied, the summons having been served and returned within a year after the commencement of the action, the court merely holds, upon the facts presented by the affidavits of both parties, that it cannot be said that the lower court abused its discretion. In Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352, the defendant was promptly served with summons, and his attorneys appeared for him, and entered into a written stipulation in his behalf with the plaintiff that the case should abide the result of another similar action. It was held that under these and other mentioned circumstances the delay in returning the summons after the lapse of three years after the service of the same was excusable and not ground for a dismissal of the action.

Each case must, as we have seen from all the authorities, rest upon its own peculiar circumstances, or, as it is expressed in First Nat. Bank v. Nason, 115 Cal. 626, 47 Pac. 595, "each particular case presents its own peculiar features, and no iron-clad rule can justly be devised applicable alike to all."

In the case at bar, the appellant presents no facts excusing the delay, which, though embracing only a little over four months, must, under the peculiar circumstances of the record, have resulted in greater hardship to the defendants than might be entailed upon the delay of the ordinary case for a year or more. From the facts before us we cannot say that the court abused its discretion.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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6 Cal. App. xiii

MEYERS et al. v. PARMELEE et al. (Civ. 363.)

(Court of Appeal, Third District, California. Oct. 3, 1907.)

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Joseph H. Meyers and others against Elmer E. Parmelee and another. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Solinsky & Wehe and Tuttle & Tuttle, for appellants. John M. Fulweiler, for respondents.

HART, J. This is an appeal from a judgment of dismissal. This cause was submitted upon the oral argument made in the case No. 362, Bernard v. Elmer Parmelee et al., 92 Pac. 658, the opinion in which was filed this day. The facts and the law applicable thereto are admittedly the same.

Therefore, upon the authority of said case of Bernard v. Parmelee et al., and the authorities cited therein, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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6 Cal. App. 568

CURRY v. KING et al. (Civ. 378.)

(Court of Appeal, Third District, California. Oct. 7, 1907.)

1. PRINCIPAL AND AGENT — EXISTENCE OF AGENCY—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to declare real estate to be held in trust by defendants for plaintiff on the ground that one of defendants was plaintiff's agent for its sale, and pretending to have found a purchaser procured a conveyance to such pretended purchaser for the purpose of purchasing it for himself, *held* to sustain a finding that such defendant in the sale assumed to act, and did act, as plaintiff's agent.

2. APPEAL—REVIEW—FINDINGS OF COURT.

The trial court's findings from the evidence on points where there is a substantial conflict are binding on the appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983–3989.]

3. PRINCIPAL AND AGENT—INDIVIDUAL INTEREST OF AGENT.

An agent will not be allowed to deal in his own behalf with his principal with reference to the subject-matter of the agency, unless he makes full, complete, and honest disclosure of the truth of the transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 130–146.]

4. TRUSTS — CONSTRUCTIVE TRUSTS — ESTABLISHMENT—ADMISSIBILITY OF EVIDENCE.

In an action to declare real estate to be held in trust for plaintiff on the ground that one of defendants was plaintiff's agent for its sale, and, pretending to have found a purchaser, procured a conveyance to the pretended purchaser for the purpose of purchasing it for himself, misrepresentations necessarily involving facts bearing on the constructive fraud alleged were properly admitted, though, a confidential relation between the parties being shown, the conveyance would be constructively fraudulent, and the burden of affirmatively proving good faith on defendants.

5. PRINCIPAL AND AGENT — INDIVIDUAL INTEREST OF AGENT—EFFECT.

Where an agent for the sale of real estate pretending to have received a deposit which he had not received, and to have found a purchaser which he had not found, induced the owner to convey to the supposed purchaser so that he might purchase the real estate for himself and relatives, the sale will be set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 130–146.]

6. TRUSTS — CONSTRUCTIVE TRUSTS — ESTABLISHMENT—EVIDENCE.

In an action to declare real estate to be held in trust by defendants for plaintiff on the ground that one of defendants was plaintiff's agent for its sale, and, pretending to have found a purchaser, procured a conveyance to such pretended purchaser so that he might purchase it himself, evidence as to whether the land had increased or depreciated in value after the transaction was properly excluded.

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Clara Curry against Charles King and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Judgment and order affirmed.

H. H. Welsh, J. F. Pryor, and N. C. Caldwell, for appellants. F. H. Short and W. L. McGuyre, for respondent.

HART, J. The purpose of this action is to secure a decree, declaring the property described in the complaint to be held in trust by the defendants for the plaintiff; that the deed under which the defendants hold said property be adjudged to have been obtained by fraud; and that the same is fraudulent, null, and void, etc. In accordance with the allegations of the complaint and the prayer thereof, the decree adjudges that "the plaintiff is the owner in her own right and as her separate property of an undivided one-half interest" in the land described in the complaint; that "the defendant W. O. Pickerell holds the record title of said property in trust for the plaintiff"; that "the deed from the plaintiff herein to the defendant W. O. Pickerell was procured by misrepresentation and fraud"; and that said Pickerell "holds said property as a mere trustee and agent and has no personal interest therein or beneficial estate in the same and the said deed of the plaintiff so delivered to said Pickerell, acknowledged and recorded, is hereby declared and decreed to be null and void, and the plaintiff is declared and decreed to be the owner in fee, seised, and possessed and entitled to the possession of said property, and all thereof." The defendant Pickerell is further ordered in said decree, "by his proper deed of grant," to transfer and grant to the plaintiff the property which is the subject of the controversy, and by said decree the clerk of the court is named and appointed a commissioner of said court for the purpose of executing and delivering to plaintiff a proper deed, conveying and granting said property to plaintiff on behalf of said Pickerell, in case the latter fails and refuses to execute and deliver to plaintiff such deed to said property. From this judgment and an order denying their motion for a new trial, the defendants prosecute this appeal.

The plaintiff and the defendant King in the month of October, 1902, entered into a written agreement relative to the sale of the land in controversy. The conclusion to be reached upon the record before us depends upon the solution of the question of the nature of the legal relations of the parties, as established by the contract mentioned and certain correspondence and transactions occurring between them after the expiration of the time at which said written agreement, by force of its own terms, became ineffective. It appears from the evidence that at the time of the making of the writing referred to plaintiff resided at Johannesburg, in Kern county, and the defendant King was a resident of Hanford, Kings county. King had addressed a letter to the plaintiff concerning the property in dispute, making inquiry as to whether it was for sale, and, if so, the price for which plaintiff would be willing to thus dispose of it. The plaintiff replied, stating that the sum she desired for the property was $2,000. Upon the receipt of said letter King prepared and sent to the plaintiff the written contract mentioned, and requested her to sign the same and return it to him. The plaintiff signed said contract and returned it to King by mail, as requested. The contract is in the following language: "Contract of Sale. Hanford, Cal., 10–15, 1902. I hereby constitute and appoint Chas. & R. J. King my sole agent for the term of sixty days from date hereof to sell or negotiate the sale of the following described real property, to-wit, The north one-half of the northwest quarter of section thirty, township twenty, south, range fifteen east, M. D. B. & M. Said sale to be made on the following terms, viz.: Two thousand dollars cash on delivery of deed and abstract, and upon fulfillment of said terms, I agree to furnish abstract of title and convey said real property free of all incumbrance. I hereby contract and agree to pay the said Chas. & R. J. King, my agent, for selling said property, the following commissions, to-wit: No commission. [Signed] Mrs. Clara Curry, Administrator." An undivided one-half of the land over which the dispute arises and as described in the foregoing contract was acquired by the plaintiff through the estate of her deceased husband; the other undivided one-half thereof having been distributed, upon the administration of said estate, to her three minor children.

It is contended by the plaintiff that by the terms of said contract she constituted the defendant King her agent, with full power to sell for her the property mentioned therein within the time limited by the provisions thereof. On the other hand, the defendant King insists that the writing only amounts to and was intended as an option tendered by plaintiff to him to purchase said property within the time designated in the agreement. If, from a consideration of the entire transaction, including the written agreement and the correspondence passing between the parties subsequently to the expiration of the time limited in said written agreement and the acts and conduct of said parties at the time of the execution of the deed to the property in dispute, we can say that the legal relations of said parties as to the disposition of said property were those of principal and agent, then there can be no doubt that the evidence justifies the findings, which, in turn, fully fortify the decree.

It may be as well, in the beginning, to dispose of the question of the nature of the relations between the parties as established by the facts disclosed by the record. From the language of the written contract and the evidence produced at the trial we feel no constraint in declaring it to be our opinion that the purpose of the original agreement was simply and solely to invest King with the authority of an agent of the plaintiff to sell or negotiate the sale of the property therein described, and that the instrument was so intended and understood by both parties thereto. The language of the contract is so unobscure upon this point that there is no room or occasion for invoking the aid of the ordinary rules of construction to ascertain its real purpose and meaning. Plainly and unequivocally, as it is to be observed, it provides: "I hereby constitute and appoint Chas. and R. J. King my sole agent for the term of sixty days from date hereof to sell or negotiate the sale of the following described property, to wit." Is it to be supposed that, had the parties intended the instrument as a mere agreement of option, by which the plaintiff offered to sell and granted to the defendant the right to purchase the property within the time limited, such language would have been employed to express such intention? King's business was that of a dealer in real estate, and it is reasonable to presume that he well knew, from his experience in that business, the distinction between an agreement of option and a contract of agency. It would hence seem conformable to a reasonable view of the writing that had he intended, through said writing, to acquire merely the right to purchase the property, having himself, according to his own testimony, prepared the agreement, he would have so phrased it as to have left no ground for doubt as to the character of the relations designed to be created thereby. That Mrs. Curry understood that, by the writing, she clothed King with the authority of an agent, is manifest from the following language in her letter to the defendant, under date of January 27, 1903, in which she informed him of having been offered $5,000 for the land. "So you can return the deposit and I will pay you your 05 per cent. commission for the trouble you have been to out of the sale." But it appears that the time limited in the written agreement had expired prior to the beginning of the particular transaction finally culminating in the execution of the deed; that is, before the time at which a letter apprising plaintiff of the sale of the land to the appellant Pickerell had been sent by King, and before the telegram following that letter was sent to plaintiff by King asking her if he should accept a deposit on said sale. It was proved at the trial that, after the plaintiff had received said letter and the telegram relative to the sale to Pickerell, several letters passed back and forth between the parties upon the subject of such purported sale. Most of these letters—at least, most of the letters written by the plaintiff—were introduced in evidence. Among other things, they show her acceptance of the proposition of sale to Pickerell, and they also appear to have been written in reply to previous communications from King; their general tenor indicating that she looked upon King as her agent, and that he was in fact acting that role for her. Therefore, assuming that, at the time King informed Mrs. Curry of the alleged sale to Pickerell, the written agreement had become ineffective and without force by lapse of the time limited therein (and we think the evidence shows such to be the fact), still, in our opinion, the correspondence thus shown to have passed between the parties, from and after the circumstance of the announcement by King of the sale of the property, together with the conduct of King and the character of the conversation between him and plaintiff, sufficiently establishes the fact that, as to the sale of the property, the defendant King not only assumed to act, but did in fact act, as her agent. And it would require no expansion of the imagination to hold, under the evidence, that the correspondence referred to, particularly the letter and telegram from King declaring the land had been sold, and inquiring of plaintiff if he should accept a deposit thereon and her reply, authorizing him to accept the deposit, operated as an extension of the time specified in the agreement within which he might "sell or negotiate the sale" of the land. A fair construction of the entire transaction, as it is disclosed by the evidence, justifies the conclusion that King, in the transaction, at least assumed to act as plaintiff's agent; that plaintiff so treated his relation to her in the transaction; that defendant in effect told her that, as agent, he had sold to Pickerell, when he declared that unless she ratified said sale it would "get him in a mix-up" with Pickerell.

From the evidence it appears that, a few days after the receipt of the letter by King from the plaintiff in which she stated that she had been offered by another party the sum of $5,000 for the land and requested King to return the deposit and cancel the agreement to sell to Pickerell, the defendant King went to Johannesburg for the purpose of interviewing the plaintiff relative to the matter. The plaintiff testified, in substance, as to the conversation between herself and the defendant King as follows: That King said to her that she had, because of her refusal to approve the sale to Pickerell, "got him in a kind of a mix-up over the affair";

that King said that he had taken Pickerell's money in good faith, and "he came up there to square himself with Pickerell"; that she then stated to King that she could get $5,000 for the property, and hence she would not sell it for $2,000; she declared that King read the deed twice to her, and she still insisted that she did not want to sell to Pickerell for $2,000, and King replied that "Pickerell was a man of means, of influence, and if we would have Pickerell in with us it would be a great help to us, because Pickerell had money, and, of course, it takes money to make money"; that "if we would let Pickerell have a half interest that he (Pickerell) would make the place bring all it possibly could bring." "He said he (Chas. King) had no interest in the matter at all"; that "said Pickerell was buying it." The plaintiff then proceeded: "In this conversation with Mr. King at Johannesburg, he told me that he was acting in our interests. He said he was simply there to square himself with Pickerell, to place himself in the right light with Pickerell, but, of course, was there in our interests. He said he paid his own expenses and all there for that purpose. He never at any time mentioned to me that any one other than Mr. Pickerell was interested in the purchase." Plaintiff, after this conversation, accompanied by King, went before a notary public and executed the deed. The testimony of the plaintiff as to this conversation was corroborated by her present husband in all its salient points.

Pickerell, who was a bookkeeper in the First National Bank of Hanford, testified that he had absolutely no connection with the transaction whatever; that he did not purchase the land, nor did he authorize King or any other person to purchase it for him. He said that he issued a check for $1,000 in connection with the transaction, but that the same was charged to the account of R. J. King, brother of defendant King, and who was one of the purchasers of the property. Before the sale, he said, he never had talked with the defendant King about the transaction; that Arthur King, also one of the purchasers, had said to him that he wanted to buy in his (Pickerell's) name. He declared that he had no interest in the deed or the property. The defendant King admitted that he never received a deposit on the purported sale, but declared that he could have obtained the deposit from Arthur King at any time he called for it. It also appears from King's testimony that the land was bought jointly by his brother, his nephew, and himself, but he said that he acquired his interest in it "a week, or something like that, after the deed was made at Johannesburg." King's version of the conversation between himself and plaintiff differed in many important particulars from the story thereof as detailed by plaintiff and her husband. But the court's findings from the evidence upon all points where there is a substantial conflict are binding upon this court.

The relation of the plaintiff to the defendant, as well established by the facts and assumed by him throughout the transaction, was that of an agent, and consequently fiduciary in its nature. He was, as her agent, charged in full measure with the duty of good faith in his dealings with her touching the subject-matter of his authority as such agent. The proposition here stated is so well and conclusively settled that the citation of authorities upon the subject would seem to involve only a waste of time. The animating principle of the proposition is that no one should nor will be permitted to enjoy the fruits of an advantage taken of a fiduciary relation, whose dominant characteristic is the confidence reposed by one in another. The act of an agent, within the scope of his authority, is the act of his principal, and hence the authority of an agent is so fraught with responsibility and grave concern to his principal, dealing as it does with the property rights of the latter, that it proceeds out of the highest considerations of confidence, which, the principles of equity demand, must be preserved to its utmost in transactions involving the exercise of such authority. Therefore an agent will not be allowed to deal in his own behalf with his principal with reference to the subject-matter of the agency, unless he makes full, complete, and honest disclosure of the truth of the transaction. He is bound to treat with his principal concerning the property over which he has been vested with authority in the utmost good faith, and so religiously does equity require adherence to this rule that a transaction between them as to the property whereby the agent acquires the ownership thereof is, upon its face, deemed by the law to be fraudulent. As illustrative of the application by the text-writers and the courts of the principles here discussed, we direct attention to the following authorities: Wharton on Agency, §§ 231–232; 1 Story's Eq. 360a; Benham v. Rome, 2 Cal. 387, 56 Am. Dec. 319; Hunsaker v. Sturgis, 29 Cal. 142; Hardenbergh v. Bacon, 33 Cal. 356; Rubidoex v. Parks, 48 Cal. 215; Golson v. Dunlap, 73 Cal. 162, 14 Pac. 576; De Mallagh v. De Mallagh, 77 Cal. 126, 19 Pac. 256; Sterling v. Smith, 97 Cal. 343, 32 Pac. 320; Smith v. Townsend, 109 Mass. 500; Copeland v. Mercantile Insurance Co., 6 Pick. (Mass.) 204; Condit v. Blackwell, 22 N. J. Eq. 481; Tyler v. Sanborn, 128 Ill. 136, 21 N. E. 193, 4 L. R. A. 218, 15 Am. St. Rep. 101. In Rubidoex v. Parks, supra, the court (we quote the syllabus) lays down the rule as follows: "The agent and principal are not absolutely prohibited from dealing with each other in respect to the subject-matter of the agency or trust; *but in all their dealings with each other, the utmost good faith is required, and the burden of proof is on the agent to show affirmatively that he acted in good faith, fairly and honestly.*" (Italics are ours.)

The evidence in the case at bar shows that King not only failed to make full disclosure to the plaintiff of the facts of the alleged sale, as it was his duty to do, but that he grossly misrepresented the facts, and by such misrepresentation persuaded plaintiff to convey the property. He assured her that he had no interest in the matter whatever; that she would probably profit by selling a half interest to Pickerell, who was a man of means and influence. Pickerell, as seen, had no substantial connection with the transaction whatsoever. He was, according to his own testimony, a mere figurehead, used by the defendant (perhaps at the time unconsciously to Pickerell himself) for the accomplishment of the purposes of King's scheme to secure the ownership of the property for himself and relatives. In fact, there is nothing in the transaction, as it was conducted on King's part, which, under the evidence, commends it as one in which there was the slightest semblance of good faith. But, it is declared by the appellants, that "if," borrowing the language of their brief, "there was a relation of confidence between the parties, then each and all of these representations were immaterial, for the reason that the deed would be constructively fraudulent even without any representations at all." Undoubtedly the confidential relation between the parties being shown, the burden of affirmatively proving the good faith of the transaction rested upon the defendant. But the testimony of the alleged misrepresentations made by King to the plaintiff, while undoubtedly admissible even upon the theory that such misrepresentations were part of the transaction and of the conversation, necessarily involved facts bearing upon the constructive fraud alleged in the complaint, and hence for that purpose was directly to the point. In other words, the testimony of the conversation was no doubt offered primarily for the purpose of disclosing the legal relations of the parties in the transaction, and the fact that misrepresentations were made by King to the plaintiff was necessarily brought out as a part of the conversation. The evidence of the alleged misrepresentations, however, was itself proof of constructive fraud, because, in their very nature, they carried with them the obviously material and important fact of the concealment of the real truth of the transaction as it was managed by the defendant.

The findings upon all the vital issues tendered and tried are as before suggested, sufficiently supported by the evidence. As is aptly said by counsel for the respondent, "the case is one where the purchaser, being in fact and holding himself out to the seller as her agent, and pretending to have received a deposit, which he had not received, and pretending to have found a purchaser, which he had not found, induced the owner, whom he pretended to represent, to convey the property to the supposed purchaser"; whereas, in fact, it was his purpose by the circuitous and surreptitious means shown to have been adopted by him, to purchase it for himself and relatives. There were some exceptions reserved to the rulings of the court, which it is sought to make available here, refusing to admit evidence of the value of the property; said evidence having been offered by the appellant apparently upon the theory that the question of value was material in determining whether the equitable relief asked for should be granted. The rulings of the court are unobjectionable under the issues. The theory of the case, as presented by the complaint, as we have seen, was founded upon constructive fraud, and upon that theory it was immaterial whether the land had increased or depreciated in value after the transaction. The only questions to be determined were: Was King the agent of the plaintiff, and, if so, did he purchase the property for himself under circumstances violative of the good faith with which an agent is charged in his dealings as such with his principal?

We find no errors in the record.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

6 Cal. App. 594

BAULE v. DROBATZ. (Civ. 350.)

(Court of Appeal, First District, California. Oct. 9, 1907. Rehearing Denied by Supreme Court Dec. 5, 1907.)

1. APPEAL — REVIEW — FINDINGS — CONFLICTING EVIDENCE.

Where there is a substantial conflict in the evidence, the trial court's findings will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983–3989.]

2. SAME—DISCRETION—NEW TRIAL.

Whether newly discovered evidence could with reasonable diligence have been discovered and produced at the trial, and whether, if it had been produced, a different conclusion might have resulted, are questions addressed to the legal discretion of the trial court, the action of which will not be disturbed on appeal, unless it appears that the discretion has been manifestly abused.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by George Baule against Fannie Drobatz. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, she appeals. Affirmed.

W. C. Kennedy, for appellant. E. M. Rosenthal, for respondent.

KERRIGAN, J. This is an action for work and labor done, and for money loaned. Judgment was entered on both counts for plaintiff. From this judgment and the order denying her motion for a new trial, defendant appeals. Insufficiency of the evidence to support the findings of fact and newly discovered evidence are the chief grounds upon which appellant relies.

The plaintiff was a second cousin of Martin

Drobatz, and also an intimate friend of the Drobatz family. He lived with that family at intervals up to the death of defendant's husband in May, 1905. While living with them plaintiff would sometimes pay for his board by working, and at other times by the payment of such sums of money as would seem to him to be fair. He testified, however, that on March 1, 1905, the defendant told him that her husband was ill and could not work, and she requested plaintiff to take charge of her ranch in Santa Clara county. From that date until August 1, 1905, he was the only man on the place, and he did all the work necessary to be done about the premises; that there had been no agreement as to his wages, but he thought his services were reasonably worth $30 a month. He also testified that at different times from August, 1903, to May, 1904, he had loaned defendant various sums of money, aggregating $1,260, on account of which he had been paid $500. The defendant testified substantially as follows: "He [plaintiff] never pretended that he was working for wages, nor did I dream of it. After my husband's death, Baule became a different man towards the family. He was insolent, and acted as if he was the head of the concern. Finally I told him he must leave. Then, for the first time, he claimed that my husband owed him money at the time of his death. I recalled that about three years ago on the street Baule gave my husband some money in a package, which I understood was about $400. He at this time claimed that it was $500, and then he also claimed that he should have something for what he had done on the place since my husband's death, and that he wanted a settlement before he left. We talked the matter over, and, while I did not believe it, I considered the money loaned to my husband a debt of honor, and finally concluded that I would pay him that money and $50 in complete settlement of all demands, and he said that, if I would pay him the $550, he would be satisfied and would leave. * * * He came back in the afternoon, and when I had the money on a table I called in my children, Geraldine, May, and Francis, and I counted out the $500, and then $60, and he gave me back $10 in change. * * * He said, 'That settles everything between us.' I said, 'Now, that's all that I owe you. Is there anything more?" He said, 'No, that is all. I'll ask you for nothing more.'" The settlement between the parties testified to by the defendant was corroborated by the testimony of two of her daughters. The trial court found that defendant owed the plaintiff a balance of $58 for services rendered, and $760 for money loaned.

There is a plain and substantial conflict in the testimony of the respondent and that of the appellant and her two daughters as to the facts upon which the court made its findings. When there is a substantial conflict in the evidence, this court, under a well-established rule of law in this state, will not disturb the findings of the trial court.

The next point urged by appellant is as to the action of the trial court in refusing to grant her motion for a new trial on the ground of newly discovered evidence. Respondent asserts that the affidavits for and against the motion are not certified as provided in rule 29 of this court (78 Pac. xii), nor are they incorporated in the bill of exceptions, and hence he contends they cannot be considered on this motion. Somers v. Somers, 81 Cal. 608, 22 Pac. 967; Skinner v. Horn, 144 Cal. 278, 77 Pac. 904. This point has merit, but we prefer to rest our decision upon another ground. Appellant claims that the newly discovered evidence is material for her, and that she could not with reasonable diligence have discovered and produced it at the trial. On this motion there were introduced nine affidavits—six by the appellant and three by the respondent. No good purpose would be subserved by summarizing the contents of those affidavits. It is sufficient to say that the question of whether the newly discovered evidence could with reasonable diligence have been discovered and produced at the trial, and the question whether, if it had been produced, a different conclusion might have resulted, were questions addressed to the sound legal discretion of the trial court, and its action will not be disturbed unless it appears that its discretion has been manifestly abused. Oberlander v. Fixen, 129 Cal. 690, 62 Pac. 254; People v. Buckley, 143 Cal. 392, 77 Pac. 169; People v. Sing Yow, 145 Cal. 4, 78 Pac. 235. We have carefully examined the affidavits on the motion for a new trial, and the showing made by them does not warrant us in saying that the trial court improperly exercised its discretion in the matter.

There is no other point meriting attention.

The judgment and order, appealed from are affirmed.

We concur: COOPER, P. J.; HALL, J.

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6 Cal. App. 586

WATER SUPPLY CO. v. SARNOW et al.

(Civ. 391.)

(Court of Appeal, Second District, California. Oct. 8, 1907.)

1. Execution—Notice—Necessity.

Under Code Civ. Proc. § 685, authorizing execution by leave of court after five years after entry of a judgment, execution may be issued without notice to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 159.]

2. Same—Effect of Attachment.

Since the lien of an attachment of land became merged in the subsequent judgment for plaintiff if the land remained in the judgment debtors when the judgment was docketed, and under the express terms of Code Civ. Proc. § 671, expired five years after the date of the judgment, the fact of the attachment did not preclude the court from ordering execution to issue under section 685, authorizing execution to issue by leave of court after five years after entry of a judgment.

3. Same—Presumption as to Ownership.

Where land was attached, it will be presumed, in the absence of a contrary showing, that the property remained in the debtor when judgment for plaintiff was docketed.

4. Same — Second Execution — Waiver of First.

The issuance and levy of a second execution does not waive rights acquired by a levy under a former execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 202.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Water Supply Company against L. G. Sarnow and Josie E. Sullivan to compel litigation between defendants. From a judgment for Sullivan and an order denying a new trial, Sarnow appeals. Affirmed.

See 82 Pac. 689.

C. L. Claflin and Geo. E. Whitaker, for appellant. Bernard Potter and T. F. Allen, for respondent.

ALLEN, P. J. Action by plaintiff under the provisions of section 386 of the Code of Civil Procedure to compel defendants to litigate among themselves their claims to certain moneys in the hands of plaintiff. Judgment went for defendant Sullivan. From an order denying a new trial, defendant Sarnow appeals.

From the admissions in the pleadings and from the findings of the trial court, which latter have support in the evidence, it appears that Sarnow in January, 1902, obtained a judgment against plaintiff; that prior thereto, in February, 1897, defendant Sullivan commenced an action in the superior court of Los Angeles county against Sarnow and others, in which action a writ of attachment was issued and levied upon certain real property standing in the name of Sarnow and other parties; that thereafter, in February, 1897, a judgment was duly given, made, and docketed in said action in favor of Sullivan and as against said Sarnow and others; that after the expiration of five years from the docketing of such last-named judgment, to wit, in May, 1902, the superior court, upon affidavit being filed pursuant to section 685 of the Code of Civil Procedure, and without previous notice, ordered an execution to issue upon said judgment for its enforcement, and the same was duly levied upon all moneys in the hands of plaintiff due said Sarnow, which writ was thereafter returned unsatisfied; that afterwards, in October, 1902, another execution was issued upon said judgment and duly levied in the manner of the first execution; that, when both of said executions were levied, the plaintiff had money in its hands due to the said Sarnow equal to the amount of said judgment of Sullivan unpaid; that the plaintiff, after said levies and before the trial of this action, deposited in court the money so in its hands due said Sarnow. The judgment of the court was that the money, or a sufficient amount thereof, be paid over to the defendant Sullivan in satisfaction of said judgment.

The first error assigned relates to the action of the trial court in admitting in evidence the deposition of Keyes, clerk of the superior court of Los Angeles county, because an exhibit referred to in said deposition was not attached to the deposition. There is no exhibit referred to in the deposition, as shown by the bill of exceptions.

It is next contended that the executions were issued without notice, and therefore void. No notice, under the circumstances of this case, is required. Doehla v. Phillips (Cal. Sup.) 91 Pac. 330.

It is next claimed that nothing was due Sarnow, because an appeal was pending when the executions were levied. There is no competent evidence in the record establishing such an appeal.

While not specified as error, it is insisted in argument that no execution could issue under section 685 of the Code of Civil Procedure, because of the previous attachment. The lien of attachment became merged in the subsequent judgment if the identical property remained in the judgment debtors when the judgment was docketed. That it so remained will be presumed in the absence of any showing to the contrary. The lien of the judgment, including that of the attachment so merged, ceased at the expiration of five years from the date of the judgment. Code Civ. Proc. § 671. The fact that an attachment had once been issued, the lien of which had ceased, would not preclude the court from ordering execution upon the showing made by the affidavits. Nor does the issuance and levy of a second execution waive the rights acquired by the first levy, which was, as found by the court, complete and regular. Lawrence v. Security Co., 56 Conn. 423, 15 Atl. 406, 1 L. R. A. 342.

We find no error in the record, and the order is affirmed.

We concur: SHAW, J.; TAGGART, J.

6 Cal. App. 588

PEOPLE v. PEMBROKE. (Cr. 100.)

(Court of Appeal, First District, California. Oct. 9, 1907.)

1. Criminal Law—Evidence at Preliminary Hearing—Transcript—Certification.

Pen. Code, § 686, provides that where defendant in a criminal case has been afforded an opportunity to cross-examine a witness at a preliminary hearing, and he is absent from the state at the time of the trial, the witness' testimony may be read; and section 869, subd. 5, declares that the certificate of the reporter to his transcript of evidence shall be prima facie evidence that the same was a correct statement of the witness' testimony. *Held*, that where the testimony of an absent witness was given at a preliminary hearing and at which several stenographers officiated, and was duly certified, it was no objection to its admission that another stenographer not shown to have taken any of such witness' testimony did not properly certify her portion of the transcript.

2. Same—Trial—Objections to Evidence.

Where an answer was responsive in part, to the question, accused's motion to strike the entire answer as nonresponsive was properly overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1643.]

3. Witnesses—Impeachment—Foundation.

Where no attempt was made at defendant's preliminary examination to impeach a witness, absent from the state at the time of the trial, and whose testimony at such preliminary examination was thereupon read in evidence, contradictory statements alleged to have been made by such witness were inadmissible to contradict him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1271.]

4. Criminal Law—Appeal—Prejudice.

Where accused, who was only 17, had already testified that he stated to a railroad company in applying for a position that he was 21, he was not prejudiced by the introduction of his written application, in which he gave his age as 21.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137, 3138.]

5. Same—Rebuttal—Alibi.

Where, in a prosecution for robbery, accused, to prove an alibi, testified that from the latter part of September until the 19th or 20th of October, 1904, he was painting his brother's house in San Francisco, and during that time was only once in Oakland, on October 10th, where the robbery was alleged to have occurred, the people were properly allowed to prove in rebuttal that defendant was painting a house in Oakland from September 29th to October 7th, inclusive, and on the 12th and 19th, though the robbery was alleged to have occurred on the 8th.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1615.]

6. Same—Appeal—Assignments of Error.

An assignment that the court erred in refusing to give "instructions and each of them asked by defendant and set out in folios 93 to 102, inclusive, of the transcript," was insufficient to present any question for review.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2957.]

Appeal from Superior Court, Alameda County; Henry H. Melvin, Judge.

Percy Pembroke was convicted of robbery, and he appeals. Affirmed.

Snook & Church, for appellant. Attorney General Webb, for the People.

HALL, J. Defendant was convicted of the crime of robbery, and has appealed to this court from the judgment, the order denying his motion for a new trial, and the order denying his motion for an arrest of judgment.

The first point raised on the appeal concerns the action of the trial court in allowing to be read, from the transcript of the proceedings before the committing magistrate, the testimony of one Edward Stanley, who, it was shown, had left the state of California, and at the time of the trial was absent from and residing out of the state. The objection made to the reading of such testimony was that the transcript did not appear to be certified as required by subdivision 5 of section 869 of the Penal Code. From the transcript in question it appears that on the 18th day of July, 1906, when the magistrate read the charge to the defendant and fully informed him of his rights in the premises, one Mabel Walsh was appointed shorthand reporter for that occasion. The examination of the defendant was set for the 18th day of August, 1906. At the end of the statement of the proceedings had on the said 18th day of July appears the certificate of Mabel Walsh, as such reporter, which it is conceded is in proper form. On August 18, 1906, upon the calling of the case for examination, Milton H. Schwartz was appointed shorthand reporter for the purposes of the examination. Said transcript shows that on that day Edward Stanley gave testimony on behalf of the people, and was cross-examined by the attorney for the defendant; the testimony being set forth by questions and answers. At the close of his testimony he seems from the transcript to have been excused from further attendance at the examination unless he should be notified over the telephone to the contrary. Then follows the testimony of three other witnesses. Then follows a statement as to proceedings had on several different days to which the examination had been from time to time continued, and upon none of which was any testimony taken. Next follows the certificate of Milton H. Schwartz, as such shorthand reporter, which is conceded to be in proper form. At the next calling of the case, September 22, 1906, H. W. Pulcifer was appointed shorthand reporter, and after the statement of the proceedings of the day follows the certificate of H. W. Pulcifer as such shorthand reporter, which is conceded to be in proper form. Upon the next calling of the case, September 24, 1906, Mabel Walsh was appointed shorthand reporter, and, as appears from said transcript, the only thing done was the rendering by the magistrate of his order holding the defendant to answer to the superior court. The certificate of Mabel Walsh, as such reporter, to the transcript of the proceedings of this day is (after stating her appointment), "that I did correctly take down in shorthand writing the proceedings of such decision, and transcribed the same into longhand, and that the foregoing is a full, true and correct statement of such decision, and a full, true and correct transcript of my shorthand notes of the said decision."

It will be observed that the reporter does not certify the transcript to be a "correct statement of such testimony and proceedings" as the statute requires, but that it is a correct statement of the decision. Defendant urges that for this reason the testimony of Edward Stanley should not have been read to the jury, but we do not think that this contention can be sustained. The testimony of Stanley appears in a part of the transcript which it is conceded was properly certified to. The statement of the testimony, written out and certified by the reporter, is only prima facie evidence of what the testimony was. The only testimony in the transcript purporting to be given by Stanley preceded the certificate of Schwartz, which it is conceded is in proper form. If Stanley gave any other testimony at the examination of defendant, it would have been competent for defendant to have shown it. He did not offer or attempt to show that in fact Stanley gave any testimony other than that which he gave on the 18th day of September, 1906. He did not even attempt to show that any testimony was given by anybody upon the occasion when Mabel Walsh acted as reporter. The only testimony taken at the preliminary examination read under the ruling of the court was the testimony of Stanley taken on the 18th day of September, 1906, and this appears to have been all the testimony that he gave, for at the conclusion of his testimony he seems to have been allowed to depart. The certificate of Schwartz to that part of the transcript containing the testimony that was read was prima facie evidence that the same was a correct statement of such testimony. Subdivision 5, § 869, Pen. Code. And it having been shown that said Stanley was absent from the state, it was proper to read his testimony from such transcript. Section 686, Pen. Code.

Appellant urges that the court erred in refusing to strike out an answer made by the witness White as not responsive to the question put by defendant's attorney. The motion was "to strike out the answer as not responsive," and was not confined to some designated portion thereof. In any view that can be taken of the question and answer, a part of the answer was directly and categorically responsive to the question. The words, "No, sir," directly answered the question put, and the explanatory matter which followed was also proper, we think, under the circumstances disclosed by the record. At any rate, the motion asked to have the entire answer stricken out, when at most only a part was objectionable, and for this reason was properly denied.

The court refused to allow defendant to prove statements alleged to have been made by Edward Stanley, whose testimony taken at the preliminary examination was read in evidence at the trial. The witness Stanley, although cross-examined at the preliminary examination by counsel for the defendant, had not been asked about the statements or the conversation which it was attempted to prove. In other words, no foundation had been laid for the impeachment of the witness, for which reason the ruling of the court was clearly correct. People v. Compton, 132 Cal. 484, 64 Pac. 849; People v. Witty, 138 Cal. 577, 72 Pac. 177.

Appellant assigns as error the ruling of the court in permitting the people to introduce in evidence, over the objection of defendant, as a part of his cross-examination, a written application which the defendant had made to a railroad company for work. The only purpose that we can discover in introducing the written application was to show that defendant therein gave his age as 21 years, although he had testified upon his direct examination that he was but 17 years of age. Our attention has not been called to any other matter in the written application that could have possibly harmed defendant, and, as to the statement in the application that he was 21 years of age, he had, before the written application was read in evidence, stated without objection that he had made such representation to the railroad company, and had given his explanation for so doing. He therefore could not have been injured by the reading in evidence of the statement contained in the written application, which he had already stated that he had made, even if it be conceded that proof of such inconsistent statement about his age was not proper.

In rebuttal, the people were allowed to prove by the testimony of one Henry Pym that defendant was engaged in painting the house of Thomas Prather, situate on Alice street, in the city of Oakland, on September 29, 30, and October 1, 2, 3, 4, 5, 6, 7, 12, and 19, 1904. The robbery with which defendant was charged was committed in the evening of the 8th day of October, 1904, at the city of Oakland, or a suburb thereof, not far from defendant's home. For the purpose of proving an alibi, defendant had testified that from the latter part of September until the 19th or 20th of October, 1904, he had been engaged in painting his brother's house in San Francisco, and during said time only returned to Oakland once, to wit, on October 10th. On his behalf other testimony was given to the same effect. Of course, all this testimony on behalf of defendant was material and pertinent. Although the crime was committed on the 8th of October, defendant was not confined to the giving of testimony as to his whereabouts on that day. The testimony that he was in the city and county of San Francisco engaged in painting his brother's house for a period covering more than a week before and more than a week after the date of the crime excluded the possibility of an innocent mistake on the part of such witnesses as to where he was on the day of the crime. We doubt not that, if the court had limited counsel for defendant to testimony as to where defendant was on the 8th day of October, he would have felt that his client had been deprived of material testimony. If it was competent and material for defendant, in his effort to prove an alibi as to the 8th day of October, to prove that he was in San Francisco continuously from September 29th to October 19th, with the exception of October 10th, it was competent and material for the

people to give evidence contradicting such testimony. The testimony of the witness Pym was clearly rebuttal of the testimony relied on by defendant to prove an alibi, and the court ruled correctly in overruling defendant's objections thereto.

Appellant closes his brief with the statement that "we also contend that the court erred in refusing to give to the jury the instructions and each of them asked by the defendant, and set out in folios 93 to 102, inclusive, of the transcript," but does not make any attempt to further elucidate his views in that regard. This method of presenting a question to this court certainly has the merit of brevity, if no other. It is neither the duty, nor the practice, of this court to examine questions thus presented, and in view of the many decisions in this state so holding we assume that counsel did not expect that we would. People v. Chutnacut, 141 Cal. 682, 75 Pac. 340; People v. McLean, 135 Cal. 309, 67 Pac. 770; People v. Woom Tuck Wo, 120 Cal. 297, 52 Pac. 833; People v. Gibson, 106 Cal. 458, 39 Pac. 864.

The judgment and orders are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

6 Cal. App. 597

—In re ROSS' GUARDIANSHIP. (Civ. 346.)

(Court of Appeal, First District, California. Oct. 9, 1907.)

1. Guardian and Ward—Custody and Control of Person—Access to Child by Parent.

Where the father of a minor was a fit and proper person to have her custody, it was not an abuse of discretion for the court to allow the father access to his child, though he had previously abandoned her to her grandfather, who had been appointed her guardian; Civ. Code, § 251, providing that, in the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, § 112.]

2. Same—Support by Father of Minor in Custody of Guardian.

Where the father of a minor was a fit and proper person to have her custody, had a comfortable home, was married, and able and willing to provide for his child in his home, it was not an abuse of discretion for the court not to order the father to pay for the child's support to the child's grandfather, to whom she had been previously abandoned, and who had been appointed her guardian under the Code of Civil Procedure, beginning with section 1747, providing for the appointment of guardians of minors, and who insisted on retaining her custody under such appointment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, § 122.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Petition by Charles Hudson, guardian of Emma Ross, a minor, for an order requiring Orrin W. Ross, the father of Emma Ross, to pay the guardian a stated amount per month for her support. From a judgment denying the order sought, and that the father was to have certain access to his child, the guardian appeals. Affirmed.

J. O. Traber, for appellant. W. D. Crichton, for respondent.

HALL, J. In October, 1904, the superior court in and for the county of Fresno, after due proceedings, taken in accordance with the provisions of the Code of Civil Procedure for the appointment of guardians of minors, appointed Charles Hudson the guardian of the person of Emma Ross, a female child, then of the age of six years; the ground for such appointment being, as appears from the finding of the court made upon the hearing of the petition therefor, that the father of said minor, Orrin W. Ross, had abandoned said minor to said Charles Hudson, who is the grandfather of said minor. The mother of said minor was at that time incompetent, and confined in a state asylum for the insane. Hudson qualified as such guardian, and ever since has had the care and custody of such minor. In his petition to be appointed such guardian of the person of said minor, said Hudson alleged that the father of said minor was able to pay for the support of said minor, and prayed that he be required to pay therefor. The court, however, made no provision for the support of the minor by its father, and made no mention thereof in its order appointing the guardian. On the 23d day of April, 1906, the said guardian petitioned said court for an order, requiring said Orrin W. Ross, the father of said minor, to pay said guardian for the support of said minor the sum of $25 per month thereafter. In this petition the guardian alleged that the father, Orrin W. Ross, was then able to pay a reasonable sum for the support of said minor, and that $25 per month was a reasonable sum therefor, and that she could be better supported were the court to make such order. Orrin W. Ross filed an answer and cross-petition to said petition, and among other things alleged that he was able, ready, and willing to take said minor, and to support her in his own home, and prayed the court to revoke the order appointing said Hudson the guardian of said minor, and for general relief. The court upon the hearing made the following findings of fact: (1) That since the birth of said minor said Charles Hudson has supported and maintained her to the best of his ability, but that since November 4, 1906, his financial resources have become impaired, and he is not able now to provide adequately for the proper support and maintenance of said minor; (2) that Orrin W. Ross, the father of said minor, has a comfortable home, is married and able and willing to provide for, maintain, and educate his said child at his own home; (3) that said Orrin W. Ross is a fit and proper person to have the care, custody, and control of said minor, Emma Ross. As conclusions of law, the court decided that the guardian, Charles Hudson, was not entitled to an order that Orrin W. Ross pay him the sum of $25 per month, or any other sum, for the support of said minor, and that said Orrin W. Ross was entitled to a modification of the original judgment, so that he shall be entitled to have said minor visit him at his home one-half of the time she is not in school, and upon Saturdays and Sundays. Judgment was entered accordingly, from which the guardian has appealed upon the judgment roll.

Appellant contends, first, that the court had no power to order that the father have the right to have the child visit him at all. We cannot accede to this view of the law. Although a parent who knowingly and willfully abandons his minor child under the age of 14 years forfeits the guardianship of such child (section 246, Civ. Code), the relationship of parent and child is not thereby entirely severed. When a court of competent jurisdiction appoints a guardian of the person of a minor, such minor becomes a ward of the court, and the guardian is in effect an arm of the court, and is subject to the control of the court in the discharge of his duties as such guardian. Such court has authority to control and direct the guardian in the performance of his trust so as to insure the proper care of the infant. 16 Am. & Eng. Ency. of Law, 31; Lord v. Haugh, 37 Cal. 657. Circumstances may make it desirable and conducive to the well-being of a child that a parent, who has been deprived of its custody or guardianship, have access to such child, and the court appointing the guardian has jurisdiction to so direct. Woerner's Am. Law of Guardianship, 159. "In the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the court." Civ. Code, § 251. In the case at bar the court found the father to be a fit and proper person to have the custody of the minor, and under such circumstances it certainly was not an abuse of discretion to allow the father access to his child, though he had previously abandoned the child to its grandfather.

It is next urged that the judgment should be reversed because the court refused to order the father to pay the guardian some stated sum per month for the support of the child. Of course, we cannot reverse the judgment for this reason if the court had no power to make such order, or if under the circumstances disclosed by the record before us the court did not abuse its discretion in refusing such order. Undoubtedly, a father entitled to the custody of his minor child is liable for his support (Civ. Code, § 196), and if a father "neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessaries, and recover the reasonable value thereof from the parent." Civ. Code, § 207. Our statute also provides that a civil action may be brought by a child, or certain relatives, against the parent for abuse of parental authority, in which the duty of support may be enforced. Civ. Code, $ 203. But appellant does not bring his case within any of the foregoing provisions of the Code. The child is not under the charge of his father, and the father is not now entitled to its custody; neither has he been deprived thereof by the proceedings authorized by section 203, Civ. Code. The proceedings under which appellant was appointed guardian of the person of the child are the statutory proceedings for the appointment of guardians of minors contained in the Code or Civil Procedure, beginning with section 1747. Although it has been held that under such proceedings a father may be deprived of the custody of his child, it has never been held that in such proceedings he may be compelled to compensate the guardian for the support of such child. Ex parte Miller, 109 Cal. 643, 42 Pac. 428. On the contrary, Justice Temple, in a concurring opinion in the above-cited case, expressly holds that a parent deprived of the custody of his child by the summary proceeding laid down in the Code of Civil Procedure is no longer liable for its support, and that, aside from the cases of divorce and actions between the parents in regard to the custody of children, there is no other case in which the court has power to deprive the parent of his authority and yet hold him liable for the support of his child, except as provided in section 203, Civ. Code. There certainly is no provision in the Code of Civil Procedure, under which these proceedings were inaugurated, which expressly authorizes the court to compel the parent thus deprived of the custody of his child to pay the guardian for its support. But whether or not such power may be inherent in the court, we do not think the record in this case shows an abuse of discretion on the part of the trial court. The court found that the father is a fit and proper person to have the care and custody of his child, and that he has a comfortable home, is married, and is able and willing to provide for, maintain, and educate his said child in his own home. The general rule is that where a father has supplied his child with necessaries, or is ready to supply them, he cannot be held liable to a third person for necessaries furnished to the child without his knowledge. 21 Am. & Eng. Ency. of Law, 1054. In Chilcott v. Trimble, 13 Barb. (N. Y.) 504, it was said: "Where a parent is willing to support his infant child, * * * no agreement of the father to pay for such support can be implied. * * * The law of nature, which requires the parent to support his infant offspring, designates his own house as the place where that duty shall be performed." In this case the grandfather insists on retaining the custody of the child under his appointment as guardian of the child, in the face of the unchallenged finding of the court that the father is now a fit and proper person to have its custody, and is able and willing to support it in his own home. Under these circumstances, even if we concede that the court has the power to order the father to pay the guardian for the support of his child, there was no abuse of discretion in refusing so to do.

The judgment is therefore affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

152 Cal. 290

SALMON et al. v. RATHJENS. (S. F. 4,373.)

(Supreme Court of California. Nov. 18, 1907. Rehearing Denied Dec. 16, 1907.)

1. Death—Actions for Causing Death—Statutes—Parties.

The statute of California authorizing an action for death contemplates that the action shall be brought either by the personal representatives of the deceased solely for the benefit of all the heirs, or by all the heirs for their own benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 35–48.]

2. Same—Compliance with Statutes.

The right of action for negligent death is statutory, and the action must be brought in the names of the persons to whom the right is given by the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 35.]

3. Same—Parties.

In an action by heirs for the negligent death of their ancestor, all the heirs should join as plaintiffs, and, where the consent of any one cannot be obtained, he may be made a defendant, as expressly authorized by Code Civ. Proc. § 382.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 56–58.]

4. Parties—Defect—Waiver.

Under Code Civ. Proc. § 434, providing that, where no objection is taken either by demurrer or answer, the same will be deemed waived, etc., a defendant in an action for negligent death, brought by heirs of the decedent, who fails to raise by his answer the objection that plaintiffs are not the sole heirs of the decedent, waives the objection that all the heirs of decedent have not been made parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 134, 167–177.]

5. Same.

The complaint in an action by heirs of a decedent for his negligent death stated a cause of action on the theory that plaintiffs were the only heirs. During the trial, four months after the filing of the answer, defendant for the first time sought to raise the question whether decedent left other heirs. Nothing warranting the suspicion that there were any other heirs was disclosed by any evidence, and defendant had no information in regard to the matter, other than such as he had at the time of filing his answer. *Held*, that the court properly ruled that the objection of nonjoinder of all the heirs could not be raised by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 167–177.]

6. APPEAL — REVIEW — DISCRETION OF TRIAL COURT—AMENDMENT OF PLEADING.

An application to amend, made during the progress of the trial, is addressed to the sound discretion of the trial court, and its action will not be disturbed on appeal, unless an abuse of discretion clearly appears.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3825–3833.]

7. DEATH — ACTIONS FOR CAUSING DEATH — PARTIES—MOTION TO STAY PROCEEDINGS.

A motion by defendant in an action by heirs for the negligent death of their ancestor to stay proceedings until other heirs are brought in as parties is properly denied, in the absence of a showing of the existence of any other heir.

8. APPEAL—PRESENTATION OF QUESTIONS IN LOWER COURT—RULINGS ON EVIDENCE.

Where defendant in an action for negligent death brought by heirs of decedent asked one of the heirs whether decedent left other heirs than those joined as plaintiffs, without informing the court that the object of the question was to obtain evidence material to the question of damages, defendant on appeal could not urge that the court erred in sustaining an objection to the question, on the ground that the evidence sought was material to the question of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1282.]

9. SAME—REVIEW — HARMLESS ERROR — EVIDENCE.

In an action for negligent death, brought by the heirs of the decedent, the exclusion of evidence of the existence of other heirs than those joined as plaintiffs was not prejudicial to defendant on the ground that the evidence was material on the question of damages, when, so far as the question of damages was concerned, the only possible effect of the existence of other heirs would be to enhance rather than to diminish damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4055, 4187.]

10. DEATH—CAUSE—EVIDENCE.

In an action for negligent death, evidence *held* to support a finding that the death of decedent resulted from injuries negligently inflicted by an employé of defendant while acting in the course of his employment.

11. EVIDENCE—EXPERT WITNESSES—EXAMINATION.

One producing an expert witness has the right to question him as to his experience in the particular matters concerning which he is to be examined, not only to establish his competency, but to strengthen his grounds of knowledge and the reasons for trusting his belief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2360–2363.]

12. SAME.

Though one holding a license to practice medicine may be an expert competent to testify as to the probable effect of certain injuries, the fact that he has had unusually great practical experience in the particular matter to which he testifies is a legitimate method of strengthening his testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2360–2363.]

13. SAME.

Where, in an action for negligent death, the evidence showed that decedent died from cerebral meningitis, and a physician for defendant testified that he could not say from the facts that the meningitis came from the injuries, and that he had never seen such a result from injuries to the head or knee as sustained by decedent, questions as to his experience with head and knee injuries were competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2360–2363.]

14. APPEAL—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where, in an action for negligent death, the evidence showed that cerebral inflammation causing death could be caused by the injuries sustained by decedent only by reason of some infection of the wounds and the transmission of the germs to the brain, and that this was a very rare occurrence where the wounds were properly cared for, the exclusion of evidence of the experience of a physician testifying for defendant that he could not say from the fact that the cerebral inflammation came from the injuries was not reversible error.

15. DEATH — ACTIONS FOR CAUSING DEATH —EVIDENCE—ADMISSIBILTY.

Where, in an action for negligent death, the proof showed that decedent was injured in a runaway occasioned by the negligence of defendant's employé, evidence of the failure of the employé to make subsequent inquiry as to the condition of decedent or as to his relatives, or the place where he lived, was irrelevant, as against defendant.

16. APPEAL — REVIEW — HARMLESS ERROR — ADMISSION OF EVIDENCE.

In an action for death occasioned by the negligence of an employé of defendant, error in admitting evidence of the conduct of the employé after the injury, showing his indifference to the consequences following the injuries, was not ground for reversal.

17. SAME—ERRORS NOT AFFECTING RESULT.

A judgment will not be reversed on account of an error, where it is apparent that no substantial right of appellant could have been prejudicially affected thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4033.]

18. DEATH — ACTIONS FOR CAUSING DEATH — DAMAGES.

In an action by heirs for the negligent death of their ancestor, money expended in medical treatment of the decedent is not a proper element of damage, where the charges therefor have not been paid by plaintiffs, and where they are not liable therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 110.]

19. TRIAL—WAIVER OF ERROR—REFUSAL TO STRIKE OUT EVIDENCE.

A motion of defendant to strike out evidence admitted for plaintiffs without objection was denied. Plaintiffs, before closing their case, moved to strike out the same evidence. Defendant objected thereto, and the court thereupon denied the motion. Plaintiffs again moved that the evidence be stricken out, and that the jury be instructed to disregard the same. Defendant again objected, and the court stated that it had concluded to instruct the jury to disregard the testimony. *Held*, that the conduct of defendant waived the error of the court, if any, in denying his motion to strike out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 978, 979.]

20. APPEAL — REVIEW — HARMLESS ERROR — EXCLUSION OF EVIDENCE.

Where, in an action for negligent death, there was no conflict in the evidence as to the injuries received by decedent, and the hypothetical questions asked expert witnesses of both parties stating the injuries and the history of the case were substantially the same, and an expert for defendant, on being asked the question, stated that he did not think that the injuries would cause death, error in sustaining an objection to a question, whether or not in his opinion the injuries he found decedent to be suffering from were sufficient to cause death, was not ground for reversal, since, for all practical purposes, a complete answer to the question objected to was given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194-4199.]

21. Evidence—Hearsay.

In an action by children for the negligent death of their father, the testimony of a child that the father took care of his children and assisted in their support; that he would sometimes earn $2 a day, and sometimes more; that when he worked he would purchase the necessaries of life; that he was good to his children, spent his evenings at home, and provided for the education of his children—was not objectionable as hearsay, because based on declarations made by the father to the child or any other person.

Department 1. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Emma E. Salmon and another against P. F. Rathjens. From a judgment for plaintiffs, defendant appeals. Affirmed.

Monroe & Cornwall, John H. Dickinson, and C. H. Wilson, for appellant. Milton & Eisner and H. A. Hollzer, for respondents.

ANGELLOTTI, J. This is an action by two children of Moses Farmer, deceased, one of whom is a minor, for damages resulting to them from the death of said deceased, which is alleged to have been caused by the negligence of defendant. There was a jury trial resulting in a verdict for plaintiffs for $4,500, upon which judgment was entered. Defendant appeals from the judgment and from an order denying his motion for a new trial.

1. The first point made for reversal relates to the refusal of the trial court to allow defendant to amend his answer during the progress of the trial, and its refusal to allow certain questions asked one of the plaintiffs. The complaint was filed April 28, 1903. The allegation therein as to heirship of plaintiffs was as follows: "That the plaintiffs herein, Emma E. Salmon and Lurline Farmer, are daughters of the said Moses Farmer, deceased." Defendant on June 4, 1903, demurred to this complaint for want of facts, and on the further ground "that there is a defect of parties plaintiff, in this: that it appears from said complaint that there are heirs at law of said deceased who are not made parties plaintiff herein." This demurrer was overruled September 2, 1903. On October 2, 1903, the answer of defendant was filed. The answer contained specific denials of the allegations of relationship and heirship on the part of plaintiffs, but was silent upon the proposition as to the existence of any other heir. The trial commenced February 8, 1904. During the progress of the trial plaintiff Emma E. Salmon, a married woman, testified on behalf of plaintiffs. She testified on direct examination that she was a sister of her coplaintiff Lurline Farmer, and that deceased was their father. On cross-examination she was asked, "Have you any sister besides Lurline Farmer?" This was objected to as irrelevant and immaterial, and not proper cross-examination. Thereupon defendant asked leave to amend the answer, by inserting therein allegations on information and belief to the effect that plaintiffs are not the sole and only heirs of the deceased, but that there is "another child, or children or heirs," of deceased, the names of which and their residences are unknown to defendant, that the omission to make such unknown heir or heirs parties produces a defect of parties plaintiff. The amendments offered contained a statement "that the facts in this paragraph alleged on information and belief were first known to him on this 9th day of February, A. D. 1904." The proposed amendments were signed by counsel for defendant, but do not appear from the record to have been verified, and the record fails to indicate that any other showing was made in support of the application to amend. Plaintiffs objected to the amendment being made at that time, and the court denied the application to amend. Defendant then asked the witness several questions relating to the matter, such as: "Have you any sister besides Lurline Farmer?" "Is there any child other than yourself and Lurline Farmer now living, the daughters or sons of Moses Farmer, deceased?" "Was there any such child at the time of the filing of this suit?" And objections that the matters sought to be elicited were incompetent, irrelevant and immaterial, and not within the issues of the case, were sustained. At the close of plaintiffs' case, it was stipulated that it should be considered that Emma E. Salmon was recalled as a witness for defendant, and that the same questions were again asked, the same objections made, and the same rulings given. Defendant then asked leave to amend his answer in the respect hereinbefore designated, making no other showing in support of his application. The court denied the application. Counsel for defendant then stated to the court that defendant is informed and believes that there are, and were at the time of the beginning of the action, heirs of deceased other than plaintiffs, and moved, without further showing, that all proceedings be stayed and abated until such other heirs are made parties to the suit. The motion was denied by the court.

Our law relating to actions of this character undoubtedly contemplates that the action shall be brought either by the personal representatives of the deceased solely for the benefit of all the heirs (Webster v. Norwegian M. Co., 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181), or by all the heirs for their own benefit. So far as heirs are concerned, a single joint cause of action is given. The language of our statute permits no other construction. The right of action in such a case being entirely statutory, the action must be brought in the names of the persons to whom the right is given by the statute. This is the universal rule. See Oates v. U. P. R. R., 104 Mo. 514, 16 S. W. 487, 24 Am. St. Rep. 348; Usher v. West Jersey, etc., 126 Pa. 206, 17

Atl. 597, 4 L. R. A. 261, 12 Am. St. Rep. 863; St. Louis, etc., v. Needham, 52 Fed. 371, 3 C. C. A. 129; 5 Ency. Pl. & Pr. 851. The cases from other states holding that the action may be maintained by one or more beneficiaries without joining all are based upon statutes construed as giving the right of action to one or more for the benefit of all, just as our own statute gives the right to the personal representatives of the deceased for the benefit of all the heirs. See Collins v. East Tenn., etc., Co., 9 Heisk. (Tenn.) 841; Huntington, etc., R. R. v. Decker, 84 Pa. 419; Pierce v. Conners, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279. An action by a portion only of the heirs is not the action authorized by our statute. All the heirs should, therefore, join as plaintiffs in an action by heirs, and, if the consent of any one who should be so joined cannot be obtained, he may be made a defendant. Code Civ. Proc. § 382. It would, therefore, seem that where all the heirs are not joined, and timely objection is made on that ground by a defendant, the action should be abated, or, at least, the other heirs should be made parties. It does not follow, however, that a reversal should be ordered because of any of the rulings of the trial court which we have set forth. The complaint stated a cause of action upon the theory that plaintiffs were the only heirs of deceased, just as completely as it would have done had it in terms alleged that plaintiffs were the only heirs. Knott v. McGilvray, 124 Cal. 128, 56 Pac. 789. No objection that there were other heirs was made by defendant in his answer, or until the trial had commenced and was in progress, which was more than four months after the filing of the answer. Up to that time the defendant had rested without denial or objection in this regard, upon the theory that plaintiffs, if heirs at all, were the only heirs, as we are satisfied he had the right to do under the complaint, if he had no knowledge of the existence of any other alleged heir. See concurring opinion of Henshaw, J., in Daubert v. Western Meat Co., 139 Cal. 485, 73 Pac. 244, 96 Am. St. Rep. 154. Even then, it was not made to appear to the court that there was any reasonable ground for supposing that there might be another heir, defendant contenting himself with his mere general information and belief statement that there were other heirs as a basis for leave to so amend his answer as to authorize the institution of inquiry as to the existence of others who should have been joined as plaintiffs. Nothing warranting even the suspicion that there was any other heir had been disclosed by any evidence given on the trial, and the trial court was amply warranted by the circumstances, including the failure to make any showing in support of the application, in concluding that the sole object of the proposed amendment was to authorize the commencement of an inquiry by defendant in regard thereto, and that defendant then had no information in regard to the matter other than such as he had at the time of filing his answer. If this was the situation, defendant should have laid the foundation for his inquiry long before by tendering the issue in his answer; and no excuse is made for his failure to do so. By his failure to so make the objection that all the heirs of deceased had not been made parties he had waived it (section 434, Code Civ. Proc.), and no reason is apparent why such waiver should be allowed to be withdrawn after the case had come to trial upon the issues made by the pleadings. A different question might be presented if it had appeared that the proposed amendment was essential to the protection of any substantial right of defendant, and there had been a reasonable showing why the objection had not been made earlier. As we have seen, no such showing was made, and we are satisfied that defendant could not be subjected to a second recovery in a subsequent action by some other heir or heirs of whose existence he had no knowledge at the time of this action. See Daubert v. Western Meat Co., 139 Cal. 480, 69 Pac. 297, 73 Pac. 244, 96 Am. St. Rep. 95. An application to amend made during the progress of a trial is addressed to the sound discretion of the trial court, and the action of the trial court will not be disturbed on appeal unless an abuse of discretion clearly appears. Under the circumstances here appearing, there was no abuse of discretion. The motion that all proceedings be stayed until the other heir or heirs were brought in as parties was, of course, properly denied, in the absence of a showing of the existence of any such heir or heirs.

Under the issues made by the pleadings, unless the questions asked plaintiff Emma E. Salmon as to the existence of other children were material to the question of amount of damage, we cannot see that the court erred in sustaining objections thereto. That claim is now made by learned counsel for defendant, although no such claim appears to have been made in the trial court at the time the questions were asked. It is urged that it was proper to show that deceased expended a portion of his earnings on account of other children, thus diminishing the amount of damage to these plaintiffs. If this was the object of counsel in asking the questions, they should have so informed the court, for the questions themselves indicated no such purpose, and the object sought could only have been attained by subsequent and different questions. The action, however, was necessarily for the aggregate damage to all the heirs of the deceased. Our law allows but a single action in such cases, and in that action the damage to all heirs is recoverable. So far, therefore, as the question of damage is concerned, the only possible effect of answers showing the existence of other children would be to enhance rather than to diminish the damage. They could not diminish the damage, but they might possibly enhance it by showing the loss to such other children of services on the part of deceased having a pecuniary value. We cannot see that the court erred to the prejudice of defendant in sustaining the objections to the questions.

2. On December 24, 1902, the deceased, while crossing Howard street at the corner of Eighth street, was run into by a runaway horse attached to a buggy, belonging to defendant, and knocked down and injured. It is not questioned here that the runaway occurred by reason of the negligence of defendant's employé, who was using the horse and buggy in the course of his employment, and who had left the horse standing without being hitched in front of a house where he was making a delivery for defendant. Plaintiffs' claim was that the injuries there received by deceased were the cause of his death. The verdict of the jury in favor of plaintiffs was a finding in accord with this claim. The contention that the evidence was insufficient to support such a conclusion cannot be upheld. The deceased was 63 years of age, apparently in good health, was never sick, and attended to his business every day. There was evidence that he was hit by a front wheel of the buggy, knocked several feet and run over by the wheels, that his face was badly bruised and a leg injured, and that blood appeared to be coming from his mouth and one ear. He was immediately taken to the receiving hospital, and thence, on the same day, to Mt. Zion Hospital, where he remained under treatment until January 21, 1903. On the last-named day he was taken to a private hospital, where he remained under treatment until February 14, 1903, when he died. An autopsy was held. The only evidence as to the immediate cause of death was that of the attending physician, Dr. Rosenstirn, whose conclusion was based entirely upon what he saw and ascertained at the autopsy. He testified that the deceased died from purulent cerebral meningitis, or, in other words, a suppurated inflammation of the membranes covering the brain. He further testified that the autopsy disclosed an incised wound on the "left side of the knee joint" in which was some gauze, and a wound over one of the eyes that was not entirely healed, and which was surfaced with proud flesh. In response to a hypothetical question, embracing the disclosures of the autopsy as testified to by him, and the facts already stated as to the injuries received at the time of the accident and the subsequent treatment and death, he testified substantially that the injuries were certainly sufficient to cause death, and the history of the case would indicate that the inflammation of the brain causing the death was caused by such injuries. Opposed to this was the testimony of four experts, who testified that they could not say from the history of the case disclosed by the hypothetical question that the inflammation of the brain was due to the injuries. One of them testified that he did not think such injuries would cause such a result, but would not say positively that they did not. They generally agreed that they might, but that such a result was very unusual. It appears from all the evidence that such an inflammation may be due to a great variety of causes. It may come from an injury to the head, or may be due to germs from any distant wound which has become infected, or to a disease of the ear, nose, or throat, or it may follow pneumonia or tuberculosis, or it may be the direct effect of the infectious disease sometimes called cerebro-spinal meningitis and sometimes spotted fever, which has been epidemic in some parts of the country. There is absolutely nothing in the evidence to indicate the existence of any cause for the inflammation of the brain other than the injuries received by deceased from the runaway. The effect of the evidence of defendant's experts is that such injuries might possibly have produced such a result, and the positive evidence of plaintiffs' expert is that the history of the case indicated that they did produce that result. In the absence of any other sufficient cause appearing to exist, such appears to be the reasonable conclusion in the light of the facts. We certainly would not be justified in holding that there was no sufficient basis for a conclusion to that effect on the part of the jury.

3. Dr. Carson, an expert witness for defendant, testified without other showing of his qualifications than that he had been a physician since the year 1901, and was practicing at the Southern Pacific Hospital. He testified that he could not say from the facts stated in the hypothetical question that the meningitis came from the injuries, or that there was infection in the knee wound or head wound, and that infection causing menigitis ought not to have resulted from either of such wounds. He further testified that he had never seen such a result from such injuries to the head or knee. He was then asked: "What experience have you had with head injuries?" "What experience have you had with knee injuries?" Objections to these questions by plaintiffs, on the ground of incompetency, irrelevancy and immateriality, were sustained. There can be no doubt that a party producing an expert witness has the right to question him as to his experience in the particular matters concerning which he is to be examined, not only for the purpose of establishing the competency of the witness to the satisfaction of the court, but also for the purpose of making plain the strength of the witness' grounds of knowledge and the reason for trusting his belief. Although one holding a license to practice medicine and surgery may, by reason of that fact alone, be sufficiently an expert to testify as to the probable effect of certain injuries, the fact

that he has had unusually great practical experience in the particular matter as to which he testifies would undoubtedly add somewhat to the weight of his testimony, and it is a legitimate and proper method of strengthening his testimony, one tending to the doing of substantial justice. See Wigmore on Evidence, §§ 562, 655. The objections to the questions should have been overruled. We are of the opinion, however, that the matter was not of sufficient importance to warrant a reversal. The effect of all the evidence in the case was to plainly show that cerebral inflammation could be caused by the injuries so long after their infliction (52 days) only by reason of some infection of the wounds and the transmission of the germs to the brain, and that this was a very rare occurrence where the wounds were properly cared for. The mere fact that the witness had during his two or three years' practice seen many cases of such injuries, while technically admissible in evidence, was, under the circumstances, of no practical importance, and would not have added materially to the effect of the evidence given on behalf of the defendant. It is to be observed, in this connection, that the question was limited to head and knee injuries. There was no good reason for such limitation. The theory being that such inflammation may result from an infected wound on any part of the body, practical experience with wounds generally, wherever situate, was the matter to be inquired into in this connection, and answers to the limited questions asked the witness would not have fully covered the matter, and would not have been as important in the case as answers to general questions relative to wounds wherever situated.

4. The employé of defendant through whose negligence the runaway occurred testified on behalf of defendant. He said that, after capturing the runaway horse, he drove back to the scene of the accident, and was there told that "the man was more scared than injured," and that he remained around there until the ambulance came and took him away. On cross-examination, he was asked whether he ever made any inquiries as to who the man was that was hurt, who his people were or where they lived, and whether he ever saw the man from the time he was hurt until he died, and, over proper objections, answered these questions in the negative. It may be conceded that there was nothing in the evidence given on direct examination that would render this proper cross-examination, and certainly failure on the part of the employé to make subsequent inquiry as to the condition of a person injured by his negligence, or as to his relatives, or the place where they lived, or his failure to subsequently visit the injured person, was not a matter relevant to any issue in the case, or chargeable in any way against the employer. But it is inconceivable that this testimony could have operated to the prejudice of defendant. It at most tended to show an indifference subsequent to the accident on the part of the employé to the consequences following the injuries that had been inflicted by reason of his alleged negligence, and in no degree reflected on the defendant or strengthened the case of plaintiffs. The situation is very different from that presented in Lissak v. Crocker Estate Co., 119 Cal. 444, 51 Pac. 688, where a subsequent declaration of an employé improperly admitted was of the character tending to charge the defendant with negligence, and also from the situation presented in Smith v. Westerfield, 88 Cal. 382, 26 Pac. 206, where incompetent evidence bearing directly on the main point in issue was erroneously received. It is too well settled to require discussion that a judgment will not be reversed on account of an error, where it is apparent that no substantial right of the appellant could have been prejudicially affected thereby.

5. Dr. Rosenstirn testified for plaintiffs that a reasonable charge for the medical services rendered by him to the deceased was $500, and that he thought the charges for the hospital services would be $150 or $200. This testimony came in without objection. On cross-examination he testified that none of these charges had been paid, and that he did not know the amount charged against deceased at the hospital. Defendant then moved that the testimony as to the fees and hospital bill be stricken out, on the ground they had not been paid, and that no liability on the part of plaintiffs to pay them had been shown. The motion was denied, and this ruling of the court is assigned as error on this appeal. We have no doubt that the evidence was improper. It may be doubted whether in an action of this character money expended in medical or surgical treatment of the deceased can ever be a proper element of damage. However this may be, certainly plaintiffs cannot recover for such charges where they have never been paid by them, and plaintiffs are in no way liable therefor, and have incurred no loss on account thereof.

Defendant is, however, precluded from urging this error as a ground for reversal. Before closing their case, plaintiffs themselves moved the court that the evidence be stricken out. Defendant objected thereto, saying: "We do not consent to that. The evidence is before the jury, and it cannot be withdrawn." The court thereupon denied the motion. Subsequently plaintiffs again moved that the evidence be stricken out, and that the jury be instructed to disregard the same. Defendant again objected. The court then stated that it had concluded to instruct the jury to disregard the testimony, and defendant excepted. These objections of the defendant constituted an effectual waiver of the error of the court. Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164; Mitchell v. Davis, 23 Cal.

384. The fact that some little time intervened between the denial of defendant's motion and the subsequent motions of plaintiffs (how much does not appear) does not materially differentiate this case from those cited.

6. Dr. Boskowitz, the emergency surgeon at the Central Emergency Hospital when the deceased was brought there on December 24, 1902, testified for defendant. He stated that he then examined the deceased, and observed the injuries from which he was suffering. He was then asked: "Will you state to the court and jury whether or not in your opinion the injuries that you then found said Moses Farmer to be suffering from were sufficient to cause death?" An objection to this question was sustained. It may be conceded, for the purposes of this decision, that the witness was not disqualified from testifying by reason of subdivision 4 of section 1881 of the Code of Civil Procedure, and that the question was proper. The effect of the subsequent testimony of the witness was to substantially cover the matter, and defendant could not have been prejudiced by the ruling. There was no conflict in the evidence as to the nature of the injuries received by deceased, and the hypothetical questions asked the witnesses by plaintiffs and defendant, stating the injuries and the history of the case, were in all substantial respects the same. Dr. Boskowitz was asked this question, and answered: "I don't think that those injuries would cause death." For all practical purposes, this, together with his subsequent testimony in support of his opinion, was, under the circumstances, a complete answer to the question objected to.

7. Complaint is made because of the court's refusal to give a requested instruction as to the duty of a pedestrian entering upon a street crossing. We are satisfied that, under the facts of this case, the requested instruction had no proper application.

8. We see no ground for reversal in the denial of the motion made during cross-examination of Mrs. Salmon to strike out on the ground that it was hearsay all of her testimony as to the earnings of the deceased, and his expenditures for provisions for the household of which he, Mrs. Salmon, her husband, and her sister were the members. Her only testimony as to earnings and expenditures on direct examination was as follows: "My father took care of and supported my sister, and also assisted in my support. * * * He would sometimes earn $2 a day and sometimes $3. When he was working, he would purchase the groceries, meats, and necessaries of life. When my husband worked, he would purchase them. My father was good to me and to my sister. He spent his evenings at home, and from the time my sister was born she lived with my father, and he provided for her schooling and education." The cross-examination disclosed no reason for holding that the knowledge of the witness was, as to any of this testimony, based entirely on any declarations made to her by deceased or any other person.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

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6 Cal. App. 629

THOMAS v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 4,895.)

(Supreme Court of California. Dec. 12, 1907.)

JUDGMENT—DEFAULT—OPENING TIME FOR APPLICATION.

Service and filing of a notice within six months after the taking of a judgment, that application will be made on a specified day after the expiration of the six months, to vacate the judgment, is not an application within six months within Code Civ. Proc. § 473, authorizing the vacation of certain judgments where application therefor is made within six months after the taking of judgment.

In Bank. Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Application by Carl Thomas for a writ of prohibition against the superior court of the state of California in and for the city and county of San Francisco and another. The district court of appeal made the writ peremptory, and defendants petition for rehearing in the Supreme Court. Denied.

The following is the opinion of Cooper, P. J., of the Court of Appeal, in which Kerrigan and Hall, JJ., concur.

"Application for a writ of prohibition. The facts as stated in the verified petition, and not denied, are as follows: Petitioner commenced an action in the superior court against the California Fruit Distillery Association, E. Goldberg, and others, for the purpose of recovering judgment upon the facts stated in his complaint, whereupon a summons was duly issued and served. A demurrer which had been interposed by defendants above named was overruled, and said defendants were allowed 10 days in which to answer. On January 16, 1907, the said defendants having failed to answer, their default was entered, and on the following day judgment was entered upon such default against Goldberg for $1,179.10, and against the California Fruit Distillery Association for $1,180.83. On the 25th day of January, 1907, the said defendants named served and filed a notice of motion to set aside the default and judgment so entered against them, and the matter coming regularly on for hearing on June 6, 1907, the court duly made an order denying the motion to set aside the default and judgment, which order was duly entered. On July 12, 1907, the said defendants served upon plaintiff a notice of appeal from the said judgment, and from the order refusing to vacate the same and set aside the default. Appeal was perfected by filing the notice and giving the proper undertaking.

"On July 13, 1907, the said defendants served and filed, without permission of the court, a second notice of motion, to the effect that on the 19th day of July, 1907, they would move the court to set aside the said default, and vacate the said judgment in said action. On September 14, 1907, the said appeals of said defendants from the judgment and order refusing to set aside said default were by the written request of said defendants' attorneys dismissed by this court, and said dismissal duly entered of record. The said superior court is about to proceed, and, unless prohibited, will proceed, to hear the said second application to vacate said judgment, and set aside said default. The only question is as to the jurisdiction of the superior court to hear and determine the said second motion.

"The judgment entered in the superior court became, when entered, valid and binding upon the parties, and it would so continue unless set aside or reversed by the court in which it was entered, or by some appropriate proceeding on appeal, or by a direct attack in a court having jurisdiction. The dismissal of the appeal in this court was not made without prejudice. In such case it was, in effect, an affirmance of the judgment and of the order refusing to set aside the default. Code Civ. Proc. § 955; Ritzman v. Burnham, 114 Cal. 522, 46 Pac. 379. The motion to set aside the default, having thus been affirmed in this court, became final between the parties, and res adjudicata. Wheeler v. Eldred, 137 Cal. 37, 69 Pac. 619. Having once been fairly before the court, and adjudicated between the parties, it cannot afterwards be litigated even upon grounds not disclosed in the former motion. Greer v. Greer, 142 Cal. 523, 77 Pac. 1106. In this case the defendants were given due notice, and the right to appear and defend when the summons was served upon them. After their demurrer was overruled, they were given time to answer. When their time for answering had expired and judgment entered against them by default, they availed themselves of the right given them by the law to move for relief from the default. The court heard them and the evidence offered in support of their motion. Then and there was the time to fully show all the facts that might in any way have excused their default, whether by inadvertence, mistake, or excusable neglect. The court decided against them on this motion, and the decision has been affirmed. It must be presumed to be correct. It cannot again be appealed from, nor can the trial court again review it. If a trial court, after a judgment has become final, can set it aside, or relieve from it, there would be no end to the matter. The case of Kirby v. Superior Court, 68 Cal. 604, 10 Pac. 119, is conclusive of this.

"The writ is made peremptory, and the superior court of the city and county of San Francisco, and Hon. E. P. Mogan, one of the judges thereof, are commanded to refrain from further proceedings in the matter of hearing said motion."

S. C. Wright and Robinson & Robinson, for petitioners. Mastick & Partridge, for respondent.

PER CURIAM. The petition for rehearing in this court after decision in the District Court of Appeal is denied. In denying the application we do not wish to be understood as giving assent to the proposition that a trial court has not jurisdiction to entertain a second application for relief from a judgment, made in due time under section 473, Code Civ. Proc., although it had denied the former application, and its ruling thereon had been affirmed on appeal. In the case at bar, the second application, the hearing of which is prohibited by the judgment of the Court of Appeal, was not made within the time prescribed by section 473, Code Civ. Proc., the only thing done in the matter prior to the expiration of the six months being the serving and filing of a notice of motion that such application would be made on a day after the expiration of the six months.

This was not the making of the application within the six months (Spencer v. Branham, 109 Cal. 339, 41 Pac. 1095); and the trial court could not properly grant the application.

6 Cal. App. 610

MANN v. MANN. (Civ. 374.)

(Court of Appeal, First District, California. Oct. 11, 1907.)

DIVORCE — JUDGMENT — AMENDMENT—STATUTORY PROVISIONS.

Plaintiff, wife, in divorce was nonsuited, the court stating that a restraining order, under which money due on a policy covering property which had been burned was being held, would not be released, as the court had agreed that payment of plaintiff's counsel fee should be made out of the money, and that it would at a later date entertain a motion to provide for the support of plaintiff and her minor daughter. Thereafter the judge signed a formal judgment of nonsuit, and vacation of the restraining order, on representation by defendant's attorney that he would collect the policy and have the money in court on the day set for the motion for maintenance. On that motion, the court made an order directing specified payments for the maintenance of plaintiff and daughter and counsel fees. Subsequently the court, on motion, amended the judgment of nonsuit, and vacation of the restraining order, by incorporating therein the provisions of the order for maintenance. *Held*, that the court was not authorized by Code Civ. Proc. § 473, under which the amendment was made, providing that the court may relieve a party from a judgment taken against him through his mistake, surprise, or excusable neglect to make the order amending the judgment.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Divorce by Rebecca Mann against Harry Mann. Plaintiff was nonsuited, and from an order under Code Civ. Proc. § 473, amending the judgment by incorporating therein the provisions of an order, subsequently entered, for the maintenance of plaintiff and her minor daughter, defendant appeals. Order reversed.

George H. Bahrs, for appellant. Berry & Brady, for respondent.

KERRIGAN, J. June 15, 1906, plaintiff commenced an action for divorce. At that time there were two children of the parties—a girl, Celia, of the age of 13 years, and a boy, Allen, of the age of 11 years. When the complaint was filed, a restraining order was issued, directed to the Phœnix Insurance Company of London. This company had issued a policy of insurance for $1,500, covering property of the plaintiff and defendant, which property had been destroyed by fire April 18, 1906. This cause was tried August 20, 1906, and after the plaintiff had introduced her testimony the court granted defendant's motion for a nonsuit. This order was entered upon the minutes on August 20, 1906, and on the same day entered on the register of actions in the office of the county clerk. The court stated at the time the motion for a nonsuit was granted that the restraining order, under which the money due on the insurance policy was being held, would not be released, as the court had previously agreed to make provision for the payment of plaintiff's counsel fee out of said money, and that it would, at a later date, entertain a motion to make provision for the support of plaintiff and her minor daughter. September 14, 1906, the attorneys for the respective parties hereto met in the chambers of the trial judge, and the attorney for the defendant requested the judge to sign a formal judgment of nonsuit, and to vacate the restraining order. The request was granted without objection from the attorney for the plaintiff, and upon representation by Mr. Jacob Samuels, defendant's attorney, that Samuels would collect the money due on said insurance policy, and have the same in court September 28, 1906, which was the day set for the hearing of the motion to make provision for the maintenance of the plaintiff and the said minor daughter. Defendant was not present at the meeting on September 14, 1906, and it does not appear that he ever authorized his attorney to enter into any agreement whereby he should be bound to pay any money. Subsequently, and without the knowledge of his attorney, the defendant obtained a certified copy of the order releasing the insurance money, collected the same, and refused to make it subject to the order of the court. September 28, 1906, the court made an order, directing the defendant to pay forthwith to plaintiff the sum of $150 for the maintenance of herself and the said minor daughter, the sum of $75 for plaintiff's counsel fees, and a further sum of $150 per month, commencing October 28, 1906, for the further maintenance and support of said plaintiff and said minor daughter. Subsequently the court, upon motion, under section 473 of the Code of Civil Procedure amended the judgment of September 14, 1906, by incorporating therein the provisions of the order of September 28th. The appeal is taken from this order.

The part of section 473 of the Code of Civil Procedure relied upon by respondent reads as follows: "The court may * * * upon such terms as may be just, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; provided that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order or proceeding was taken." Under the terms of section 136 of the Civil Code the court could have denied the divorce, and provided support for the wife and minor children of the defendant or any of them. When the motion for nonsuit was granted on August 20th, doubtless the judge had this section in mind, and supposed he was proceeding thereunder. Whatever may have been the effect of this action of the court, it was disregarded by all concerned, and in the formal judgment of nonsuit, which was made and entered September 14th, there is no mention of the subject of maintenance.

We think the court had no jurisdiction to make the order of April 22, 1907, amending the judgment. See Egan v. Egan, 90 Cal. 15, 27 Pac. 22; Dyerville Mfg. Co. v. Heller, 102 Cal. 615, 36 Pac. 928; First National Bank v. Dusy, 110 Cal. 69, 42 Pac. 476; O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225. This last-mentioned case was an action for divorce, in which the trial judge filed with the clerk July 8, 1895, a paper entitled "Memorandum of Decision," which set forth, among other things, that the plaintiff was entitled to a divorce, and that the question of alimony and counsel fees was reserved for further consideration. On the same day a minute order was entered as follows: "This case having been heretofore submitted for consideration and decision and taken under advisement, and now the court being fully informed and having fully considered the same, it is hereby ordered that the marriage heretofore and now existing between the defendant and plaintiff be and the same is hereby dissolved, and a decree of divorce granted to plaintiff on the ground of extreme cruelty of the defendant toward the plaintiff. It is further ordered that the question of counsel fees and alimony be reserved for future consideration and decision. See memorandum of decision on file herein." July 25, 1895, formal findings of fact and conclusions of law were signed and filed, upon which judgment was entered. In these findings no mention was made of counsel fees or alimony. February 18, 1897, the court made an order amending the decree of July 25, 1895, nunc pro tunc, by inserting at the end thereof the following: "It is ordered that the question of alimony and counsel fees be reserved for further consideration. * * *" An appeal was taken from this order, and the Supreme Court said: "We think from the evidence upon which the order here in question was made it clearly appears that the decree entered July 25th as signed by the judge, was his last direction to the clerk, and was the decision in the case. * * * If error was committed in rendering the judgment, it was a judicial error, which could be remedied only by appeal or motion for a new trial."

In the case of Dyerville Mfg. Co. v. Heller, supra, the judgment was entered upon the stipulation of the parties. Nearly eight months afterward upon motion the judgment was modified, on the ground that the decree was in excess of the stipulation and the prayer of the complaint, and had been inadvertently entered. While the Supreme Court in that case held that the trial court under section 473 of the Code of Civil Procedure had no jurisdiction to make the order, nevertheless it took pains to say: "When the judgment is entered as rendered, but rendered in excess of the stipulation, as is claimed to be the case here, such judgment is erroneous, and the error one of law committed at the trial, the remedy for which is either by motion for a new trial or by appeal." Egan v. Egan, supra, was a divorce case, in which the parties, pending the submission of the matter to the court for decision entered into a stipulation adjusting their property rights, but the court refused to incorporate its terms into the decree. After the decision in the case had been rendered, a motion was made for an amendment of the judgment under section 473 of the Code of Civil Procedure, which motion was granted. The Supreme Court, in reversing this order, held that the judgment was not taken against the defendant through any mistake, inadvertence, surprise, or excusable neglect, but that the subject-matter of the stipulation was intentionally excluded from the judgment by the court itself at the time it rendered the judgment. The facts in the case at bar above narrated do not disclose this to be a case in which a judgment has been taken against a party through mistake, inadvertence, surprise, or excusable neglect. There is no element of mistake, inadvertence, surprise, or excusable neglect in the case.

It follows that the order appealed from should be reversed, and it is so ordered.

We concur: COOPER, P. J.; HALL, J.

6 Cal. App. 633

FOX v. WORKMAN, City Treasurer. (Civ. 322.)

(Court of Appeal, Second District, California. Oct. 14, 1907. Rehearing Denied by Supreme Court. Dec. 12, 1907.)

1. MANDAMUS—GROUNDS OF RELIEF.

Mandamus lies only to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 1.]

2. SAME — PROCEEDINGS—ANSWER—EFFECT AS EVIDENCE.

Under Code Civ. Proc. § 1091, providing that on mandamus the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof, affirmative allegations of a sworn answer not controverted, either by pleading or proof, are sufficient to support the judgment, though there be no evidence introduced under them, and to that extent the answer may be considered as if it were evidence.

3. SAME.

Where, in mandamus to compel the city treasurer to sell lots to pay an alleged unpaid balance of interest due on street improvement bonds, there was nothing in the record by which the court could ascertain the amount due petitioner, if it should be determined that he was entitled to receive "straight interest" on the delinquent installments of principal as claimed, or from which the court could determine that the amount of principal and interest collected by the city treasurer and by him tendered to petitioner was not in full of his claim, and the street improvement bond act in providing the form of bond leaves the rate of interest in blank, while the act itself provides a maximum rate only, mandamus was properly denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 37.]

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Application by Edwin R. Fox for a writ of mandamus to compel William H. Workman, city treasurer, to sell lots to pay an alleged unpaid balance of interest due on street improvement bonds. The application was denied, and, from an order denying a new trial, petitioner appeals. Order affirmed.

L. M. Fall, for appellant. Leslie R. Hewitt, City. Atty., and John W. Shenk, for respondent.

TAGGART, J. Petitioner applied to the superior court for a writ of mandate, which application was denied. He then moved for a new trial in the said proceeding, which motion was overruled. This appeal is from the court's ruling on the motion.

Petitioner is the owner and holder of certain street improvement bonds issued by the city of Los Angeles in accordance with the provisions of the street improvement bond act as amended in 1899. The respondent at the times hereinafter mentioned was the city treasurer of said city. On October 5, 1901, the owner of the lots upon which said bonds were a lien having defaulted in his payment of both principal and interest due thereon, petitioner declared said bonds delinquent, and made demand in writing upon respondent to sell said lots as provided by law to satisfy said bonds. The latter regularly published notice of sale of said property for nonpayment of said bonds, the time of sale being fixed therein for October 29, 1901. The amounts due upon said bonds, as stated in said notice, were $668.50 principal, and $205.11 interest, which sums were in full of all unpaid principal and coupon interest, respectively, as shown upon the face of said bonds and the coupons attached thereto. Owing to a judgment rendered by the superior court of Los Angeles county on October 15, 1901, declaring said bonds null and void, no sale was made under said notice, and no further steps taken by respondent in the matter. Thereafter the judgment of the superior court was reversed, and said bonds were declared valid by the Supreme Court on an appeal from said judgment. Thereupon the owner of said lots on September 20, 1904, paid to the respondent, and respondent received in full satisfaction of said bonds and interest, the sum of $886.01, which, by his answer, he tenders to petitioner, and alleges he is willing and ready to pay over to petitioner upon presentation and surrender of said bonds and principal and interest coupons belonging thereto. Petitioner contends that he is entitled to straight interest at the contract rate upon the principal from the date the bonds were declared delinquent (October 5, 1901) until the date of collection (September 20, 1904), and that he is entitled to a writ of mandate commanding the respondent to sell said lots to pay the unpaid balance of interest due according to this theory or contention. This amount he alleges to be $126.04.

It is conceded that some of the specifications of insufficiency of the evidence to sustain the findings made by appellant are well grounded, but that after this concession is made there remain well sustained findings sufficient to support the judgment. If, as appellant contends, the proceeding in mandamus is a civil action and governed in the main by the rules of practice in civil cases, it must not be forgotten that it is not a civil action which every citizen having a cause of action against another may avail himself of. Neither will it lie at the suit of every one having a cause of action against a person occupying a public office. It lies only to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station. Some effect must be given to the provision of the statute (section 1091, Code Civ. Proc.) that "on the trial the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof, either in direct denial or by way of avoidance." The application of this section leads to the conclusion that if the affirmative allegations of the sworn answer present matters material to the issue before the court and are not controverted, either by pleading or proof, they are sufficient to support the judgment of the court, although no evidence be taken to support them. McClatchy v. Matthews, 135 Cal. 276, 67 Pac. 134. To this extent, then, the answer may be considered as if it were evidence. Bearing in mind that this is not an action against W. H. Workman or the lot owner to compel payment of the amount of interest due on the bonds, but a proceeding in mandate to compel the city treasurer to do his duty, we must look to the statute to see what he can be required to do in this connection under the petitioner's application for a writ of mandate.

The record contains no statement of the rate of interest which was to be paid on the bonds. No copy of the bonds, or either of them, is set out in the record, in pleading or evidence, and the only allegations from which by computation the rate of interest might be arrived at are of the several amounts of principal and interest due on the respective bonds under the general allegation, "The following is a description of each of said bonds," etc., specifying the particulars given, among which appears, "Also the amount of the principal of each of said bonds and the accrued interest thereon." Computation of interest upon the principal sums given at the rate assumed in appellant's brief upon the only time given fails to give the amount of interest stated in the petition in any instance. As to some of the bonds the amounts approximate; as to others they do not. There is no data from which it can be learned whether any credits were made upon the principal or interest account. There is then nothing in the record by which the court could ascertain the amount due the petitioner, if it should be determined that he was entitled to receive what he calls in his brief "straight interest" on the delinquent installments of principal.

Looking to the street improvement bond act, we find the form of bond states the rate of interest in blank, while the act itself provides a maximum rate only, leaving the matter of rate to be determined by the city council. As no "straight contract" rate of interest was alleged, proven, or found, there was nothing from which the trial court could determine that the amount collected by respondent and by him tendered to petitioner was not in full of his claim. It is upon the principle declared in Ellis v. Witmer, 134 Cal. 254, 66 Pac. 304, that appellant relies. It was there said: "The statute provides that, on the demand being made, 'then the whole bond, * * * with the accrued interest, shall become due and payable immediately, and on the day following shall become delinquent.' The effect of this provision is simply to make the bond due on the making of the demand and on the following day delinquent, leaving its terms otherwise unaffected. The obligation to pay interest therefore continues unimpaired." Appellant's right to interest therefore is dependent upon the contract. There is no contract in the record which would impose upon the respondent the duty of collecting any interest other than that evidenced by the coupons and displayed in his notice of sale.

Finding 11 alone is sufficient to support the judgment of the court in denying the application for a writ of mandate. It is therein found that respondent has collected from the lot owner and holds in his possession the full amounts of principal and interest due on each of the bonds owned by petitioner. This is not controverted by petitioner, except as to the amount, and these amounts the record discloses to be the full sums which respondent should have collected.

Order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

6 Cal. App. 602

HUBBARD v. LEE et al. (Civ. 358.)

(Court of Appeal, First District, California. Oct. 11, 1907. Rehearing Denied by Supreme Court Dec. 9, 1907.)

1. Mechanics' Liens—Proceedings to Perfect—Notice to Owner—Effect.

Code Civ. Proc. § 1184, provides that materialmen and persons other than the contractor may serve written notice on the owner of premises that they have performed labor or furnished materials to the contractor, stating the agreed price; that, on such notice being served, the owner must withhold from the contractor "sufficient money due or that may become due to the contractor, etc., to answer such claim and any lien that may be filed therefor for record under this chapter." *Held*, that the notice intercepts only the amount due or to become due to the contractor at the time when served, and makes the owner responsible for nothing else.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 172.]

2. Same—Right of Materialmen—Personal Responsibility of Owner.

Code Civ. Proc. § 1183, relating to mechanics' liens, provides that, where the contract is not recorded, it shall be void, and the materials furnished by others than the contractor shall be deemed to have been furnished at the personal instance of the owner, and they shall have a lien for the value thereof. *Held*, that the owner of the premises is not made personally responsible for the materials, but the presumption that he ordered the materials obtains only to the end that the premises may be subjected to a lien to secure their payment.

3. Same—Enforcement—Defenses.

Where the owner of premises by his statements leads a materialman to believe that the building thereon is not completed, and the materialman relies thereon and delays filing his mechanic's lien, the owner is bound by his statements in proceedings to foreclose the lien, in view of Civ. Proc. § 1962, subd. 3, providing that where one has by his own act intentionally led another to believe a thing true, and to act upon the belief, he cannot in litigation arising out of his act be permitted to falsify it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 446.]

4. Same—Evidence.

In an action by a materialman to foreclose a mechanic's lien, where the owner had not recorded the contract showing when the work was to be completed, nor a notice required by law, showing when it was actually completed, evidence of his statements to plaintiff at different times that the building was not yet completed are admissible as tending to show the date of completion, and to prove that the owner was estopped from claiming that the lien filed within the statutory period after his statements were made was not filed in time.

5. Estoppel—Pleading—Necessity.

Where plaintiff's claim for a mechanic's lien is not founded upon the theory that the owner is estopped to falsify his statements to plaintiff made within the statutory period for filing the lien that the building was not yet completed, and he is ignorant that it must ultimately rest thereon, his recovery is not precluded by his failure to plead the estoppel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 300.]

6. Appeal—Reservation of Objection in Lower Court—Estoppel.

Where no objection is made in the lower court to evidence of estoppel on the ground that estoppel had not been pleaded, and the court excluded it on another ground, that objection cannot be urged for the first time on appeal.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by T. B. Hubbard against Eugene A. Lee and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Reversed.

A. H. Jarman and Will M. Beggs, for appellant. Beasly & Fry, for respondent Lee. J. S. McGinnis, for respondents Hastings & Hastings.

COOPER, P. J. Action to foreclose lien for materials. Findings were filed, upon which judgment was entered for defendant Lee as to the lien claimed on his land. This appeal is from the judgment and an order denying the plaintiff's motion for a new trial. It appears that in April, 1905, defendants Hastings, copartners, herein called the contractors, entered into a written contract with defendant Lee, the owner of the lots, by the terms of which they agreed to furnish materials and labor and build for Lee three houses for the sum of $6,700. This contract was never filed for record in the office of the county recorder. The contractors entered upon the performance of the contract, and at their request Hubbard and Carmichael Bros., the assignors of plaintiff, furnished lumber, mill work, and building materials, which were used in the construction of the houses, of the value of $2,894.90, of which sum $1,000 was paid by the contractors, and no more. The buildings were completed in October, 1905, but no notice of completion was ever filed in the recorder's office. On June 29, 1906, the assignors of plaintiff served upon Lee a notice in writing, stating that $1,894.90 was still due them for materials used in the buildings, and demanding that Lee withhold from the contractors the said sum and pay the same to them for said materials. At the time this notice was served Lee had paid to the contractors the sum of $6,225 upon account, and there was remaining due upon the contract and for certain extra work the sum of $526.35, and no more. The court rendered a personal judgment against Lee for the latter named amount, and as to this there is no controversy. On July 23, 1906, the plaintiff's assignors filed for record in the recorder's office their claim of lien in due form and properly verified, and immediately thereafter commenced this action for the purpose of foreclosing the said claim and having it declared a lien upon the buildings and lots of Lee. The court held that the claim of lien was not filed for record within the time allowed by law, and that the plaintiff was not entitled to foreclose the same, but was only entitled to a personal judgment against the original contractors for the balance after deducting the said $526.35. Two questions are presented for decision, which we will consider in the order set forth in appellant's brief.

The first contention is that, as the contract was void as to plaintiff's assignors because not recorded, the owner, Lee, became personally responsible to them for the amount of their claim. It is urged that the statute itself is notice to the owner, and that, if he pays the contractor the full contract price, he does so at his peril. It is provided in the Code (Code Civ. Proc. § 1184) that materialmen and persons other than the contractor may serve a written notice upon the owner that they have performed labor or furnished materials to the contractor, stating the value or the agreed price. Upon such notice being served, it is the duty of the owner to withhold from the contractor "sufficient money due, or that may become due, to such contractor, or other person, to answer such claim and any lien that may be filed therefor for record under this chapter." At the time the notice was given in this case there was only $526.35 due the contractor, and nothing else became due. The notice, therefore, intercepted the amount "due," and it was kept by the owner, and applied by the judgment of the court toward the payment of the plaintiff's claim. It is therefore evident that the notice did not and could not make the owner responsible for anything not due or to become due to the contractor at the time it was served. The contention, therefore, resolves itself into the question as to whether or not the statute makes the owner responsible personally for materials furnished to the contractor in cases where the contract is void because not recorded. We do not think such is the meaning of the statute. It provides (Code Civ. Proc. §§ 1183, 1184) that, unless the contract is recorded, it shall be void, and the materials furnished by all persons except the contractor "shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." And, again, that, in case such contracts do not conform substantially to the provisions of the section, all labor done and materials furnished "shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." The statute means that in such case the materials shall be deemed to have been furnished at the special instance and request of the owner, for the purpose of giving the materialman a lien upon the building or structure upon and in which such materials were used. It imposes a penalty upon the owner of the lot upon which the building is erected by making the building and the lot subject to a lien for the value of the materials. The owner in such case does not purchase the materials, nor does he make any contract to pay for them. The materialman does not contract with the owner, nor furnish the materials upon his personal credit. The only liability of the owner is that imposed by the statute, and that is to subject his property to a lien; and even then the claim of lien must be properly made and recorded, and action brought to foreclose in proper time as in other cases. No personal liability is mentioned in the statute, and in each section, after the words "shall be deemed to have been done and furnished at the personal instance of the owner," we have the additional words, "and they shall have a lien for the value thereof." We are not inclined to extend the meaning of the statute beyond its express terms for the purpose of compelling the owner to pay a debt that he did not contract nor agree to pay, and that was in fact incurred by another party. Buell v. Brown, 131 Cal. 158, 63 Pac. 167. While the following cases do not go to the extent of what has been said, they uphold the construction we have placed upon the statute: McMenomy v. White, 115 Cal. 339, 47 Pac. 109; McClain v. Hutton, 131 Cal. 133, 61 Pac. 273, 63 Pac. 182, 622; Kennedy, etc., Lumber Co. v. Priett, 115 Cal. 98, 46 Pac. 903; S. Cal. Lumber Co. v. Schmitt, 74 Cal. 625, 16 Pac. 516.

The second contention of appellant is that the court erred in excluding certain evidence as to statements or declarations of defendant Lee, and also of the contractors, as to when the buildings were completed. The complaint alleges that the buildings were completed May 17, 1906. Hastings, one of the contractors, testified that the buildings were completed on said last-named date. The court found that they were completed in the month of October, 1905, and, further, that the contractors "performed labor upon and used materials in the construction of said buildings on or about May 17, 1906, but that the said labor performed and materials furnished were to remedy certain trivial imperfections therein." It is thus seen that the question as to when the buildings were completed was a material one, as upon it depended the validity of the lien. It is sometimes a question not easily determined as to when a building was in fact completed. In many cases the question is so close as to whether the last work was done by way of completing the building, or to remedy trivial imperfections, that the finding of the trial judge will not be disturbed. In this case the owner did not file the contract for record, as the statute made it his duty to do. He did not file for record a notice setting forth the date the building was actually completed, as the statute provides he must do. Having done nothing by way of protecting the materialman, he is not in a position to claim the strict exclusion of all testimony tending to show his own acts and conduct in relation to the fact as to when the buildings were completed.

Lee was called as a witness by plaintiff, and was asked the following question: "Q. In April, 1906, did you have any conversation with Mr. T. B. Hubbard, wherein you informed him that the buildings were not completed, and that you had not accepted them?" Defendant's counsel objected to the question on the ground that it was incompetent, irrelevant, and immaterial, and not the way to prove the completion of the buildings. Counsel for plaintiff then said: "We want to show by the defendant Lee himself that he, Lee, informed Mr. T. B. Hubbard, manager of Hubbard & Carmichael Bros., that these buildings were not completed, and that he, Lee, had not accepted the buildings, and would not until certain other work was done. That Lee had repeatedly made these statements, and that Hubbard & Carmichael Bros., materialmen, and plaintiff's assignor, had relied upon these statements." The court sustained the objection to the question, and plaintiff duly excepted. The plaintiff while a witness in his own behalf was asked the following question: "Q. Between September, 1905, and May, 1906, did you have any conversation with Wesley W. Hastings with reference to the completion of the Lee house?" Defendant's counsel objected to the question as immaterial. Counsel for plaintiff thereupon stated that the object of the question was to prove an estoppel. The court sustained the objection, to which the plaintiff duly excepted. The same question, in effect, was asked of the witness as to statements made by the contractors, and the same ruling was made. The plaintiff, after being further questioned as to statements made by defendant Lee, was asked if he "acted upon those statements." Upon objection being made, counsel for plaintiff again stated to the court as follows: "I will state to the court that the purpose of these questions is as follows: I want to prove by Mr. Hubbard and other witnesses that Mr. Wesley W. Hastings, as the architect, informed Mr. Hubbard, as the manager of Hubbard & Carmichael Bros., frequently between the months of September, 1905, and May, 1906, that the Lee houses were not completed, nor were they accepted, and that there were two payments still due. I want to prove, also, that Mr. Lee, the owner of these houses, informed Mr. Hubbard that the houses were not complete, and that he had not accepted them even as late as April, 1906." The court, in excluding the offered evidence, said: "Your offer to prove these matters is denied. It is the duty of a materialman to determine for himself, when the houses are completed. He has no right to rely upon the statements of the owner, or the architect."

In our opinion the court erred in its rulings in so excluding the offered testimony. It was competent for the purpose of proving or tending to prove the fact as to when the buildings were completed, and also for the purpose of proving that the defendant Lee was estopped from claiming that the lien was not filed in time. It was an admission that the buildings had not been completed. Whether or not the statements were made was for the court to determine, but we must presume for the purposes of this case that they were made. If Lee stated to the plaintiff or his assignors repeatedly that the buildings had not been completed, and that he had not accepted them, as late as April, 1906, what reason was there for excluding the evidence? If the statements were made and were untrue, they certainly were made for some purpose. If they were not made for the purpose of lulling the plaintiff into repose, so that the time for filing a lien would expire, it is difficult to perceive their object. It would be the most natural thing for a materialman to ask the owner as to whether or not the building had been completed, and in such case the materialman would have a right to rely upon the answer or statement given to him by the owner. It would not be the duty of the materialman to employ an expert to examine the building in order to determine the fact. If he did, the owner might not allow such expert to enter the building. In the present case the owner, not only failed to file any notice as to when the building was completed, but now claims that his statements to the lien claimant, that the building had not been completed, were immaterial, and the court held that the plaintiff "had no right to rely upon the statements of the owner." If the claimant could find no notice of record, if he could not rely upon the statements of the owner, and if he could not rely upon the statements of the architect, his right to file a notice of lien, and thus save his rights, was a mere hazard. If he had filed it before the building was completed, it would have been too early. If he waited beyond the statutory time, it was too late. If the owner by his own declaration intentionally led the plaintiff to believe that the buildings were not completed, and plaintiff acted upon such belief, and by reason of such declaration, as to the completion of the buildings he cannot now be permitted to falsify such declaration. Code Civ. Proc. subd. 3, § 1962. In McIntyre v. Trautner, 63 Cal. 429, it was held that when defendant objected that the job was not satisfactory, that the pipes leaked, and requested plaintiff to go and put them in proper shape, that defendant would not be heard to say that the work was completed before the plaintiff repaired and perfected the pipes. See, also, Minneapolis Trust Co. v. Great Northern Ry. Co. et al., 74 Minn. 30, 76 N. W. 953; Minneapolis Trust Co. v. Maxfield, 81 Minn. 28, 83 N. W. 463; 20 Am. & Eng. Ency. of Law (2d Ed.) p. 399. Defendants attempt to obviate the point by arguing that, as the plaintiff did not plead estoppel, he will not be allowed to prove it. Such rule does not apply when the plaintiff is without knowledge that his demand must ultimately rest upon estoppel. Donnelly v. S. F. Bridge Co., 117 Cal. 421, 49 Pac. 559. In this case estoppel was not the foundation of the plaintiff's claim. He may have believed, and may have been justified in believing, that the buildings had not been completed. It may be further said that no objection was made to the evidence on the ground that estoppel had not been pleaded, nor did the court place its ruling upon that ground. In such case the objection cannot be urged here for the first time. Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157; Flinn v. Ferry, 127 Cal. 648, 60 Pac. 434.

The judgment and order are reversed.

We concur: HALL, J.; KERRIGAN, J.

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6 Cal. App. 624

WALDTEUFEL v. PACIFIC VINEYARD CO. (Civ. 366.)

(Court of Appeal, Third District, California. Oct. 11, 1907.)

1. Trial — Instructions—Objections—Sufficiency.

An objection by defendant to instructions given at request of plaintiff, as follows: "To the giving of the foregoing instructions and to each and every portion thereof, the defendant excepts" was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 689.]

2. Damages—Measure of Damages—Breach of Contract.

Where, by a contract for the sale of land to plaintiff, defendant agreed to plant the land with certain vines, and planted inferior vines, plaintiff's measure of damages was the difference between the value of the land planted according to agreement and the value not so planted, at the time when plaintiff discovered the breach of the agreement or when with reasonable diligence, he could have made such discovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 321, 322.]

3. Same.

In such case, the time for taking the measure of damages, even if it could be extended by reason of negotiations between the parties beyond the time plaintiff discovered the fraud, could not be extended beyond the date of the commencement of the action and to the date of the trial.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Susie Waldteufel against the Pacific Vineyard Company. Judgment for plaintiff, and defendant appeals. Reversed.

Frank Kauke, for appellant. Jos. J. and Wm. H. Webb, for respondent.

CHIPMAN, P. J. This is an action upon two written contracts, one of which was alleged, in two different counts, to have been modified by oral agreement or given a construction by the parties somewhat at variance with the terms of the written contract. The second contract, with its breach by defendant, was set forth in two separate counts. Both agreements were for the sale and purchase of certain vineyard land; there being 20 acres in each tract, partly planted and partly not planted. The case was tried to a jury and plaintiff had the verdict. Judgment was entered thereon, from which defendant appeals.

Of the first tract it was alleged that defendant had agreed to plant the land to muscat and emperor grape rootings, instead of which defendant planted the land to many different varieties of vines, inferior to muscats and emperors, and planted them in a "mixed up and jumbled together manner," to plaintiff's damage. Of the second tract it was alleged that defendant warranted that 10 acres were planted to muscat vines; that plaintiff acted on such warranty; that the vines proved to be "a mixed up and jumbled together" lot of vines of many different varieties; that defendant's representations were false and fraudulent.

Only a casual examination of the complaint is necessary to disclose its vulnerability and that it would not stand against a demurrer properly interposed. But defendant failed to take advantage of any defect in the complaint by demurrer or otherwise, and went to trial on an answer specifically denying its material allegations, and pleading full satisfaction of plaintiff's claims. At the trial defendant sought to obtain the advantages he would to some extent have derived from a demurrer by objections to the evidence, but in such form as, according to the view of plaintiff, failed to raise the question of the sufficiency of the complaint; and on the appeal here defendant urges the entire insufficiency of the complaint in one or more of its counts, to state a cause of action. This attack is met by plaintiff, who claims that the complaint is sufficient in every count to sustain the general verdict, and that it is too late for defendant to rely upon any uncertainty in the complaint or that the evidence was not within the issues. While it may be that we could find some way to sustain the complaint as a basis for the general verdict and the rulings of the court upon the evidence offered, in view of the condition of the record, we do not find it necessary to make the attempt, inasmuch as the case must go back for a new trial on other grounds. It is to be hoped, however, that, should the case again come before us, the parties will have profited by their discussion of the points involved, and that the pleadings will be looked to with greater care.

The first of these contracts was made February 23, 1904, and the second November 18, 1904. The trial was had June 25, 1906. The husband of plaintiff testified that he attended to the business of making the contracts for his wife, that the property belonged to her, and that he was acting as her agent throughout the transactions; and this seems not to be controverted. Plaintiff's husband testified that he discovered the mixed up condition of the vines complained of in the spring of 1905 after the vines had developed foliage as to both tracts of land; that he called it to the attention of the president of defendant, Mr. Malter; that they had some talk in which the suggestion was made by Malter that defendant would let plaintiff select other land of defendant company and convey it in lieu of the land already conveyed, but this talk came to nothing, and it does not appear clearly whether this talk related to both tracts. We infer that it related only to the second tract. Finally, in the summer about August, or in the fall not later than November, 1905, and in reply to plaintiff's importunities, made by her husband, Malter abruptly told him "to go to hell." That ended the matter, and, instead of going where he was directed, the irate husband chose the presumably more congenial destination, and went to his wife, who brought the action in December, 1905. At the request of plaintiff the court instructed the jury as to the cause of action, based upon the first contract, as follows: "(3) If you find a verdict for the plaintiff in this case—that is, if defendant was guilty of acts which caused damage as alleged in the complaint—the measure of damages would be the injury caused to the land by the planting of such improper or unfit lot of vines thereon, or, in other words, the difference between the actual value of the land as it now stands if improperly planted or planted with a lot of vines mixed and jumbled, and its value as it would be if properly planted in the manner and with the sort and character of vines for which the parties contracted and which were contemplated by the contract, if any existed between the parties, for the furnishing of such vines and the planting of the said land therewith." At plaintiff's request, the court instructed the jury as to the cause of action based upon the second contract, as follows: "With regard to the third and fourth causes of action, the measure of damage there would be practically the same as in the first, in case the plaintiff is entitled by your verdict to any damage by reason of the facts therein alleged, with reference to the second parcel of land bought; that is to say, that the value of the land as defendant represented it to be, or what it would have been worth if it was as represented by defendant, less the actual value at the time, to wit, at the time plaintiff discovered the falsity, if falsity there was, in such representations, unless plaintiff was justified in waiting a still longer time before trying to prevent further damage, and in that case the difference between the value of the land as it would have been if as represented at the time when plaintiff finally found she was no longer justified in relying on the promises of defendant that the defendant would remedy the defects and make the plaintiff whole, and the actual value of the land and its improvements at that time would be the measure of the damage for which plaintiff would be entitled to recover, coupled with any expense she may have incurred in proper efforts to remedy said defects, if they exist, or to lessen the damages caused, if any were caused by defendant's acts."

Appellant urges that instruction No. 3 does not state the true measure of damages, and that the instruction following is open to the same objection, and, besides, is self-contradictory and conflicts with instruction 3. The evidence offered by plaintiff at the trial in support of the view of the law taken in the instructions was admitted over defendant's objection. Respondent contends that appellant cannot be heard to object to the instructions because its objection was not sufficiently specific. It was as follows: "To the giving of the foregoing instructions, and to each and every portion thereof, the defendant then and there duly excepted and now excepts." Addressed to the instructions asked for by plaintiff this was sufficient. It might not have been when pointed to instructions given by the court on its own motion. Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380; Cavallaro v. Texas, etc., Ry. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94; Miller v. Fireman's Fund Ins. Co. (Cal. App.) 92 Pac. 332.

The measure of damages was stated in Shearer v. Park Nursery Co., 103 Cal. 415, 37 Pac. 412, 42 Am. St. Rep. 125. In that case the plaintiff had contracted for fruit trees of a designated variety of fruit. They turned out to be of a different variety, and plaintiff sued for the damages resulting from this breach of warranty. It was held, giving a construction to section 3313 of the Civil Code that "the time to which the warranty refers is the time when the breach thereof is, or with due diligence might be, discovered by the purchaser." And it was held to be proper in proving the damage "to prove the difference between the value of trees of the kinds ordered by plaintiff and the trees actually delivered by defendant at the time when those delivered first bore fruit; that being the earliest date at which plaintiff discovered, or could have discovered, the breach of the warranty." In doing this, the court held further that it was proper "(1) to prove the value of the land occupied by the trees at the time the breach of warranty was discovered; and (2) the value the land would have had at the same time if trees of the kinds and proportions ordered by plaintiff had been planted and cultivated, instead of the trees of a kind not ordered by plaintiff." Applying the principle of this case to the one here, we think the measure of damages is the difference between the value of the land planted according to agreement and the value of the land not planted according to agreement, the time of taking such measure being when plaintiff discovered the breach of the agreement, or at the time at which, with reasonable diligence, he could have made such discovery. In Rowe v. C. & N. Ry. Co., 102

Iowa, 286, 71 N. W. 409, an orchard was destroyed by fire caused by defendant carelessly allowing fire to escape from its locomotive engine. The measure of damage was there held to be the difference in the value between the real estate before and after the fire. Heilman v. Pruyn, 122 Mich. 301, 81 N. W. 97, 80 Am. St. Rep. 570, was a case similar to Shearer v. Park Nursery Co., supra, where the measure of damages laid down is the difference between the value of the land with and without the trees, or, as the trial court instructed the jury, "the value that would have been added to the premises if the trees had been of the variety ordered." In the present case the instructions given to the jury directed them to fix the value of the land at the time of the trial (June, 1906) as improperly planted, and as it would then be if properly planted, and to award the difference as damages. But as to the first contract the cause of action accrued in the spring of 1905, and the value, respectively, of properly and improperly planted land at that time would obviously be different from the value of the same land a year later. So, also, as to the second contract, as plaintiff discovered the fraud in the spring of 1905, her cause of action then accrued. And, if the right to measure the damage as of a later date, by reason of the negotiations above mentioned, could be allowed (as to which we express no opinion), it certainly could not be extended to the date of the trial in 1906 and beyond the date of the commencement of the action.

The judgment is reversed, and the cause remanded for a new trial.

We concur: HART, J.; BURNETT, J.

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6 Cal. App. 618

GABEL v. PAGE. (Civ. 359.)

(Court of Appeal, Third District, California. Oct. 11, 1907.)

1. Landlord and Tenant—Recovery of Possession—Actions—Sufficiency of Evidence.

In an action for unlawful detainer of demised premises after expiration of the term of a written lease, and default in payment of rents, evidence *held* to sustain findings that the parties entered into a subsequent oral lease from month to month for an indefinite period, and that the time for payment of the rent was extended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 1248.]

2. Appeal—Review—Verdicts—Conflicting Evidence.

Where the evidence is conflicting, the verdict of a jury will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935–3937.]

3. Evidence—Parol Testimony—Varying Written Lease—Subsequent Parol Lease.

Proof of an oral lease, to take effect after the expiration of a written lease, is not inadmissible as varying the terms of the written lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1741.]

4. Landlord and Tenant—Length of Term—Presumption—Statutory Provisions.

An oral lease or understanding, under which the tenant under a written lease was to remain in possession of agricultural land until the next summer after the termination of the lease on October 31st, and that the rent was to be paid by the month, is not within the presumption established by Civ. Code, § 1943, providing that a hiring of real property other than lodging and dwelling houses, in places where there is no usage on the subject, is presumed to be one year from its commencement, unless otherwise expressed in the hiring.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 219.]

5. Frauds, Statute of—Oral Lease of Land—Term.

An oral lease of real property for one year from a future date is void, but such a lease at a fixed monthly rental, without any agreement or understanding as to the length of the time the lease is to run, is valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 92.]

Appeal from Superior Court, Kings County; W. M. Conley, Judge.

Action by Mary A. Gabel, trustee, against Elias C. Page. From a judgment for defendant, plaintiff appeals. Affirmed.

See 91 Pac. 339.

T. E. Clark, for appellant. E. T. Cosper, for respondent.

HART, J. This is an action for unlawful detainer of the premises described in the complaint. The case was tried by jury and verdict returned and judgment accordingly for the defendant. The appeal is from the judgment upon a bill of exceptions.

The land over which this action arises is situated in Kings county, and was demised to the defendant, and he entered into the possession thereof, by and under the provisions of a certain written lease, for the term of 12 months from the 1st day of November, 1904. The complaint was filed on the 28th day of November, 1905. It alleges that the term fixed by said lease expired on the 31st day of October, 1905, and that the defendant "unlawfully detains said premises and the possession thereof against the plaintiff herein, and in violation of the express terms of the said lease under which he entered said premises." It further avers that "the defendant has refused and neglected to pay rents and is now in arrears for rents to the amount of above $60"; that he continues to unlawfully hold and detain the premises against the will and consent of plaintiff, and "persists in refusing to quit and deliver up the possession of said premises, to either the plaintiff or her agents," etc. It is also alleged that the defendant, on several different occasions, was served by the plaintiff with written notice to quit said premises and deliver the possession thereof to said plaintiff or her agent. These several notices were made a part of the complaint and were proved at the trial. The prayer of the complaint asks for judgment for the restitution of the premises and for damages as authorized in such cases by section 1174 of the Code of Civil Procedure. It will be observed that this action was brought within a month after the date of the expiration of the written lease under which the defendant held possession of the land; but it is claimed by the defendant that he and the plaintiff, by her attorney in fact, Solomon C. Page, entered into an oral agreement by which the former was to remain in possession of the premises as lessee thereof for an indefinite or unspecified time after the end of the term fixed by said written lease. The plaintiff, by her said attorney in fact, declares that no oral agreement of the nature suggested was ever had between the parties, and that the expiration of the term stipulated in the written lease terminated the defendant's right to further possession of the demised premises. The controversy between the parties, as thus stated, therefore, finally resolves itself into the single proposition of whether or not it can be said, as a matter of law, the evidence, as shown by the record, is sufficient to sustain the verdict.

There are some other legal propositions discussed by counsel—as, for instance, it is contended that the evidence received for the purpose of showing the alleged oral lease amounted to an attempt to vary the terms of the written lease by parol testimony, and that the oral lease, if any were made, having fixed no determinate term during which it was to remain in force, comes within the provisions of section 1943 of the Civil Code, which provides that "a hiring of real property, other than lodgings and dwelling houses, in places where there is no usage on the subject, is presumed to be one year from its commencement, unless otherwise expressed in the hiring"; that there being no usage shown here, said oral lease was presumptively for a term of one year, and, having been made so as to take effect in futuro, or its terms were not to be performed within one year after the making thereof, is, under the interpretation given subdivision 1 of section 1624 of the Civil Code by the Supreme Court, absolutely void. Wickson v. Monarch Cycle Mfg. Co., 128 Cal. 157, 60 Pac. 764, 79 Am. St. Rep. 36. But we think that, while the evidence offered in support of the defendant's special plea in bar of plaintiff's action—that an oral lease of the premises to him was made by the plaintiff on the 19th of September, 1905—is exceedingly slight, it is nevertheless sufficient to support the verdict. The record evidence consists entirely of the testimony of the plaintiff and the defendant and the written lease and the written notices, signed by plaintiff's agent and with which the defendant admitted that he was served prior to the filing of the suit, demanding the adjustment of certain alleged arrearages in rent and restitution of the premises.

The defendant testified that on the 19th day of September, 1905, he had a conversation with Solomon C. Page, the attorney in fact of plaintiff, having management, as such, of all of plaintiff's business interests and affairs, in which conversation said S. C. Page orally leased to the defendant the premises in question for a short period of time, to take effect from and after the termination of the term prescribed in the written lease—October 31, 1905. He testified that he said to S. C. Page that he had some cows and a dairy on the land, and that he would have to be given a little time within which to look after them and his other interests after the expiration of his term under the written lease. He said that S. C. Page replied to him, "All right, you can stay out there"; that there was no definite time fixed, but that all he desired was to remain there until the summer of the following year; that the understanding was that he was to remain on the land and put in the crops "that the old lease called for." In reply to counsel for the plaintiff, on cross-examination, the defendant stated that the oral agreement would not, he thought, "last longer than summer." He further testified that, in reliance upon said oral lease, he proceeded to prepare the land for cultivation and the planting of crops. He admitted, however, that the crops were not put in until after the institution of the suit. The plaintiff's agent contradicted the testimony of the defendant, and offered in support or corroboration of his testimony the written notices referred to as having been served on the defendant to quit and surrender up the premises. Three of these notices were served before and one after the expiration of the written lease, and were, no doubt, admissible for whatever they might be worth in the estimation of the jury. While the defendant admitted that said notices were served upon him, they at best constituted but little, if any, more than self-serving declarations of the plaintiff and not necessarily incompatible with the claim of the making of the oral lease. As to the evidence, it may be said that this is one of those cases in which a verdict either way could be sustained upon appeal. But, as has been repeatedly declared by the Supreme and this court in innumerable cases, where it was asked that the appellate courts set aside verdicts or findings upon evidence displaying a conflict upon vital points, it was for the jury to pass upon the evidence and the credibility of witnesses. The judgment of the jury in the case at bar was that the defendant, upon whom was cast the burden of establishing his affirmative defense or special plea, had made out his case. The evidence is, as we have indicated, slight, but the jury, and the judge of the court below, to whom upon the conclusion of the taking of the testimony was submitted a motion by plaintiff for an order directing a verdict for her, and which motion was denied, were in a position of vantage, not given to reviewing courts, in which they were able to weigh the testimony by all the tests known to the law. Upon paper the testimony of a witness might appear to be not only convincing but conclusive, yet his manner of giving such testimony before the trial judge and jury might have been such as to inspire disbelief in his statements, and thus to justify a total disregard of all that he has testified to.

It appears from the record here that at a former trial of the case the defendant had testified that the term agreed upon in said oral lease was for one year, and that this statement corresponded with the averments of his answer; that before the beginning of the trial, the record of which is now under consideration, the court below allowed him to amend his answer, and that that portion about the oral lease having been made for the term of one year was eliminated, and in place thereof it was averred that an agreement was entered into between the parties whereby the defendant was to remain in the possession of the premises after the expiration of the term of the written lease, "pending the settlement of the litigation then and there going on between plaintiff and defendant." It is argued that the inconsistent statements of the defendant thus shown should be considered as an impeachment of his testimony. But this was a matter for the jury to consider, and presumably it was fully considered by it in its deliberations upon the evidence, and the defendant's apparent inconsistency does not appear to have struck the jury as significant.

There is nothing in the contention that proof of the oral lease involved the varying of the terms of the written lease by parol. The oral lease was made to take effect after the expiration of the written lease. There was no connection between the two leases, and the oral had no reference to the written, except in so far only as the fact of the termination of the latter marked the time for the beginning of the former. The written remained in full force and effect up to the date it terminated, undisturbed in its pristine integrity by the oral lease.

The view we have expressed concerning the facts as found by the jury indicate our opinion that there is no merit in the claim that the oral lease was of a character to bring it within the presumption established by section 1943 of the Civil Code. As we have seen, the defendant testified that the understanding between him and plaintiff's agent was that he was to remain in possession after the written lease had run its course until the following summer, which would make the term less than one year. Moreover, said oral lease, according to the testimony of the defendant, called for the payment of the rent by the month, and not annually. It is held in Phelan v. Anderson, 118 Cal. 504, 50 Pac. 685 (we quote the syllabus, which accurately states the point as decided), that "a parol lease for five years is void, and no rights are fixed by its terms; but, when entry is made under it, the tenancy is either at will, or from month to month, or from year to year, according to the circumstances of the case, and, where the land is agricultural, and the rent is to be paid *annually* and is in fact paid to the lessor and accepted by him as *annual* rent [italics in both instances ours], the holding is from year to year"—citing a number of cases from other jurisdictions.

Complaint is made of one of the instructions. The instructions given to the jury are not voluminous; two only having been submitted by the court. The first was to the effect that if the jury found from the evidence that the plaintiff by her agent leased the premises by verbal lease to the defendant for the term of one year, to commence on the date of the expiration of the written lease, such oral lease was void. By the second instruction, to which objection is made, the court told the jury that, if it found that said oral lease "leased the premises in question to the defendant at the monthly rental value of $29.16 without any agreement or understanding as to the length of time the lease was to run, then your verdict should be for the defendant." These instructions, with commendable brevity, state the law correctly under the evidence.

The defendant, who is charged in the complaint with having defaulted in the payment of the monthly rent, testified that the plaintiff's agent extended the time for the payment of said rent; that there was an understanding between them that the defendant would be given such time for the payment of back rent as might be reasonably necessary for him to earn the money. The agent of plaintiff disputed this testimony, but evidently the jury believed the defendant upon this as well as upon the other material points in the case.

We should judge that, at this late date, so remote from the time at which the differences between the parties were litigated in the court below, the fruits of this decision will prove commensurate only with the costs legitimately accruing in prosecuting the controversy. Reading between the lines, we might infer that the trouble is one involving family differences over the disposition of property by a common ancestor, and it may not be amiss to suggest that the parties would have perhaps found it infinitely cheaper and themselves relieved of much worry and annoyance had they compromised or otherwise settled their differences before the perfection of an appeal from which neither could hope to profit so far as their respective claims as to the oral lease were concerned.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

6 Cal. App. 614

GENILLA v. HANLEY. (Civ. 308.)

(Court of Appeal, Second District, California. Oct. 11, 1907. Rehearing Denied by Supreme Court, Dec. 9, 1907.)

1. Municipal Corporations — Contracts — Statutory Provisions — Application — Eight-Hour Day Penalty.

A contract for the construction of a sewer, awarded pursuant to law, the entire consideration of which is to be paid for by assessments on contiguous property, which contract expressly provides that the city will not be liable for any portion of the expense of the work, is not within the provisions of Pen. Code, § 653c, requirng the officer or agent of the state or any political division thereof making a contract for labor on public works to insert therein a provision for a certain forfeiture by the contractor in case he requires or permits laborers to work more than eight hours per day on the work, and to report all violations of such stipulation to the representative of the state or political division thereof, party to the contract, authorized to pay to said contractor moneys due, etc., and that such representative, on making payments of money due on the contract, shall deduct sums forfeited pursuant to the stipulations; for, even if the work was for a political subdivision of the state, there was no representative of the city authorized to pay the contractor any money.

2. Statutes — Construction — Application of Statute.

Where a duty is prescribed by a statute and a remedy is therein provided for a breach of such duty, and the remedy is such that it cannot be applied to a particular subject, it may be inferred that such subject was not within the view of the Legislature when enacting the statute. Hence, where the Legislature in an act fixes the penalty and provides the manner for enforcing the same in case of a violation of a stipulation in a contract for public work, it must be presumed that it intended the act to apply to those cases only where the penalty could be enforced in the manner designated.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Mandamus by John Genilla against James Hanley, superintendent of streets, etc. From a judgment for plaintiff, defendant appeals. Affirmed.

W. B. Mathews, Leslie R. Hewitt, City Atty., and Emmet H. Wilson, Chief Deputy, for appellant. Edward T. Sherer, Frederick Gros, and Charles C. Crouch, for respondent.

SHAW, J. This is a proceeding instituted by petition and affidavit in the superior court of Los Angeles county for the purpose of obtaining a writ of mandate directed to appellant James Hanley, as superintendent of streets of the city of Los Angeles, commanding him as such superintendent to sign and execute a certain contract for the construction of a sewer in said city, which contract had been duly awarded to petitioner. The proceedings for the doing of said work were duly had and taken under and in accordance with the provisions of an act of the Legislature of the state of California, commonly known as the Vrooman act, entitled, "An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885 (St. 1885, p. 147, c. 153), and the several acts amendatory thereof.

The respondent, as the contractor to whom said contract for the construction of a sewer had been awarded, presented to said superintendent of streets a contract duly executed by said contractor, which, it is conceded, was in due form, except in the particulars hereinafter stated, and requested said superintendent to execute the same in his official capacity as such superintendent of streets. The superintendent refused to sign or execute the agreement, upon the sole ground that it did not contain the stipulation designated in section 653c, Pen. Code, and which by the provisions of said section is required to be inserted in all contracts involving the employment of any laborer upon any of the public works of the state, or political subdivision thereof, or upon work done for any political subdivision thereof; the contention of appellant being that the provisions of said section, commonly known as the "eight-hour law," apply to contracts for street improvement which are authorized to be made pursuant to the provisions of said street improvement act. Conceding, but not holding, the proposed work to be for a political subdivision of the state, we are nevertheless of the opinion that the act is inapplicable to the contract in question. Section 653c, Pen. Code, provides: "The time of service of any laborer, workman, or mechanic employed upon any of the public works of the state of California, or of any political subdivision thereof * * * is hereby limited and restricted to eight hours during any one calendar day." The section further provides, where the contract involves the employment of any laborer upon the work mentioned in said section, the officer or agent of the state, or of any political subdivision thereof, making or awarding such contract, shall insert therein a provision to the effect that the contractor to whom said contract is awarded shall forfeit, as a penalty to the state or political subdivision thereof in whose behalf the contract is made and awarded, $10 for each laborer employed in the execution of said contract for each calendar day during which said laborer is required or permitted to labor more than eight hours in violation of the provisions of the act. Such officer or agent is further required to report all violations of such stipulation so required to be inserted in the contract to the representative of the state, or political subdivision thereof, party to the contract, authorized to pay to said contractor moneys due to him under the said contract, and such representative, when making payments of money due thereon, shall deduct and retain therefrom such sums as shall have been forfeited pursuant to the stipulation.

There is no contention that the city council ordered the whole or any part of the cost of the work paid out of the municipal treasury, as it might have done under the provisions of section 26 (page 161) of the said street improvement act. Indeed, the contract in question contains an express stipulation to the effect that in no case will the city be liable for any portion of the expense of the work. Hence there could be no money becoming due the contractor from the city, and therefore none which any representative of the city was authorized to withhold and retain as forfeited under the stipulation. While the superintendent of streets may receive and receipt for money paid on account of assessments made upon the lots and parcels of land to cover the cost of the work, he, to such extent at least, acts as the agent of the contractor. It will thus be seen there is no "representative of the state or political subdivision, party to the contract, authorized to pay to said contractor moneys becoming due to him under the said contract." Where a duty is prescribed by a statute and a remedy is therein provided for a breach of such duty, and the remedy is such that it cannot be applied to a particular subject, it is but fair to infer that such subject was not within the view of the Legislature when it enacted the statute. In the present case, the Legislature having in the act itself, not only fixed the penalty, but provided the manner for enforcing the same in case of a violation of the stipulation, must be presumed to have intended the act to apply to those cases only wherein the penalty could be enforced in the manner designated, namely, by a retention of the forfeitures out of the amount due to the contractor from the political subdivision, party to the contract. It is clear that such remedy is wholly inapplicable to the case at bar.

In the case of State v. Atkin, 64 Kan. 174, 67 Pac. 519, 97 Am. St. Rep. 343, the Supreme Court of Kansas held the provisions of the eight-hour law of that state (for a violation of the provisions of which the party was punishable by fine and imprisonment) to apply to a contract for street work made by the mayor and councilmen of a city of the first class. The law under which this contract was made (section 879, Gen. St. Kan. 1905) discloses the fact that the city itself was not only a contracting party, but assumed the obligation of paying the contractor the cost of the work.

Our conclusion is that a contract for street work, or for the construction of a sewer, awarded pursuant to the provisions of the Vrooman act, and amendments thereto, the entire cost of which is to be paid for by assessments levied upon the property contiguous to the line of such sewer or street improvement, does not fall within the provisions of section 653c, Pen. Code.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

152 Cal. 372

MERCED LUMBER CO. v. BRUSCHI. (Sac. 1,512.)

(Supreme Court of California. Nov. 29, 1907. Rehearing Denied Dec. 26, 1907.)

1. Mechanics' Liens — Subcontractors — Stipulations as to Payment.

A building contract, whereby the final payment of one-fourth of the contract price was to be made at the completion of the building, is such a substantial departure from Code Civ. Proc. § 1184, providing that at least one-fourth of the contract price shall be made payable at least 35 days after completion of the contract, as to subject the owner to the provision of that section that, if the building contract shall not substantially conform to that section, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the request of a person who contracted with the contractor, and that they shall have a lien therefor; and it is no defense to an action to foreclose such lien that the entire contract price had been paid, and that the last payment had been divided pro rata among claimants against the contractor.

2. Same—Personal Judgment.

Code Civ. Proc. § 1184, providing that if a building contract shall not substantially conform to the provisions of that section, the labor done and material furnished by all persons except the contractor shall be deemed to have been done and furnished at the request of the person who contracted with the contractor, and that they shall have a lien therefor, does not render the owner personally liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 632–635.]

3. CONSTITUTIONAL LAW — DISCRIMINATION — ATTORNEY'S FEES—MECHANIC'S LIEN FORECLOSURE.

The provision of the Code of Civil Procedure, for the allowance of attorney's fees to a person enforcing a mechanic's lien by foreclosure suit is an unlawful discrimination in favor of such suitors, and therefore unconstitutional.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 703.]

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action to foreclose a mechanic's lien by the Merced Lumber Company against Demetrio M. Bruschi and another. Judgment for plaintiff, and Bruschi appeals. Modified and affirmed.

J. K. Law and E. R. Jones, for appellant. Frank H. Farrar, for respondent.

SHAW, J. This is an action to foreclose a lien for materials furnished by the plaintiff to O. T. McCoon, to be used in the erection of a building on the land of the defendant, Bruschi, in accordance with a contract for such erection made between Bruschi and McCoon. The court below sustained a demurrer to the answer of Bruschi, who refused to answer further, and thereupon judgment was given for the plaintiff as prayed for in the complaint. McCoon made default. The defendant, Bruschi, appeals from the judgment.

The contract price for the erection of the building was $6,750. By the terms of the agreement three-fourths of this sum was to be paid at stated times during the period of construction, and the final payment of one-fourth was to be made at the completion of the building. Section 1184 of the Code of Civil Procedure provides, with respect to such contracts, that "the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work; provided, that at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract." And, further, that "in case such contracts * * * do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof."

The plaintiff bases his claim of lien on the fact that the contract violates this provision of the Code by making the last payment upon the contract price payable at the completion of the building, instead of thirty-five days thereafter, as the Code requires. As a defense, the defendant, Bruschi, alleged that the entire contract price had been paid, and that the last payment of one-fourth thereof had been paid, pro rata, to a number of persons who had performed labor upon the building or furnished materials to the contractor therefor, all of whom were entitled to liens on the premises therefor, and that the plaintiff had received his due proportion with the others.

We cannot perceive that this constituted any defense to the suit for the foreclosure of the lien. The plaintiff had given the credit for the payment referred to and asked judgment only for the balance remaining upon his claim. The statute above quoted in effect provides that, if the contract does not substantially conform to its requirements, the persons furnishing materials to the contractor, which are used in the building, shall have a lien against the property for the value of such materials, regardless of the amount of the contract price. If the contract substantially violates the statute, the payment of the entire contract price, and the application of the whole thereof upon claims of third persons against the contractor for labor and materials upon and for the building, would not relieve the owner from the penalty imposed for the benefit of one who was not paid. To allow this would be to render the statute entirely nugatory, and leave the owner free to make such contract as he pleased, provided only he paid the whole of it to lien claimants instead of to the contractor. In San Diego L. Co. v. Woolredge, 90 Cal. 578, 27 Pac. 431, and Willamette, etc., Co. v. College Co., 94 Cal. 229, 235, 29 Pac. 629, 631, it was held that a failure to observe this provision would entitle claimants to the full value of the materials furnished, although the total exceeded the contract price. It has been held that the failure to conform to the Code requirements must be of a character which is substantial, in order to subject the owner to the penalty. Thus, it was held that making the final payment payable 30 days, instead of 35 days, after completion would still allow every claimant his full 30 days within which to file his lien before any payment could be made under the contract, and hence that it would not substantially injure him, and consequently would not entitle him to more than his share of the contract price, or of the balance thereof remaining unpaid on completion. San Diego Lumber Co. v. Woolredge, supra. See, also, Yancy v. Morton, 94 Cal. 561, 29 Pac. 1111; Brill v. De Turk, 130 Cal. 243, 62 Pac. 462. But it cannot be seriously contended that a contract which makes the whole price due and payable at and before the completion of the building is not a substantial departure from a statutory provision declaring that one-fourth of it must not be payable until 35 days thereafter, and that within 30 days after completion every person who has performed labor on the building, or furnished materials therefor, may file a notice of his claim of lien in the office of the county recorder. It was not intended that the lien claimants should be compelled to rely on the good faith and honesty of the owner or contractor in devoting the last payment to the payment of their claims, but that they should have the security afforded by a lien on the property until the claims were paid. There is nothing in the statute to the effect that the owner shall be exonerated from the effect of his violation of the statute upon showing that he has paid out the entire contract price, pro rata, to the claimants of liens, and we cannot by judicial construction interpolate such provision therein.

It appears from the judgment that the court allowed the plaintiff the sum of $100 as attorney's fees, which is included in the judgment of foreclosure, and that personal judgment was ordered against the defendant, Bruschi, for any balance remaining due the plaintiff after the application of the proceeds of the property thereon. The personal judgment is erroneous. Southern California L. Co. v. Schmitt, 74 Cal. 628, 16 Pac. 516; Kellogg v. Howes, 81 Cal. 180, 22 Pac. 509, 6 L. R. A. 588; Madera Flume & T. Co. v. Kendall, 120 Cal. 184, 52 Pac. 304, 65 Am. St. Rep. 177; Giant Powder Co. v. San Diego Flume Co., 78 Cal. 200, 20 Pac. 419. These cases, except Kellogg v. Howes, relate to the personal liability of the owner under section 1183, Code Civ. Proc., but the language on this point is the same in section 1184, and the same construction should prevail. In Builders' Supply Depot v. O'Connor (Cal.) 88 Pac. 982, it was decided that the provision of the Code for the allowance of attorney's fees to a person enforcing a mechanic's lien by foreclosure suit was an unlawful discrimination in favor of such suitors, and was therefore unconstitutional and void. We are asked to re-examine the question and overrule that case. The case was fully considered by the whole court upon the petition for rehearing in that case, and again in the recent case of Mannix v. Tryon (Sac. No. 1,507; decided September 19, 1907) 91 Pac. 983. At most, its soundness is a question upon which a difference of opinion might reasonably exist. The rule must be considered as established.

It is ordered that the judgment of the court below be modified by striking therefrom the provision allowing the sum of $100 to the plaintiff for his attorney's fees, and the provision directing the entry of a deficiency judgment against the defendant, Bruschi, upon the return of the foreclosure sale, and that as so modified the judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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152 Cal. 317

PEOPLE v. EDLEMAN. (S. F. 4,236.)

(Supreme Court of California. Nov. 27, 1907.)

1. NOTARIES — APPOINTMENT — TERM — VACANCIES—STATUTES.

Pol. Code, § 791, provides that the Governor may commission any number of notaries that he may deem necessary in all cities and counties of the state, except that in the city and county of San Francisco the number shall not exceed 80, and section 793 fixes the term of office of a notary at four years from his commission. *Held*, that the office of notary is sui generis, to which section 1003a, providing that except where otherwise provided in the Constitution, whenever a person has been or shall be appointed by the Governor to fill a vacancy in any office, the appointee holds only for the balance of the unexpired term, as provided by the law creating the office, is inapplicable, each notarial appointment being for a full term.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Notaries, § 8.]

2. SAME—VACANCIES.

Under Pol. Code, § 791, authorizing the Governor to appoint and commission notaries, the death of a notary does not create a vacancy, but terminates the office held by the decedent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Notaries, § 8.]

Department 2. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by the people against Charles Edleman. From a judgment for defendant, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., and George A. Sturtevant, Deputy Atty. Gen., for appellant. H. V. Morehouse and J. E. Alexander, for respondent.

HENSHAW, J. This is an action to determine the title of Charles Edleman to the office of notary public of the city and county of San Francisco. One F. C. Mosebach was a notary public, and died before the expiration of his term. On the 9th day of April, 1902, respondent was appointed notary public "for the term prescribed by law in place of F. C. Mosebach, deceased." Thereafter, in 1903, the Legislature passed the following law: "Except in the instances otherwise provided in the Constitution, whenever a person has been or shall be appointed by the governor * * * to fill a vacancy in any office, or to fill an office when the appointment is not made until after the expiration of the preceeding term, the appointee holds office only for the balance of the unexpired term as provided by the law creating the office." Pol. Code, § 1003a. Under this statute, when "the balance of the unexpired term" of Mosebach had come to an end, the Governor appointed Hamilton A. Bower to succeed Edleman, "term expired." Edleman contended that he was appointed for the full term of four years, and the question thus presented is as to the application of section 1003a under the facts of the case. Nor is this consideration embarrassed by any question as to the power of the Legislature either to shorten or abolish an office, or a term of office, which, within the exercise of its powers, it has created. Miller v. Kister, 68 Cal. 142, 8 Pac. 813. Conceding full force to the provisions of section 1003a, the question for consideration is, is it applicable to notaries public, to their terms and offices? Herein it is to be noted that the office of notary public differs essentially from most offices of constitutional or legislative creation. It is sui generis. The law provides that the Governor may appoint and commission any number of notaries public that he may deem necessary in all cities and counties of the state, saving that in the city and county of San Francisco the number shall not exceed 80. Pol. Code, § 791. The term of office of a notary public is four years from and after the date of his commission. Pol. Code, § 793. As to the office, therefore, it is one which, while having in a certain sense an abstract existence by virtue of the legislative enactment, comes into actual being only when and as the Governor names specific men for the places. In any county in the state, other than the city and county of San Francisco, there may be as few or as many notaries public as the Governor's judgment may suggest. And in the city and county of San Francisco, within the maximum limit of 80, there may also be as few or as many as he may declare. But whenever he makes this declaration by naming a notary, as to the term of office, the law interposes and says that it shall be four years from the date of such nomination. It would seem apparent that the Legislature regarded the term as attached to the incumbent, that it lived and died with him, and that a new term of four years sprang up with each new appointment. Therefore, as to his term and office, no notary is the legal successor of another. Each notary is appointed to the particular office for the specified term. It is to be borne in mind that section 1003a deals first with the filling of vacancies in office, and, second, provides that such vacancies shall be filled for the unexpired term. If 10 notaries in the city and county of San Francisco should die or resign, there would be no vacancies in office. If, in the view of the Governor, there were still sufficient notaries to transact the business, no further appointments would be called for, and it would mean that there were but 70 notaries in San Francisco, with the right to appoint 10 more if necessity should require it. Elsewhere in the state the situation becomes even more plain. There the Governor may appoint any number. If a notary actually in office in the county of Alameda should die or resign, and the Governor should appoint a notary, how could it be said that he was appointing to a vacancy when the power is vested in him to appoint as many as he judges fit? Moreover, since, under the law, the term of a notary is made a full term of four years from the date of his commission, and as the death of a notary does not create a vacancy, it follows that each notary public when appointed is appointed, not for an unexpired term, but for the full term of four years. To the somewhat anomalous office of notary public, therefore, section 1003a of the Political Code cannot and does not apply.

For this reason the judgment appealed from is affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

152 Cal. 323

RONEY v. REYNOLDS. (S. F. 4,357.)

(Supreme Court of California. Nov. 29, 1907.)

1. APPEAL — PROCEEDINGS FOR TRANSFER — TIME OF TAKING APPEAL FROM JUDGMENT.

An appeal from a judgment must be taken within six months after its entry.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1897.]

2. SAME—REVIEW—HARMLESS ERROR—ERRONEOUS FINDINGS.

Where plaintiff's case depends upon the existence of an agreement between the parties, and the court finds that there is no contract, if its finding is proper, erroneous findings as to other distinct issues are not prejudicial error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4234.]

3. SAME—FINDING ON CONFLICTING EVIDENCE.

The credibility of witnesses and the weight of evidence are matters exclusively for the trial court to determine, and where the evidence is conflicting its finding will not be disturbed on appeal.

4. CONTRACTS — ACTION FOR BREACH — EVIDENCE.

Evidence *held* to show that negotiations between the parties concerning a loan never culminated in a definite agreement between them.

5. APPEAL—REVIEW—HARMLESS ERROR — ADMISSION OF IMPROPER EVIDENCE.

Where no damages are recoverable under the rulings of the court, admission of improper evidence as to damages is not prejudicial.

Department 2. Appeal from Superior Court, Sonoma County; Albert G. Burnett, Judge.

Action by Mary A. Roney against Edwin Reynolds. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

Henley & Costello and W. F. Cowan, for appellant. A. B. Ware and Wm. E. McConnell, for respondent.

LORIGAN, J. The complaint in this action alleged that plaintiff, desiring to purchase certain real property in San Francisco of the value of $33,000, but offered for sale for $26,000, applied to defendant for a loan of $10,000 or $14,000, informing him of the value and location of the property, the price at which it could be obtained, that she could make a large profit by buying it at the price offered, and that the owner required a part payment of $500 as a forfeiture if her agreement to purchase failed of consummation; that she informed him also that the option to purchase would extend only a reasonable time; that the defendant agreed to loan her the money at 7 per cent. interest; that thereupon plaintiff entered into an agreement to purchase said property for $26,000, and made the deposit of $500 forfeit; that she then informed defendant of the making of the contract of sale and deposit, and he required her to make abstracts of title of certain property which she was to mortgage to him as security for the loan, which she did, at an expenditure of $134; that thereafter defendant refused to make the loan, and plaintiff had no time or opportunity during the life of the option to get the money from another source; that the owner forfeited her deposit of $500, and sold the property to another; that plaintiff was ready and willing to perform her part of the agreement, and that defendant refused without the fault of plaintiff, to make the loan. Damages were claimed in the sum of $14,634. The answer of defendant denied all the allegations of the complaint. Judgment went for the defendant, and this appeal is taken by plaintiff therefrom, and from the order denying her motion for a new trial.

The appeal from the judgment was taken more than six months after its entry, and hence, was taken too late to have any points urged under it considered.

The motion for a new trial was based upon alleged insufficiency of the evidence to sustain certain findings and errors of law claimed to have been made by the court on rulings upon the admissibility of evidence. Our examination of the record satisfies us that but short consideration need be given to any of these points.

The trial court, in effect, found against the plaintiff upon all the issues in the case, and particularly found that the plaintiff, after the deposit by her of the $500 on the purchase, applied to defendant for a loan of $10,000 or $12,000 but that no agreement was entered into between them that defendant should loan plaintiff the sums of money mentioned, or any sum whatever, to enable plaintiff to make the contemplated purchase, or for any other purpose; that the negotiations between them relative to borrowing said money never arrived at the point where the minds of the parties met on the terms of said loan. It is obvious from the pleadings that the main and controlling issue in the case was whether there was or was not an agreement between the parties as to this loan. If the finding of the court that there was no agreement is supported by the evidence, it is of no moment whether the other findings as to other issues are sustained by the evidence or not. If there was no agreement to make the loan, there is no possible theory on which plaintiff could recover, and hence erroneous findings as to other and distinct issues could not be prejudicial error.

Now as to the finding that no agreement for the loan was ever entered into between the parties. Much of the briefs of both parties is taken up with a discussion of the evidence upon this point, which, when it is all considered, clearly shows that there was a radical conflict in it respecting the matter. The claim of appellant relative to the evidence appears to be, not that there was no testimony supporting the claim of defendant that no agreement to loan the money was entered into, but that no credence should be given the testimony on the part of defendant showing that fact. But the credibility of witnesses and the weight of evidence are matters exclusively for the trial court to pass on, and, where there is a substantial conflict in the evidence, the rule is absolute that a finding evolved from it by the trial court will not be disturbed on appeal.

That there was evidence that no contract for a loan was made plainly appears from the testimony adduced on behalf of the defendant. To briefly state it, that evidence shows that the negotiations with reference to the proposed loan took place in Santa Rosa, Sonoma county, where plaintiff owned property upon which she contemplated securing the loan, and where defendant, who was a capitalist, resided; that defendant then held a mortgage for $15,000 upon the property of plaintiff, upon which a large amount of interest had been allowed to accumulate; that after plaintiff had paid the deposit of $500 to secure her option on the San Francisco property she applied to defendant for the loan required, which he said he would consider, and which he subsequently told her he would not make; that she applied to others for it, but without success, and returned to defendant, stated her inability to obtain it elsewhere, and again asked him to make her the loan at whatever terms he might dictate; that they then discussed the property plaintiff had to offer for security; that no definite amount she desired to obtain was discussed or fixed, or anything said as to time of either payment of the principal or interest; that, after discussing the nature of the security plaintiff had to offer for the loan, defendant expressed his willingness to make it, provided he had security for the payment of interest, and as such security therefor insisted that the rents of one of the pieces of property in Santa Rosa, which was to be mortgaged, should be turned over to him to be applied to the payment of the interest, defendant declaring that he could not consider making a further loan on the property and leave the interest to accumulate as it had on the mortgage he already held; that plaintiff objected to turning over said rents, and closed the interview by saying that she would have abstracts of the property made, and defendant could further consider the matter of the application of the rents; that the abstracts were made, and turned over to the attorney for the defendant, in whose office plaintiff and defendant subsequently met to see said attorney relative to some defect which he had discovered in the title to one of the pieces of property offered as security for the loan; that while discussing the matter defendant told plaintiff that he would have to insist on the payment of the rentals theretofore mentioned to secure the payment of interest; to this plaintiff would not accede, declaring that if that was the case it ended the business right then, and, picking up the abstract, she left the attorney's office. No further negotiations were had. This evidence shows that the negotiations between the parties concerning this loan were inchoate, that they never culminated in the making of any definite agreement between them relative to it, and disposes of the objection of appellant that the finding of the court to that effect is not sustained by the evidence.

As to errors assigned on the rulings of the court on the admission of evidence, the rulings involve no particular questions of law. Counsel for appellant does not discuss them in his brief, and neither shall we particularly do so. The points made mainly apply to rulings excluding evidence offered by plaintiff relative to dealings between herself and the agents of the owner of the San Francisco property, the value of the property and its income, and as to matters relative to the making of the abstracts of the property of plaintiff and the expense thereof. Most of this proffered evidence seems to have gone in subsequent to the rulings. In any event, no material injury was committed in its rejection. It bore on the matter of damages, and could only be material if an agreement for the loan had been made, and as the court found none was made, and hence no damages could be recovered by plaintiff, no prejudicial error was committed, even if it were conceded that the court erred in rejecting the testimony offered by plaintiff on the subject of damages.

The other assignments of error are equally without merit.

The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

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152 Cal. 303

CENTRAL PAC. RY. CO. v. FELDMAN et al.

(S. F. 4,400.)

(Supreme Court of California. Nov. 20, 1907.)

1. Eminent Domain—Purpose of Condemnation—Railroad—Freighthouses.

Code Civ. Proc. § 1238, provides that the right of eminent domain may be exercised to obtain land for toll roads, by-roads, plank and turnpike roads, paths and roads, either on the surface, elevated, or depressed, for the use of bicycles, tricycles, vehicles, steam, electric, and horse railroads, etc. Civ. Code, § 465, subd. 7 gives to a railway company power to purchase lands, etc., to be used in the construction and maintenance of its road, and other necessary appendages and adjuncts, or acquire them by condemnation. *Held*, that the words "paths and roads for the use of" merely qualified the words "bicycles, tricycles, motor cycles and other horseless vehicles," and not the phrase "steam, electric and horse railroads," so that a railroad's power to condemn land was not limited to its right of way, but extended to land adjacent to its station grounds required for a freight house, under the rule that, while a statute conferring the power of eminent domain should be strictly construed and not extended by implication, it must be applied to effectuate the legislative intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 59-62.]

2. Same—Complaint—Selection of Land.

Under Code Civ. Proc. § 1244, prescribing the requisites of a complaint in condemnation proceedings, it is not necessary for a railroad company, in a proceeding to condemn land for a freighthouse, either to allege or prove formal antecedent selection of the land for such purpose by its board of directors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 511.]

3. Same—Necessity.

A complaint by a railroad company to condemn land for a freighthouse alleged that plaintiff's business at the station where the freighthouse was to be erected had so greatly increased in volume that the station and grounds were inadequate, that it was necessary to construct and maintain the freighthouse as an adjunct or appendage to the railroad adjoining such station grounds and as a part thereof, and that it was necessary that the land in question be taken for that purpose. *Held*, that the complaint sufficiently alleged a necessity for taking the land for public use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 512.]

4. Same—Future Necessity.

On an issue as to whether land proposed to be taken by a railroad company for a freighthouse was necessary, the jury were entitled to consider not only the present demands on the railroad company by the public, but those which might fairly be anticipated on account of the future growth of the city.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 154.]

5. Same — Damages—Market Value—Ascertainment.

The measure of compensation in condemnation proceedings is the actual market value of the land, independent of its value in use to the owner or to the party seeking to condemn it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 352-357.]

6. Same.

In condemnation proceedings, the fact that defendants were unwilling to sell the land or wished to improve it themselves did not affect the market value thereof as the measure of compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 352-357.]

7. Trial — Request to Charge — Other Instructions.

It is not error to refuse a request to charge embracing a proposition fully stated in other instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

8. Same—Application to Evidence.

Instructions based on theories unsupported by the evidence were properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-602.]

9. Appeal — Review—Harmless Error—Admission of Evidence.

In a proceeding to condemn land for a freighthouse a witness was permitted without objection to testify that a draymen's association, of which he was president, had complained to the railroad of delays in the delivery of freight. *Held*, that defendant was not prejudiced by the overruling of an objection to a question whether the association within the last year or two had made complaints and representations to the railroad company with reference to delays in the delivery of freight, which the witness answered in the affirmative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4170.]

10. EVIDENCE—HEARSAY.

In condemnation proceedings a question calling for a conversation between witness' father and his grantor, concerning a mortgage on the property in question, was objectionable as calling for hearsay.

11. APPEAL—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Defendants were not prejudiced by the sustaining of an objection to a question as calling for hearsay, where the evidence sought to be elicited was subsequently introduced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4200–4207.]

12. EVIDENCE — OPINION — EXAMINATION OF EXPERTS—VALUE OF PROPERTY.

Where, in condemnation proceedings, a witness had testified as an expert that the property was worth $30,000, it was not error to permit a question asked him on cross-examination as to whether he did not know that in recent years he had been assessed for taxes in amounts varying from $1,925 to $2,525; such evidence, though inadmissible as original evidence of market value, being competent to test the value of the witness' opinion as an expert.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2379.]

13. SAME.

Where a witness testified as an expert as to the value of property sought to be condemned, he was properly cross-examined regarding the appraisement of the property in probate proceedings in connection with the estate of a former owner to test the value of his opinion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2379.]

14. EMINENT DOMAIN—VALUE OF PROPERTY—QUESTION FOR JURY—APPEAL.

Where, in condemnation proceedings, the value of the property is in doubt arising from a conflict of evidence, such doubt is to be resolved by the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 560, 685.]

In Bank. Appeal from Superior Court, Alameda County; F. G. Ogden, Judge.

Condemnation proceedings by the Central Pacific Railway Company against Gretchen Feldman and others. From a judgment for damages, a final order of condemnation, and from an order denying defendants' motion for a new trial, they appeal. Affirmed.

F. A. Berlin (Garret W. McEnerney, of counsel), for appellants. A. A. Moore and Stanley Moore, for respondent.

SLOSS, J. This is an action brought by the Central Pacific Railway Company to condemn a parcel of land in the city of Oakland. A trial was had before a jury, which found a verdict in favor of the plaintiff, condemning the land and fixing its value at the sum of $4,000. Findings were filed and a judgment entered accordingly. The plaintiff paid into court the amount of the verdict with costs, and the court made and entered a final order of condemnation. A motion for new trial, made by defendants, was denied. The defendants appeal from the judgment, from the final order of condemnation, and from the order denying their motion for a new trial.

The complaint alleges that plaintiff is the owner of a steam railroad commencing at San Francisco and extending easterly, through the city of Oakland, and thence through the states of California, Nevada, and Utah, to Ogden in the state of Utah; that it maintains and operates in said city of Oakland, in connection with and as part of its railroad, a station and station grounds between Henry street on the west, Poplar street on the east, Fifth street on the north, and First street on the south, covering blocks numbers 449, 450, 451, 452, 474, and part of block 473; that plaintiff's business at said station had so greatly increased in volume that the station and grounds are inadequate to meet the traffic requirements; that it is necessary to construct and maintain an adjunct or appendage to said railroad, to wit, a freighthouse, adjoining said station grounds and as part thereof, and that it is necessary that the parcel of land here involved (being the portion of block 473 not already owned by the railroad company) be taken for the erection of a freighthouse for the reception and delivery of freight.

By demurrer to the complaint, and in other ways, the appellants presented the contention that the erection of a freighthouse by a railroad company is not one of the purposes for which the right of eminent domain can be exercised in this state. Section 1238 of the Code of Civil Procedure, as it read at the time this proceeding was instituted, provided that "the right of eminent domain may be exercised in behalf of the following public uses: * * * (4) Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads; paths and roads either on the surface, elevated or depressed, for the use of bicycles, tricycles, motorcycles and other horseless vehicles, steam, electric and horse railroads, canals, ditches, dams, pondings, * * * etc." It is argued that the words "steam, electric and horse railroads" are not intended to constitute an independent enumeration of public uses for which property may be condemned, but that these words are qualified by the preceding phrase "paths and roads * * * for the use of," so that the section grants merely the right of eminent domain for the purpose of acquiring "paths and roads either on the surface, elevated or depressed, for the use of steam, electric and horse railroads." From this the conclusion is drawn that the right of eminent domain may be exercised by railroads for a right of way and nothing more.

It is no doubt true, as is argued by appellants, that statutes of this character, providing for the taking of property without the consent of the owner, are to be given a strict construction. The power to take the land must be found to be given by the clear terms of the statute. But while the grant of power is not to be extended by implication, there should not be a construction so narrow "as to defeat the evident purpose of the Legislature." In re N. Y. & H. R. R. Co. v. Kip, 46 N. Y. 546, 551, 7 Am. Rep. 385. The interpretation insisted on by appellants does, we think, so restrict the operation of the law as to prevent the accomplishment of its manifest purpose. The only ground which furnishes any justification at all for the taking of private property by railroad companies is that in the carriage of passengers and freight such companies are exercising a function of a public nature and promoting a public interest. To perform this function it is as essential that the railroad company should have space for necessary buildings for the reception, discharge, loading, and forwarding of freight and passengers as that it should have a right of way on which to lay its tracks and move its trains. The grant of a right to exercise the power of eminent domain for the use of "steam, electric and horse railroads," not qualified by other words, would, by reasonable construction, include the right to exercise this power for the acquisition of any of the necessary adjuncts of such roads. N. Y. & H. R. R. Co. v. Kip, supra; In re N. Y. C. & H. R. R. R., 77 N. Y. 248; Protzman v. Ind., etc., R. R. Co., 9 Ind. 467, 68 Am. Dec. 650; Giesy v. R. R. Co., 4 Ohio St. 308; Lewis on Em. Dom. (2d Ed.) § 170.

Section 1238, Code Civ. Proc., was amended in 1901 (St. 1900–01, p. 72, c. 57), and before that, in 1897 (St. 1897, p. 70, c. 77). Prior to 1897, section 1238 read: "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: * * * (4.) Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads; steam, electric and horse railroads; canals, ditches, dams, pondings, flumes, acqueducts and pipes, for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber of streams not navigable."

That under this reading, "steam, electric and horse railroads," together with whatever was necessary for the proper conduct of such roads, constituted a public use, in behalf of which the power of eminent domain might be exercised, is not disputed. The amendment of 1897 inserted, after "turnpike roads," the words "paths and roads, either on the surface, elevated or depressed, for the use of bicycles, tricycles, motorcycles, and other horseless vehicles." (The amendment of 1901 made no change in the wording of subdivision 4.) It seems clear that it was not intended by the addition of the words inserted in 1897 to restrict the rights theretofore given, but to extend them to new objects. We think the words "paths and roads for the use of" are to be regarded as qualifying merely the words "bicycles, tricycles, motorcycles, and other horseless vehicles," and not the phrase "steam, electric and horse railroads," which is to be given the same meaning that it had before the amendment.

Furthermore, section 1238, Code Civ. Proc., must be read in connection with other statutory provisions on the same subject. Section 465, subd. 7, of the Civil Code, gives to a railroad company power to purchase lands, timber, stone, gravel, or other materials to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in title 7, pt. 3, of the Code of Civil Procedure for the condemnation of lands. Here is clear evidence of the legislative intent that the power of eminent domain conferred upon railroad companies should include not only the actual right of way, but all necessary "appendages and adjuncts." This view was taken by this court in S. P. R. R. Co. v. Raymond, 53 Cal. 223, where it was held that a workshop should be classed as an appendage or adjunct to a railroad, under section 465, subd. 7, Civ. Code, and that, where the construction of such workshop was necessary, the company had power to condemn for that purpose. A freighthouse is equally an "appendage or adjunct" to the railroad, and its erection must be held to be a purpose for which, under the statutory provision, the power of eminent domain may, upon a proper showing of necessity, be exercised.

The appellants claim that the complaint is defective for failure to allege that the plaintiff, by regular action of the board of directors, had selected the property in question for the purpose of a freighthouse. But out statute (Code Civ. Proc. § 1244) sets forth what must be contained in a complaint in a proceeding of this character, and there is no requirement that the complaint shall allege that there has been a formal antecedent selection of the land involved. The cases cited by appellants are all based on statutory provisions differing from our own.

There is no merit in the contention that the complaint fails to show that the land is needed for a public use or that its taking is a public necessity. In so far as this proposition is based on the premise that the purpose for which the land was sought was not a public use within the meaning of section 1238, Code Civ. Proc., it is answered by what has been said in an earlier part of this opinion. And the allegations of the complaint, hereinbefore quoted by us, are obviously ample to show the necessity for taking the land in question for such public use.

It is urged that the court erred in giving and in refusing instructions. Some of the points made in this connection rest upon the assumption that the purpose for which the land was sought to be taken was not a public use. This proposition has already been fully discussed. The same may be said regarding the refusal of the court to charge the jury that it was essential for the plaintiff to prove that its board of directors had designated the location of the property in question for the purposes of a freighthouse. If it was not necessary to make an allegation of such selection, it was not necessary to prove it. In this case, however, there was evidence to the effect that the plan of acquiring the property in question for the purposes of a freighthouse had been approved by the plaintiff's board of directors, and this evidence was not contradicted.

In the seventh instruction given by the court, the jury is told that, in determining whether the proposed taking is necessary, they may consider "if shown by the evidence, not only the present demands of the public upon the plaintiff, but those which may fairly be anticipated on account of the future growth of the city." There was no error in this. Future necessity is a proper factor for consideration. St. Louis & S. F. Co. v. Foltz (C. C.) 52 Fed. 627; Penn. R. Co. v. N. Docks Co., 57 N. J. Law, 86, 30 Atl. 183; In re Staten Island Co., 103 N. Y. 252, 8 N. E. 548.

The instructions on the mode of ascertaining the market value of the property were correct. The jury were rightly instructed that the fact that the defendants were unwilling to sell, or wished to improve the property themselves did not affect the market value, and that the "actual market value is the measure, and not its value in use to the owner, or to the party who is seeking to condemn it." San Diego, L. & T. Co. v. Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83.

Some of the instructions requested by the defendants were properly refused because they embraced propositions which were fully stated in instructions given. Others were based on theories which had no support in the evidence. On the whole, we are satisfied that the instructions of the court contained a full and accurate statement of the law governing the issues to be determined by the jury.

Certain rulings in admitting and excluding evidence are assigned as error.

One Parrish, a witness called by plaintiff, testified without objection that he was president of the draymen's association, and that the question of the delays in the delivery of freight by the railway company had been complained of by the association. He was then asked whether or not the association had within the last year or two made any complaints or representations to the railroad company with reference to the delays of the delivery of freight. Over the objection and exception of defendants, he was allowed to answer in the affirmative. The evidence, if incompetent and hence inadmissible, was harmless. The answer did not add materially to what had already been stated by the witness without objection.

Louis Feldman, one of the defendants, testified that his father had acquired the property in 1879 by conveyance from one Cordes, and that at that time the property was incumbered by mortgage. He was asked what was said between his father and Cordes about any mortgage on the property. Plaintiff's objection to this question, as incompetent, irrelevant, and hearsay, was sustained. We think the ruling was proper, but, if it was not, the witness subsequently brought out everything of consequence that was sought to be elicited. The defendants' object was to show that a part of the consideration paid for the conveyance was the payment of a mortgage, and the witness did testify that his father had paid for the property the consideration recited in the deed, and, in addition, a mortgage of $4,000. Besides, the time of the transaction was so remote that the price paid could have little, if any, weight on the question of value at the date of issuing the summons.

The same witness, Feldman, having testified on direct examination that in his opinion the property was worth $30,000, was asked on cross-examination whether he did not know that it had been in recent years assessed for taxation at amounts varying from $1,925 to $2,525. Objections to questions of this character were rightly overruled. While the assessed value of property is not admissible as original evidence of its market value, a witness who has testified as an expert may properly, on cross-examination, be asked what is his knowledge regarding such assessment for the purpose of testing the value of his opinion. See S. D. L. Co. v. Neale, 88 Cal. 50, 62, 25 Pac. 977, 11 L. R. A. 604; Santa Ana v. Harlin, 99 Cal. 538, 545, 34 Pac. 224. The same reasoning is applicable to questions asked the witness regarding the appraisement of the property in the probate proceedings in connection with the estate of the former owner.

None of the other points made with regard to the sustaining or overruling of objections to proffered evidence is of sufficient importance to merit detailed discussion. It is enough to say that no error substantially affecting the rights of the defendants was committed.

The final contention of the appellants, i. e., that the evidence was insufficient to sustain the verdict, is entirely without merit. On the issues as to the necessity for the taking, the plaintiff made out a strong and convincing case, which the defendants did not attempt to meet by contrary evidence. The finding of market value finds support in the testimony of numerous witnesses. On this point there was, to be sure, a conflict of evidence, but the doubt arising from such conflict was, under the familiar rule, to be resolved by the jury.

The judgment and orders appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

152 Cal. 316

KIRKPATRICK v. KIRKPATRICK.

(S. F. 4,807.)

(Supreme Court of California. Nov. 23, 1907.)

Divorce — Desertion —Default—Interlocutory Decree.

Where, in a suit for divorce for desertion, defendant was regularly served, and made default, and plaintiff's evidence of desertion was fully corroborated by her granddaughter, and supported a sufficient complaint, it was error to refuse plaintiff an interlocutory decree.

In Bank. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Suit by Harpolicy C. Kirkpatrick against J. M. Kirkpatrick for divorce. From an order denying plaintiff's petition for an interlocutory decree, she appeals. Reversed.

T. J. Butts, for appellant.

HENSHAW, J. Plaintiff sued defendant for divorce upon the ground of his desertion and abandonment of her. Defendant was personally served with summons and made default. The testimony was taken before the court commissioner, and upon consideration of the testimony the court caused the following decree and judgment to be entered: "Plaintiff's petition for an interlocutory decree of divorce is hereby denied. Let the order be entered."

From this interlocutory decree plaintiff appeals. She presents her brief upon appeal, and there is no answering brief by respondent, and no explanation of the grounds upon which the judgment of the court is based. The complaint is sufficient, the service upon the defendant is regular, his default was duly entered, and the evidence of the wife, corroborated by the testimony of her granddaughter, fully establishes the desertion. Benkert v. Benkert, 32 Cal. 467.

Under this condition of the record it was error to have refused plaintiff her interlocutory decree, and the judgment is, therefore, reversed.

We concur: LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.; McFARLAND, J.

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152 Cal. 364

PEOPLE v. RYAN. (Cr. 1,393.)

(Supreme Court of California. Nov. 29, 1907.)

1. Homicide—Appeal—Harmless Error—Instructions.

Where a verdict of murder in the second degree is found, it implies a finding that the killing was without deliberation and premeditation, so that an error in an instruction on deliberation and premeditation essential to constitute murder in the first degree is harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 720.]

2. Criminal Law—Instructions—Testimony of Accused.

A charge that the jury will consider the testimony of accused as they will that of any other witness, though it is proper for them to bear in mind the situation of accused, the manner in which he may be affected by the verdict and the interest he must feel in it, and to consider whether his position and interest may not affect his credibility, though criticised, is not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1895, 1896.]

3. Courts—Decisions as Precedents.

The decision that the giving of a charge that the jury, in considering the testimony of accused, may consider his position and interest, will in the future be ground for a reversal, rendered after the court had several times criticised such a charge as violating the Constitution, declaring that judges shall not charge with respect to matters of fact, should not be applied to a case tried before the decision, and the giving of such a charge before that time is not ground for a reversal.

4. Homicide — Self-Defense — Evidence — Admissibility.

On a trial for homicide defended on the ground of self-defense, evidence that accused had reason to believe, and believed, that decedent was jealous of him on account of his supposed friendship for decedent's wife, is relevant on the question whether or not accused apprehended danger from decedent, and in good faith inflicted the fatal blows in self-defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 417.]

5. Same — Harmless Error — Admission of Evidence.

Where, in a homicide case, accused testified that he thought some time prior to the killing that decedent was jealous of him, but that he had changed his mind a little in that respect, and he did not testify that at the time of the homicide he believed that decedent was jealous of him, or that he then acted in that belief, the error, if any, in admitting the testimony of the wife of decedent that so far as she knew decedent never had, or pretended to have, any jealousy of accused, was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 711.]

6. Jury—Challenge for Cause—Determination.

Where a juror's answers to his competency are contradictory, the court must decide which of the answers most truly shows the juror's mind, and it should be liberal in giving accused and the people the benefit of any doubt as to the fairness of the juror and his ability to lay aside preconceived impressions, and should excuse him where there is such doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 594.]

7. Criminal Law—Appeal—Review—Questions of Fact.

Where a juror's answers to his competency are contradictory, the decision of the trial court is binding on the Court of Appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3076.]

8. Witnesses—Recalling Witness — Inconsistent Statements—Explanation of Inconsistency.

Where a witness in a criminal case admitted the giving of testimony at the preliminary examination, and explained discrepancies between his testimony at the trial and at the examination, the refusal to allow him to be recalled after the close of the evidence in rebuttal to further explain parts of the testimony at the examination, introduced in rebuttal, was not erroneous; it not being claimed that any additional explanations could be given, and the inconsistencies being of no importance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 900.]

9. Same—Impeachment—Bias of Witness.

A witness for accused in a homicide case may be asked on cross-examination, for purposes of impeachment, concerning a remark imputed to him showing ill will toward decedent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1189.]

10. SAME — PROOF OF INCONSISTENT STATEMENTS.

Where a witness for the defense in a homicide case was asked on cross-examination concerning a remark imputed to him showing his ill will toward decedent, it was proper in rebuttal to prove that he made the statement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1247.]

In Bank. Appeal from Superior Court, Plumas County; J. D. Goodwin, Judge.

W. H. Ryan was convicted of murder in the second degree, and he appeals. Affirmed.

Grove L. Johnson and W. W. Kellogg, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Asst. Atty. Gen., for the People.

SHAW, J. The defendant was charged with the murder of one Fred Scott. He was convicted of murder of the second degree, and appeals from the judgment of conviction, and from an order denying his motion for a new trial.

The homicide occurred on April 19, 1905. At that time the defendant, with two other persons, Potts and Ketchum by name, were in possession of and were working, or developing, a mine belonging to Scott, under a lease which expired May 1, 1905. Scott had informed them that they must quit possession of the premises at the expiration of the lease. There was evidence that Ryan was very angry at this, and that on account thereof he had made threats that he would kill Scott if an extension of the lease were not granted. The homicide occurred in a bunk house on the premises, which was used by the three lessees as a residence. There were present at the time the three lessees, the deceased, Fred Scott, and his son Willis. There was some angry talk between Scott and Potts, and Scott said they would all have to get out on the first of the month. Ryan was sitting on a stool and had said nothing, when Scott walked over to him, took him by the hair with the left hand and gave his hair a jerk, at the same time putting his right hand in the right-hand front pocket of his trousers, and applying to Ryan a vulgar epithet. Thereupon Ryan took from the floor a piece of pick handle two feet long, which had been in use as a poker, and attacked Scott with it, striking him on the head with it seven times, and forcing or crowding him reeling backward some ten feet to one of the bunks, where he struck the last blow, and Scott fell on the bunk. Soon afterward he got up and with the assistance of his son walked to his own residence 150 feet away. At 5 o'clock that afternoon he died from the effects of the blows. On that morning Scott had said to Ryan: "You ——— ——— ——— you wont see the sun go down." About the 1st of April Ryan had mentioned to Scott that he, Ryan, was going to Greenville, and Scott had said: "If you go there and I find out you spoke to my wife, I will cut your guts out." Ryan testified that from that remark he thought Scott was jealous of him, but that he had changed his mind a little in that respect, and that he saw no reason he had to be jealous. The only excuse he gave for the homicide, in his testimony, was that he knew Scott possessed a dirk knife, and that he expected him to have it in the front pocket of his overalls in which he put his hand; that he was afraid of Scott, and struck in order to disable him, and, as the first blow did not seem to disable him, he struck the other blows as fast as he could for the same purpose, and to prevent Scott from getting away, and that he struck to save his own life. It appears from Ryan's testimony that he himself believed that he was a much stronger man than Scott, or, as he expressed it, that he could lift a bigger rock than Scott could roll over. It was admitted that Ryan's blows on that occasion caused Scott's death. So far, we have stated the facts as they appear from the uncontradicted evidence for the prosecution and from the evidence for the defense, including that of the defendant himself. There was other evidence for the prosecution to the effect that, when Ryan struck the first blow, Scott backed toward the bunk, facing Ryan; that Ryan followed, striking Scott repeatedly on the head with the pick handle, Scott putting his arm before his face attempting to guard the blows, but making no attempt to strike Ryan; that just before he got to the bunk Scott turned around with his face away from Ryan and toward the bunk and fell, face downward, on the bunk, and that Ryan struck Scott two or three blows while he was in that position. It was also shown, and not disputed, that Scott's skull was fractured just above the left ear; that there was a cut three inches long in the flesh at that place, two others of the same length on the back of the head, extending to the bone, another on the right-hand side of the forehead, and one back of the ear, besides other bruises of less severity. Ryan did not deny that he had made the several threats to kill Scott, as testified to by witnesses for the prosecution. It will be seen from this statement of the case that the only material questions about which there could be any serious controversy were whether or not the defendant was really acting in self-defense in the infliction of the blows upon Scott, and, if not, whether the homicide was murder of the first degree, murder of the second degree, or manslaughter.

Some criticism is made of an instruction relating to the space of time between the formation of the intent to kill and the act of killing necessary to constitute murder of the first degree, and to the proposition that murder of that degree must be the result of premeditation. It is not necessary to discuss this instruction. The verdict of murder of the second degree necessarily implies a finding by the jury that the killing was without deliberation and premeditation, and hence even an erroneous instruction on these subjects would be harmless, if it was declared to be applicable only to murder of the first degree, as was the case with the instruction referred to. We do not mean to intimate, however, that the instructions on these points, when considered in connection with each other, as they must be, are erroneous.

The court instructed the jury as follows: "The defendant has been examined as a witness upon his own behalf. This is his right, and the jury will consider his testimony as they will that of any other witness examined before them. It is proper, however, for the jury to bear in mind the situation of the defendant, the manner in which he may be affected by the verdict, and the very grave interest he must feel in it; and it is proper for the jury to consider whether this position and interest may not affect his credibility or color his testimony." This is, in some respects, similar to the instruction first approved in People v. Cronin, 34 Cal. 204, and afterwards held sound, or at least not prejudicial error, in the following cases: People v. Morrow, 60 Cal. 147; People v. Nichols, 62 Cal. 522; People v. O'Neal, 67 Cal. 379, 7 Pac. 790; People v. Murray, 86 Cal. 35, 24 Pac. 802; People v. O'Brien, 96 Cal. 182, 31 Pac. 45; People v. Faulke, 96 Cal. 20, 30 Pac. 837; People v. Fehrenbach, 102 Cal. 402, 36 Pac. 678; People v. Curry, 103 Cal. 549, 37 Pac. 503; People v. Hitchcock, 104 Cal. 486, 38 Pac. 198; People v. Anderson, 105 Cal. 35, 38 Pac. 513; People v. Van Ewan, 111 Cal. 153, 43 Pac. 520; People v. Newcomer, 118 Cal. 268, 50 Pac. 405; People v. Ellenwood, 119 Cal. 171, 51 Pac. 553; People v. Dobbins, 138 Cal. 698, 72 Pac. 339; People v. Boren, 139 Cal. 215, 72 Pac. 899. In many of these cases the instruction approved in the Cronin Case was sharply criticised, as in contravention of the constitutional provision that "judges shall not charge juries with respect to matters of fact," and the trial courts were advised to cease giving it. Finally, in People v. Maughs, 149 Cal. 253, 86 Pac. 187, the majority of the court declared that "after all this admonition, after all these cautions, the conclusion is forced upon us that when a trial judge does give this instruction to a jury, it can be with no other purpose than to throw his judicial weight into the scales against the defendant on trial before his court. For this reason, therefore, we think the time has come to say that in all future cases which shall arise, and where, after this warning, this instruction shall be given, this court will hold the giving of it to be so prejudicial to the rights of a defendant, secured to him by our Constitution and laws, as to call for the reversal of any judgment which may be rendered against him." The opinion in that case was filed in May, 1906. The present case was tried in October, 1905. The declaration in the Maughs Case was intended to apply only to cases tried after the opinion in that case had been promulgated, and it cannot be applied to those tried before the trial judges had had the warning therein contained that the giving of the instruction after that warning would by this court be considered evidence of prejudicial unfairness on the part of the trial court toward the defendant. The giving of the instruction in the form above quoted is not so objectionable as the one approved in the Cronin Case. It states to the jury a rule regarding the consideration of the defendant's testimony, which every intelligent man upon the panel would doubtless keep in mind, without being reminded of it by the court, and, aside from the fact that it directs attention particularly to a single witness who is a party to the action, it would be covered by the rule laid down in People v. Wardrip, 141 Cal. 231, 74 Pac. 744; People v. Farrington, 140 Cal. 656, 74 Pac. 288; People v. Moran, 144 Cal. 65, 77 Pac. 777; Goss v. Steiger, etc., Works, 148 Cal. 156, 82 Pac. 681; People v. Ruiz, 144 Cal. 253, 77 Pac. 907; People v. Wong Bin, 139 Cal. 65, 72 Pac. 505; People v. Newcomer, supra. In view of the many previous decisions sanctioning this instruction, we do not consider it proper to view the giving of it, prior to the decision in the Maughs Case, as evidence of a desire to be unfair, and, as the rule of that decision was not intended to be retroactive, it will not be applied.

We have stated the testimony of the defendant on the question of the jealousy of Scott. Such jealousy, if it existed, would tend to prove a motive, or desire, on the part of Scott to inflict personal injury upon Ryan, and, if at the time of the homicide Ryan had reasonable cause to believe and did believe that such jealousy existed, such belief would be relevant evidence upon the question whether or not he really apprehended danger from Scott and in good faith struck the deadly blows in self-defense. Even if Ryan was unaware of such jealousy, or did not believe it existed, the fact that Scott was jealous of him, if true, would tend in some degree to show that Scott was the aggressor in the fatal encounter. In rebuttal, over the objection and exception of the defendant, the court allowed the wife of Scott to testify that, so far as she knew, Scott had never had, or pretended to have, any jealousy of Ryan. This ruling is assigned as error. It is claimed that the testimony was technically incompetent, that the state of mind of one person cannot be proven by the opinion of another, however intimate, except in the single instance of mental sanity or insanity. Whether this be so or not, we are of the opinion that the testimony was not substantially prejudicial. Strictly speaking, it was not in rebuttal of any fact which the defendant claimed to exist or sought to prove in his defense. It did not tend to disprove the threat made by Scott to Ryan that he would "cut his guts out"; and it was not offered for that purpose. Ryan did not testify that Scott was, in fact, jealous. He said, in effect, that on the 1st of April, when he made the threat, he then thought that Scott was jealous of him, but that he had changed his mind a little in that respect; thus, in effect, stating his opinion that there was no jealousy. Nor did Ryan testify that at the time of the homicide he still believed that Scott was jealous of him, or that he then acted in that belief. He made no such claim. So far as the evidence in defense was concerned, therefore, there was no substantial proof of jealousy on the part of Scott at the time he was killed, and no proof at all that Ryan then supposed that Scott was moved by jealous rage. Such facts are not to be presumed in favor of the defendant; and, as the testimony of Mrs. Scott could do no more than disprove against defendant a fact which could not be presumed in his favor and which was not proven, nor, in truth, claimed by him to exist, it was, at most, merely technical error and could do no injury.

During the examination of the jurors impaneled to try the case, three of them gave contradictory answers to repeated questions put to them upon the subject of their ability to disregard opinions as to the defendant's guilt which they had formed from newspaper reports and public rumor, and from the fact that he had been held for trial, and to decide the case upon the evidence alone. Many persons, competent as jurors, have not given much attention to such subjects, are inexperienced as witnesses, and are unable readily to comprehend the force and effect of the language in which such questions are couched, and they generally answer without reflection as to the effect of their own words. Such contradictions are by no means infrequent, if, indeed, they are not the rule, rather than the exception. The trial court must decide which of the answers most truly shows the juror's mind. It should, of course, be liberal in giving the defendant and the people the benefit of any doubts that may arise as to the fairness of the juror and his ability to lay aside preconceived impressions and should excuse the juror if such doubt is created. But, where there are such contradictions, its decision is binding upon this court. People v. Fredericks, 106 Cal. 559, 39 Pac. 944; People v. Staples, 149 Cal. 405, 86 Pac. 895; People v. Ochoa, 142 Cal. 274, 75 Pac. 847; People v. Flannelly, 128 Cal. 86, 60 Pac. 670; People v. Evans, 124 Cal. 210, 56 Pac. 1024; People v. Owens, 123 Cal. 487, 56 Pac. 251; People v. Scott, 123 Cal. 435, 56 Pac. 102.

There was no error in refusing to allow the witness Potts to be recalled after the close of the evidence in rebuttal to further explain parts of his testimony at the preliminary examination, which had been introduced in rebuttal. In his previous examination he had admitted the giving of the testimony on the former occasion, substantially as proven, and had been given ample opportunity to explain, and had explained in his own way, such trivial discrepancies as had been disclosed. It was not claimed that any additional explanations could be given, and the inconsistencies were of no importance.

The question put to defendant's witness Cooksey, on cross-examination, inquired concerning a remark imputed to him which tended to show ill will of the witness towards deceased, and it was competent for impeachment. Hence it was proper, in rebuttal, to prove that he made the statement as imputed to him in the question.

This embraces all the questions discussed by the defendant's counsel. We find no prejudicial error in the record.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

(152 Cal. 357)

O'NEILL v. THOMAS DAY CO. (S. F. 3,879.)

(Supreme Court of California. Nov. 29. 1907.)

1. MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE OF SERVANT—SUFFICIENCY OF EVIDENCE.

In an action by a minor for the crushing of his fingers by the falling of a stamp with which he was working, evidence examined, and *held* insufficient to impute contributory negligence to plaintiff because he followed one of two contradictory instructions as to the method of doing the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 994.]

2. TRIAL — VERDICT — DISREGARD OF ERRONEOUS INSTRUCTIONS.

Where an instruction is given embodying only a part of the facts and charging that, if such facts existed, plaintiff could not recover, a verdict for plaintiff is not erroneous as against the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 790.]

3. CONSTITUTIONAL LAW — DUE PROCESS OF LAW — CONTEMPT — PUNISHMENT — STATUTORY PROVISIONS—STRIKING OUT ANSWER.

Under Code Civ. Proc. § 1991, providing that if a party refuse to testify or depose, his complaint or answer may be stricken out, it is improper to deprive a defendant, for his refusal to depose before a notary, of his right to defend, and, by striking out his answer, compel him to submit to a judgment without a hearing upon the merits, since such action would be depriving him of his property without due process of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 739.]

4. SAME.

Under Code Civ. Proc. § 1991, providing that, if a party refuse to testify or depose, he may be punished for contempt and his complaint or answer stricken out, a plaintiff's refusal to depose before a notary is a contempt and punishable as such, since a plaintiff who invokes a court's aid must submit himself to all legitimate orders and processes, but his complaint may not be stricken out for such refusal until he has been adjudged guilty of the contempt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 739.]

5. TRIAL—ARGUMENT AND CONDUCT OF COUNSEL—WITHDRAWAL OR CORRECTION OF OBJECTIONABLE MATTER.

In an action for personal injuries, plaintiff's counsel asked a juror whether he had ever obtained an insurance policy from the Employers' Liability Association of London. Upon defendant's objection, plaintiff's counsel remarked that he asked the question to determine the state of mind of the juror; it being understood that defendant had taken out insurance in such company. The objection was overruled, but the question was subsequently withdrawn, and none other of the kind repeated. *Held*, that such conduct and procedure was not reversible error.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Edward J. O'Neill, by his guardian ad litem, William J. O'Neill, against the Thomas Day Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Van Ness & Redman and T. C. Van Ness, for appellant. Sullivan & Sullivan and Theo. J. Roche, for respondent.

HENSHAW, J. This is an action by an employé of defendant to recover damages for personal injuries caused by the alleged negligence of the defendant. The cause was tried before a jury, which rendered a verdict in favor of plaintiff for $3,000. From the judgment following this verdict and from the order denying its motion for a new trial, defendant appeals.

The complaint alleged that plaintiff, who was a minor about 16 years of age, was set to work upon a certain stamping machine without adequate or any instruction as to the use of the machine, without being informed that the machine was defective and imperfect, dangerous, and unsafe, and without knowledge that the machine and appliances used in operating it were dangerous. It is shown in evidence that the machine was operated by placing a foot upon the treadle, which caused the stamp to descend. If the foot was allowed to remain a moment too long upon the treadle the stamp rose and descended again; the foreman of the shop testifying that this had happened to him through his inadvertence and forgetfulness in allowing his foot to remain too long upon the treadle. It was also in evidence that from time to time the machine would get out of order, and the stamp would descend when the treadle had not been moved at all. The plaintiff testified that this actually occurred upon the afternoon when he was first called upon to operate the machine. Upon the first afternoon his duty consisted in slipping flat circular disks upon the die of the machine, and the stamp descending pressed them into "canopies" in shape like a flat-brimmed sugar-loaf hat. This had been the boy's occupation upon the afternoon of one day. The next morning he was engaged in the second process in the manufacture of these canopies. Here the die and stamp were changed somewhat, and the stamp descending pressed out the rim of the canopy. While engaged in this work, the stamp descended and crushed three of his fingers, necessitating amputation.

Appellant most strongly insists that the evidence of plaintiff himself shows that he was guilty of contributory negligence so as to bar his right of recovery. Herein the contention is that it is established by plaintiff himself, by Bechtel, the foreman of the shop, who gave plaintiff instructions as to the use of the machine, and by Mulligan, a witness called for plaintiff, that the plaintiff had been frequently warned against placing his fingers under the stamp in adjusting the disks or canopies, that as plaintiff must have disobeyed these instructions, or otherwise his fingers could not have been crushed, the case is one where the contributory negligence of the plaintiff is conclusively established by the uncontradicted facts. Were this all of the evidence upon the matter, appellant's contention would be unanswerable. But the record discloses that the proposition is not so simple as this statement of it would indicate. Thus the foreman, Bechtel, testified: "I got a die in it and I put it in the press, and then I told the boy: 'Now, come on, my boy. I got a nice job for you. I will show you the way to do it. Watch me.' I sat down at the press myself, started the machine, and I made some of these shells. Then I got up from the chair, and I tell the boy: 'Now, sit down and do the same way I show you before.' I said: 'Boy, now watch me; watch and see the way I do that work.'" Here, then, was a direction to the boy to do the work as the foreman himself was doing it. As to the method employed by the foreman, which was to serve as instruction for the boy, the testimony of the plaintiff is: "He showed me how to put it in the die. He put it in with his fingers. If you drop them in, they get crooked. He took them in his hand, and slipped them in the die, and told me that was the way to do it. He put the whole of his fingers under the punch to straighten the cup. He put below the second joint of his fingers under the punch. Then he put the cup in the die. Most every time he put it in with his fingers under the punch. When it tilted, he would put the fingers of his hand in the die under the punch and straighten them out. * * * The operation, according to my ideas, would be that he would take his foot off the treadle. Then he would take one of those cups and push it in with his fingers under the punch, and then he would take his fingers out, and then he would put his foot back on the treadle and then punch that cup down. * * * He did not on any occasion tilt it straight from the outside, nor did he tell me that when you tilted it in you were to touch it from the outside." Further the plaintiff testifies: "He told me 'to get the cups in the die; you put your fingers in.' He said: 'Look out for your fingers or you will get them cut off.' But you could not get the cups in any other way than to get your fingers in." The witness Mulligan also testifies as to the foreman's demonstration of the method to be employed: "I saw Mr. Bechtel show plaintiff how to put in the cup in case it got tilted. * * * Some of the time I saw Mr. Bechtel put his finger in between the punch and the die when he was showing the plaintiff." It appears, then, that from the foreman the boy received conflicting and contradictory instructions, the one verbal, not to put his fingers under the stamp, the other physical by way of demonstration, coupled with directions that the method shown him was the method which he was to adopt. By this method he was to place his fingers under the stamp in adjusting the disks and cups, and, according to the plaintiff's own testimony, he knew no other way of adjusting them. In this condition of the evidence, contributory negligence as matter of law may not be imputed to a minor plaintiff because he follows one or another of two conflicting and contradictory instructions as to the method which he is to employ in doing his work.

It is next contended that, under the instruction given by the court upon the subject of contributory negligence, the verdict is against law. That instruction is as follows: "If you believe the statement of the plaintiff that on the afternoon that he was put to work the punch did on one occasion come down at the time plaintiff's foot was not upon the treadle, and the plaintiff at that time escaped having his fingers crushed by reason of this unexpected coming down of the punch, and further find that the plaintiff, in operating the machine thereafter and up to the time of the accident of which he complains, was nervous because of fear that the punch would again, in like manner, come down when his foot was not upon the treadle, and that, knowing and feeling this, and knowing and understanding that the punch might come down while his fingers were under the punch, plaintiff did not, notwithstanding such knowledge, nervousness, and fear, refrain from calling the attention of the foreman to the fact that the punch had acted in the manner it had, and placed his fingers in such position that the coming down of the punch in like manner would strike and injure them, and that the punch then again came down without plaintiff's foot being upon the pedal, and injured them to the extent that they were injured, then, and in that case, plaintiff was guilty of contributory negligence, and your verdict, if you find the facts to be as above stated, should be in favor of the defendant." It may not be denied that if this instruction is to be considered the law of the case, to the extent that an observance of its directions was compulsory upon the jury, the verdict was against law and should necessarily have been for the defendant, because the instruction enumerated certain facts, and told the jury that, if they found those facts to exist, plaintiff was guilty of contributory negligence. Those facts indisputably did exist; that is to say, the boy was nervous, he had been warned against placing his fingers under the punch, and, notwithstanding such knowledge, nervousness, and fear, he did refrain from calling the attention of the foreman to the fact that the punch had once before descended while his foot was not upon the treadle, and he did, in fact, place his fingers under the punch so that they were crushed. But from what has previously been said in reference to the contradictory directions given by the foreman, it is apparent that the instruction given by the court was itself erroneous in point of law, because, under the evidence, the facts enumerated in the instruction were not in and of themselves sufficient to convict the plaintiff of contributory negligence. All consideration of the conflicting directions given to the plaintiff was eliminated. But it is urged under the authority of Emerson v. Santa Clara County, 40 Cal. 543, that, even though the instruction be erroneous, nevertheless, for the guidance and direction of the jury, it became their law, and their failure to observe and follow it was error calling for a reversal of the case. Such unquestionably was the rule laid down in the Emerson Case; but it is a rule which has long ceased to commend itself to this court, and, indeed, has been distinctly discredited and overruled (Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 104, 45 Pac. 1047; Edwards v. Wagner, 121 Cal. 376, 53 Pac. 821), and the rule now is that, while the jury should conform to the instructions of the court upon matters of law, if it appear to the appellate tribunal that an instruction was erroneous, it will not disregard a verdict contrary to such erroneous instruction. This, it may be added, is the general rule, as it certainly is a wise and just one. See Armstrong's Administrator v. Keith, 3 J. J. Marsh. (Ky.) 153, 20 Am. Dec. 131, and note.

Plaintiff, regularly subpœnaed by defendant for the taking of his deposition before a notary, appeared, and under advice and instruction of his attorney refused to answer pertinent and material questions propounded to him. Defendant's attorney moved the court, under section 1991, Code Civ. Proc., to strike out his complaint, and the motion was denied. Thereafter, and when the jury had been impaneled, the defendant's counsel objected to the case proceeding, and to evidence being taken while plaintiff was in contempt for refusing to answer the questions propounded to him upon his deposition. The court overruled the objection. At the time these proceedings were had, the law stood as expounded in Lezinsky v. Superior Court, 72 Cal. 510, 14 Pac. 104, and was to the effect that such a refusal to testify was not punishable as a contempt of court. It had also been declared that the provision of section 1991 of the Code of Civil Procedure, authorizing the court to strike out the answer of a recalcitrant defendant, if employed, would be to deprive such a party, haled into court without his consent, of his property without due process of law. Foley v. Foley, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147. Under the ruling as it then stood in the Lezinsky Case, the attorneys for defendant were justified for their failure to ask the court to proceed against plaintiff in contempt. That case has since been distinctly overruled in Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597, and it is declared that such conduct is a contempt, and punishable as such. Upon the other hand, the situation of a plaintiff and of a defendant are vitally different, so far as concerns the operation of section 1991, Code Civ. Proc. Plaintiff is always a voluntary actor before a court. A defendant is always under compulsion. The plaintiff is always seeking affirmative relief at the hands of the court. The defendant is merely contesting plaintiff's right to such relief. While, therefore, it is improper, under such circumstances, to deprive a defendant of the right to make his showing as to the matter urged against him, and, by striking out his answer, to compel him to submit to a judgment without a hearing upon the merits, the case of a plaintiff is far different. He is seeking the court's aid, and it is manifestly just and proper that, in invoking that aid, he should submit himself to all legitimate orders and processes. And certainly no plaintiff can, with right or reason, ask the aid and assistance of a court in hearing his demands, while he stands in an attitude of contempt to its legal orders and processes. Section 1991 of the Code of Civil Procedure declares as to such a plaintiff that his contumeliousness may be punished as a contempt and his complaint may be stricken out. By analysis, this section manifestly requires that before a plaintiff is punished he must be adjudged guilty of contempt. To such a judgment for a contempt, committed out of the immediate presence of the court, a citation and showing is necessary. The court, having found the contempt, must punish the plaintiff for it, and in a proper case that punishment may take the form of a rule striking out his complaint. A certain discretion is vested in the court in this regard, but it is not a discretion which would permit the court in one case and under a given state of facts to strike out the complaint, and in another case and under an identical state of facts to refuse to strike it out. If the plaintiff upon being adjudged guilty of contempt should express his willingness to obey further orders of the court, and to answer the questions propounded to him, clearly whatever other punishment might be awarded against him for his contempt that of striking out his complaint would be altogether too severe. But, upon the other hand, if the plaintiff remain obdurate and contumacious, it would not only be the right, but as well the duty, of the court, to refuse to proceed with his litigation further, and to evidence its refusal by ordering the pleading stricken from the files. Such, we take it, is the plain meaning of section 1991. But in every case it will be noted that, before any punishment may be awarded, the party must be adjudged in contempt. No such judgment was rendered against this plaintiff, and for that reason, as the penalties which defendant asked are imposable only after the party is found to be in contempt, the court was warranted in its refusal to grant defendant's motions.

Misconduct upon the part of plaintiff's attorneys is charged. This misconduct consisted in asking a juror whether at any time he ever obtained from the Employers' Liability Association of London a policy of insurance. To this question objection was made upon the ground that it was irrelevant, incompetent, immaterial, and improper. In presenting the matter to the court the attorney for the plaintiff stated that he had a right, upon the examination of jurors, to ascertain whether a juror had at any time been interested in policies of insurance issued by that company, so as to enable him to determine the state of mind of the juror, and to assist him in determining whether to exercise a peremptory challenge; it appearing or being understood that defendant had taken out insurance in this company. The objection was overruled by the court, but the question was subsequently withdrawn, and no other question of the kind was repeated. There was nothing in this to demand a reversal and retrial of the case. The same circumstances appeared in Russell v. Pacific Can Co., 116 Cal. 527, 48 Pac. 616, where the identical objection was presented, and it was there declared as above.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; McFARLAND, J.

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152 Cal. 311

CLOUGH v. DUFFY et al. (S. F. 4,846.)

(Supreme Court of California. Nov. 20, 1907.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS — CONFORMITY TO PRELIMINARY PLANS.

The board of supervisors of the city and county of San Francisco, contemplating the submission to the voters of a proposal for the issuance of bonds for the improvement of accepted streets, by ordinance, directed the board of public works, through the city engineer, to file with the supervisors plans and estimates of the cost. The board obtained from the city engineer, and filed with the supervisors, a report of plans and estimates for improvements on S. street at only three points. Thereafter, the supervisors passed an ordinance for an election for the issuance of bonds for the improvement of accepted streets in accordance with the plans and estimates of the city engineer. Subsequently, the supervisors passed an ordinance giving notice of a special election, which ordinance referred to the ordinance theretofore passed, but also to the proposition as one for the issuance of bonds for the improvement of accepted streets. The city charter does not require the supervisors, before submitting a proposal for a bonded debt, to obtain plans of the city engineer. *Held*, in an action to enjoin the improvement of a part of S. street, other than that as to which there were plans and estimates in the engineer's report, that the board of supervisors, in determining what improvements were required on S. street, were not limited to improvements at points mentioned in the engineer's report, but that the fund produced by the sale of bonds was applicable by them to the improvement of other points on that street.

In Bank. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Action for injunction by George A. Clough against George F. Duffy and others, constituting the board of public works of the city and county of San Francisco and another. From an order denying an injunction, plaintiff appeals. Affirmed.

Gray & Cooper, for appellant. Wm. G. Burke, City Atty., A. S. Newburgh, Asst. City Atty., and Wm. T. Kearney, for respondents.

McFARLAND, J. This action was brought in the superior court of the city and county of San Francisco to obtain a writ of injunction enjoining the defendants Duffy, Aigeltinger, and Eagan, constituting the board of public works of said city and county, and defendant the Barber Asphalt Paving Company, a corporation, from carrying out a certain contract entered into between said parties for improving Sutter street, an accepted street in said city and county, from the eastern line of Van Ness avenue to the western line of Sansome street. S. W. Horton, as auditor of said city and county, and Charles A. Bantel, as treasurer, are also made parties defendant; and it is sought to enjoin the former from approving any demand of said asphalt company under said contract upon any city fund produced by the sale of certain bonds, and to enjoin the treasurer from paying any of the funds so produced to said asphalt company upon said contract. Upon the final hearing the superior court made an order denying said injunction, and from this order plaintiff appeals.

On the 29th day of September, 1904, at a special election held in said city and county, there was duly submitted to the qualified electors thereof the proposition to incur certain bonded debts for several municipal purposes, and among others to incur a bonded debt in the amount of $1,621,000 for the repairing and improvements of accepted streets of said city and county. This proposition was carried at the special election by the vote of more than two-thirds of the voters; and afterwards the said bonds were duly issued, and of said bonds there were duly sold sufficient to produce more than $75,000 for the purpose of repairing and improving said accepted streets, and said amount was paid into the treasury of said city and county. Afterwards, on April 8, 1907, the board of supervisors, upon the recommendation of the board of public works, passed an ordinance ordering the improvement of Sutter street from Van Ness avenue to Sansome street, under the supervision of the board of public works, and in accordance with plans and specifications filed by the board and approved by the board of supervisors, and appropriating $75,000 for the purpose. In pursuance of said ordinance, the board of public works, after due advertisement and notice for sealed proposals, entered into the contract with the asphalt company, which is here sought to be enjoined. It is admitted that all of the proceedings, including the special election, leading up to this contract, were regular and legal; and the only point made by appellant is that the fund produced by the sale of said bonds is not applicable to the payment of any demand arising, or which may arise, out of said contract.

The above point of appellant is based on the contention that the purposes of the said bond issue are not general—that is, do not include generally the improvement of accepted streets—but are confined, so far as Sutter street is concerned, to certain parts of that street mentioned in Ordinance 946, and therefore do not include any of that part of said street lying between Van Ness avenue and Sansome street which are not mentioned in said ordinance.

It seems that when the board of supervisors were contemplating the submission to the voters the proposals for the issuance of bonds for various municipal purposes, including the improvement of accepted streets, they directed by Ordinance No. 702 the board of public works, through the city engineer, to procure and file with the supervisors plans and estimates of the cost of repairing and improving the accepted streets of the city and county. In pursuance of this direction the board of public works obtained from the city engineer, and filed with the supervisors, a report of plans and estimates of the cost of repairing and improving said streets. In this report there were plans and estimates for improvements on Sutter street at only three points—at Hyde street, at Taylor street, and at the crossing of Larkin street; but this report contained nothing as to the improvement of Sutter street continuously from Van Ness to Sansome. On August 3, 1903, the board of supervisors passed Ordinance 946, by which it was ordered that an election should be held at which the proposals should be submitted to the vote of the people for the issuance of bonds for several specified purposes, and, among others, for "the repair and improvement of accepted streets of the city and county"; and in section 2 there were these words: "In accordance with the plans and estimates of cost of the city engineer heretofore filed in the office of the board of supervisors." Afterwards the board of supervisors passed Ordinance No. 956 "giving notice of a special election for the purpose of submitting to the electors of the city and county propositions for the construction of a new city hospital," and several other improvements, and including in general terms "the repair and improvement of accepted streets." It is true that in one part of the ordinance reference is made to Ordinance 946; but when the matter of the improvement of accepted streets is again mentioned the language used is as follows: "Proposition to incur a bonded debt of the city and county of San Francisco, to the amount of one million six hundred and twenty-one thousand dollars ($1,621,000) with interest at three and one-half per cent. per annum, for the purpose of repairing and improving accepted streets of said city and county."

We do not think that by the foregoing facts the board of supervisors, in determining what repairs and improvements were required on Sutter street, were limited to improvements at the few places mentioned in said report of the city engineer. There is nothing in the city charter providing that the board, before submitting a proposal for a bonded debt, shall require plans and estimates of costs to be furnished by the engineer. The plans and estimates of the city engineer were evidently ordered by the board of supervisors merely for their information, and the better to enable them to correctly estimate the cost of the proposed improvements of the accepted streets, and the amount of the bonds the proposal should name. See Hammond v. City of San Leandro, 135 Cal. 450, 67 Pac. 1092. The said report of the city engineer was not in the nature of specifications such as are necessary where a contract is to be let for the doing of a specific piece of work. Ordinance No. 702 does not speak of "specifications"; it merely directs that the city engineer file "plans and estimates of the cost of repairing and improving the accepted streets of the city and county, as provided in section 1 of this ordinance," and section 1 is merely that "it is hereby determined and declared that the public interests and necessity demand the repair and improvement of the accepted streets of the city and county." The power and duty of estimating the amount of the bonded debt necessary, of submitting a proposal to the voters, and of using the products of the bonds for the general purpose "of repair and improvement of the accepted streets" rested with the board of supervisors, and it could not be shifted by them to the shoulders of any other person or persons, although they could call for information on the subject to aid their judgment. We see no law or principle by which they were precluded from ordering the work on Sutter street, which is the subject of the contract here in question. The voters are presumed to have acted upon the notice of submission of the proposal which was general in its character, and with the understanding that the contemplated bonds were to be used generally for the repair and improvement of the accepted streets according to the discretion and direction of the city officials who had authority over that matter.

The order appealed from is affirmed.

We concur: SLOSS, J.; LORIGAN, J.; HENSHAW, J.

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152 Cal. 331

PEOPLE v. KAUFFMAN. (Cr. 1,300)

(Supreme Court of California. Nov. 29, 1907.)

1. Conspiracy — Object of Criminal Conspiracy—Question for Jury.

Whether a criminal act by one of the parties to an unlawful conspiracy was the ordinary and probable effect of the common design, so as to hold other conspirators equally responsible, or whether it was a fresh and independent product of the mind of such party, making him alone responsible, is a question of fact for the jury.

2. Criminal Law—Appeal—Conclusiveness of Verdict.

If there is any evidence to support the jury's finding on a question, its determination is conclusive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3075.]

3. Same — Criminal Responsibility — Persons Liable—Acts of Co-Conspirators.

In a prosecution against a party to a conspiracy to commit burglary for the shooting of an officer by another of the conspirators while they were returning from the scene of the proposed crime, where such conspiracy was still existent at the time of the shooting, defendant was responsible therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 74.]

4. Same—Prosecution—Sufficiency of Evidence.

In a prosecution against a party to a conspiracy to commit burglary for the killing of an officer by another of the conspirators while they were returning from the scene of the proposed crime, evidence examined, and *held* to justify the jury in finding that the common design embraced, not only the actual burglary, but the protection of the conspirators from arrest or interference on their way to and from the scene of the proposed crime.

In Bank. Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

William Kauffman was convicted of murder in the second degree, and he appeals from an order denying a new trial. Affirmed.

William H. Schooler, for appellant. U. S. Webb, Atty. Gen., and Lewis F. Byington, Dist. Atty., for the People.

SLOSS, J. William Kauffman, Frank Woods, William Henderson, John Courtney, William B. Kennedy, and Allan Goucher were by indictment jointly charged with the murder of one Eugene C. Robinson. Upon a separate trial Kauffman was convicted of murder in the second degree, and he now appeals from the order denying his motion for a new trial.

His principal contention is that the evidence was insufficient to justify the verdict of guilty. There was evidence tending to establish this state of facts: In January, 1902, the defendant, William Kauffman, rented rooms at 203 Turk street, in the city and county of San Francisco. These rooms were occupied by Kauffman, Henderson, and Goucher, who, together with Woods, Courtney, and Kennedy, devised a plan to rob the safe at Cypress Lawn Cemetery in San Mateo county. Having provided themselves with burglars' tools, nitroglycerin, and fuse for the purpose of breaking into the safe, they started on the night of the 20th of January, 1902, for Cypress Lawn. Before starting, each of the six, with the exception of Kauffman, had armed himself with a revolver. Kauffman had no revolver, but had on his person a small drill, and a bottle of nitroglycerin which he had made. In going to the cemetery the party divided into squads of three, for the purpose, it may reasonably be inferred, of lessening the danger of detection. Upon arriving at the cemetery they found an armed man upon the premises, and decided to return to San Francisco. They rode back on a street car until they reached the corner of Mission and Twenty-Ninth streets, where they found that the car went no further. Thence they started to walk into the city, proceeding along Valencia street, here again dividing into two parties of three each; Woods, Henderson, and Kauffman going ahead, and Kennedy, Goucher, and Courtney following at some little distance. After they had gone along in this way for some distance, Woods, Henderson, and Kauffman were called back by the others, who suggested the burglary of a coal yard. This proposition was objected to by the appellant and others, and was not carried out. Woods, Kauffman, and Henderson continued walking in advance of the others. Walking along Valencia street they had reached Seventeenth street, when they heard a call or yell, and saw Kennedy and Goucher running towards them. Kennedy turned and fired a shot back. and then climbed or jumped over a fence and disappeared. Goucher joined the three in advance, saying that he was not going to run, and added something about having a gun. The four had walked a short distance when Robinson, a police officer, came running up behind them and asked, "Who has got that gun?" Woods ordered him to throw up his hands. Two or three shots were exchanged, probably between Woods and Robinson, and then a fusilade of shots followed, in the course of which both Woods and Robinson were wounded. This encounter occurred at about 1 o'clock on the morning of January 21st, and Robinson died on the same day as the result of the wounds so received by him. After the shooting, the appellant and his codefendants fled, and all, with the exception of Henderson, made their escape from the scene. Woods and Kauffman started a day or two later for Portland, Or., whence Kauffman made his way east until he reached Ft. Williams, Canada, where he was arrested. At the time that Goucher came up and joined Woods, Henderson and Kauffman, Kauffman still had in his possession the nitroglycerin and the drill with which he had started. When Goucher came up, Kauffman handed him the nitroglycerin, but still kept the drill. As has been said, the appellant was not armed, and during the shooting was standing still, his own testimony being to the effect that he held his hands up in the air. The theory of the people was that the killing of Robinson was an act committed in furtherance of a common design or conspiracy by the six defendants to commit an unlawful act, and that, therefore, Kauffman, as one of said conspirators, was criminally responsible for such killing, although he took no active part in the attack upon Robinson.

There is no dispute about the rules of law governing the criminal liability of each of several parties engaging in an unlawful conspiracy or combination. An apt statement of them, abundantly supported by authority is to be found in 8 Cyc. 641, in the following language: "The general rule is well settled that, where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law the act of one is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. Nevertheless the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design. Even if the common design is unlawful, and if one member of the party depart from the original design as agreed upon by all of the members, and do an act which was not only not contemplated by those who entered into the common purpose, but was not in furtherance thereof, and not the natural or legitimate consequence of anything connected therewith, the person guilty of such act, if it was itself unlawful, would alone be responsible therefor."

The contention of the appellant is that the unlawful combination or conspiracy embraced only the proposed burglary at the cemetery, and that, when this project was abandoned by reason of the discovery of an armed guard on the premises, the conspiracy or common design was at an end, and that anything done thereafter was the individual act of the party doing it. If, as matter of law, it can be said that the criminal combination embraced no more than this contemplated burglary, and that the shooting of Robinson was not within the reasonable and probable consequences of the common unlawful design, it would follow that no case was made out against the appellant. But whether or not the act committed was the ordinary and probable effect of the common design or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, is a question of fact for the jury. Bowers v. State, 24 Tex. App. 542, 7 S. W. 247, 5 Am. St. Rep. 901; Spies v. People, 122 Ill. 1, 12 N.E. 865, 3 Am. St. Rep. 320. And, if there be any evidence to support the finding of the jury on this question, its determination is conclusive. In this case the people contended that the evidence justified the jury in finding that the common plan or design in which Kauffman and his codefendants had engaged included, not only the breaking into the safe, but also the protection of themselves and each other from arrest and detection while going to and coming from the scene of the proposed burglary, and that any act committed by any of them in the course of such going or coming for the purpose of resisting arrest and preventing consequent detection might be found to be within the scope of the common design or plan. Treating the extent of the conspiracy as a question of fact, the trial court submitted the question to the jury, giving them the following instruction: "If you find from the evidence in this case that the defendant and others entered into a conspiracy to commit a burglary, and that in connection with such a criminal purpose they had agreed to resist arrest and interference going to the scene of the proposed crime and returning therefrom, and that being confederated together for the felonious purpose of such burglary and resistance to the civil power of the state—even to the extent of taking human life—and that in furtherance of such a conspiracy one of the conspirators killed Officer Eugene C. Robinson, then it will be your duty to convict the defendant of the crime of murder because the law holds that all who entered into such a conspiracy assumed to themselves as a body the attribute of individuality, rendering whatever was done by one of the conspirators in furtherance of that design the act of all."

Was there evidence justifying the jury in finding that the conspiracy extended to the extent indicated in this instruction? This court has in effect answered this question in the affirmative in People v. Woods, 147 Cal. 265, 81 Pac. 652, 109 Am. St. Rep. 151. That was the appeal of Woods, one of the defendants jointly charged with Kauffman, from a judgment upon a conviction of murder of the first degree. The evidence, which is set forth with some fullness in the opinion of the Chief Justice, was substantially the same as that presented in this case. In the opinion in the Woods Case, it is said (page 271 of 147 Cal., page 655 of 81 Pac.): "The court was not only justified in overruling the objections to the testimony regarding the conspiracy upon the ground above set forth, but upon the further ground that upon the evidence—circumstantial and direct—the jury would have been justified in concluding that a part of the common design was to resist arrest by the use of the pistols with which the defendants armed themselves. People v. Pool, 27 Cal. 572. Pistols are not used for breaking into a safe. Their purpose is to kill those who interfere to prevent a burglary or arrest the perpetrators." It is argued that the decision in the Woods Case is not applicable to the facts here presented, because in that case it appeared that Woods himself had fired upon Robinson, and had inflicted the fatal wound. But the court was considering the admissibility of testimony regarding acts of parties other than Woods. This testimony was admissible only upon the theory that these parties and Woods were co-conspirators, and, in holding that the evidence was properly introduced, it was material to the decision to hold that upon the evidence the alleged conspiracy might have been found by the jury not to have terminated. If such conspiracy was still existent at the time of the shooting, the result that Kauffman was responsible for acts done by any of the conspirators follows as truly as did the conclusion that evidence of the acts of co-conspirators was admissible against Woods. But, if we were to regard the question as a new one, we have no doubt of the correctness of the views expressed in the former case. The jury was certainly justified in believing that the division of the band into two parties of three was decided upon on the homeward, as on the outward journey, for the purpose of lessening suspicion, and that to all intents and purposes the six were going home together. Five of them were armed with deadly weapons, and several of them—Kauffman among others—had on their persons burglars' tools. For their own protection against the consequences of their felonious enterprise, it was necessary that these tools should not be discovered upon them by any officer of the law. Adding to this the consideration suggested by the court in People v. Woods, namely, that pistols are used by burglars, not for breaking into safes, but for preventing interference with the criminal design or arrest by those who may discover its existence, and the further fact that there is evidence here to the effect that Kauffman himself had endeavored to secure a pistol before starting on the journey, we think it clear that there was ample evidence to justify the jury in finding that the common design or conspiracy embraced not only the actual burglary at Cypress Lawn Cemetery, but the protection of the party from arrest or interference on their way to and from the scene of the proposed crime.

This appeal was originally heard in the District Court of Appeal for the First Appellate District, and there a reversal was ordered on the ground of insufficiency of evidence. Upon petition of the people, the cause was ordered transferred to this court for hearing and determination. It appears that all of the briefs filed in the District Court of Appeal were destroyed in the fire of April, 1906, and, with the exception of a brief filed by the appellant since the submission here, we have before us nothing but the petition of the Attorney General asking for the transfer of the cause and the reply of the appellant thereto. These papers deal only with the point decided in the appellate court, and contain no argument on behalf of the appellant with reference to other points that may be relied upon by him. We have, however, carefully examined the transcript, and find in it no prejudicial error. The instructions given by the court were full and contained an accurate definition of the law applicable to the case. Instructions requested by the defendant and refused were for the most part based upon the theory that as matter of law the alleged conspiracy must be held to have terminated when the conspirators abandoned the plan of breaking into the safe at Cypress Lawn Cemetery. As we have already said, the question whether or not the conspiracy had then terminated was one of fact for the jury. Many objections to testimony were based upon the same untenable theory, and the others were equally without merit.

There is nothing in the point, suggested in the last brief filed, that the verdict is based upon the uncorroborated testimony of an accomplice. Apart from the testimony of Henderson, there was sufficient evidence of every material element of the crime. See People v. Woods, supra.

The order denying a new trial is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J; McFARLAND, J.; HENSHAW, J.

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152 Cal. 338

ST. MARY'S HOSPITAL v. PERRY. (S. F. 4,744.)

(Supreme Court of California. Nov. 29, 1907.)

1. Executors and Administrators — Distributive Share—Failure to Pay—Proceedings by Distributee.

While the probate court by contempt proceedings may compel an executor or administrator to deliver to the distributee property distributed by its order or decree, the distributee is expressly authorized by Code Civ. Proc. § 1666, to sue the executor or administrator therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1269.]

2. Same—Nature of Action.

An action against an executor or administrator to recover plaintiff's distributive share of an estate, authorized by Code Civ. Proc. § 1666, is against the executor or administrator individually and not against the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1658.]

3. Same—Distribution—Final Decree.

As against a decedent's estate, all the rights of a distributee are fully adjudicated by the decree of distribution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1309.]

4. Same—Parties—Description.

Where a suit against an executrix to recover plaintiff's distributive share of the estate as fixed by the decree of distribution was plainly a suit against the executrix in her individual capacity, the words "as executrix" in the title of the cause following defendant's name should be held to be merely descriptive.

5. Pleading — Motions — Judgment on Pleadings.

A motion by plaintiff for judgment on the pleadings can be properly granted only where the complaint is sufficient to warrant the relief sought, and the answer presents nothing by way of denial or new matter to bar or defeat the action.

6. Executors — Distributive Share — Actions—Issues.

Where, in a suit against an executrix for plaintiff's distributive share, the complaint charged that the decree distributed to plaintiff $691.56, in discharge of a legacy bequeathed to plaintiff to endow a bed in plaintiff's hospital to the memory of testatrix's husband, an allegation in the answer that the decree directed that the legacy be used for the endowment of a bed for the poor, in memory of testatrix's husband, and that plaintiff should take the legacy subject to that condition, raised no material issue.

7. Pleading—Facts or Conclusions.

A distribution decree directed payment to plaintiff of a certain sum in satisfaction of a legacy for the endowment of a bed in plaintiff's hospital to the memory of testatrix's husband. *Held*, that an allegation in the answer of the executrix in a suit to recover such legacy that defendant was informed and believed that plaintiff was not entitled to the legacy, unless it agreed to permanently maintain such bed, etc., and that before commencement of the action plaintiff had notified defendant that the amount of the legacy would only be sufficient to endow a bed for about 18 months, was properly regarded as a mere conclusion of law, and as not raising an issue of fact.

8. Executors and Administrators — Distribution—Delivery of Share—Duty.

In the absence of an appeal from a decree of distribution, it is the duty of the executor or administrator to deliver the property distributed to the distributees taking their receipt therefor, unless the decree expressly provides otherwise, the right of the legatee being finally and conclusively established by the decree of distribution.

9. Trusts—Testamentary Trusts—Acceptance by Trustee—Statutes.

Where a decree of distribution gives the property to the distributee in trust for certain purposes, the latter's mere acceptance of the property under the decree, with knowledge of the provisions thereof, is an acceptance of the trust, within Civ. Code, § 2222, providing that a voluntary trust is created as to the trustee by words or acts indicating his acceptance of the trust, etc.

10. Executors and Administrators — Distribution of Property in Trust—Breach by Legatee.

Where a legatee accepts the legacy under a distribution decree declaring a trust, the executrix having no supervisory powers over the performance of the trust is not entitled to require an agreement from the distributee to perform the trust as a condition precedent to payment of the legacy.

11. SAME—INTEREST—COSTS.

Where an executrix wrongfully refused to pay over a legacy to a distributee, she was chargeable in her individual capacity both with interest and costs of a suit by the legatee to recover the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1296.]

12. SAME—JUDGMENT.

Where an executrix wrongfully refused to pay over a legacy distributed to the legatee by the distribution decree in trust for certain purposes, it was not proper that the judgment in favor of the legatee and against the executrix personally for the recovery of the legacy should declare the conditions on which the plaintiff held the fund.

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by the St. Mary's Hospital against Stella Perry, as executrix of the will of Rosalie Meyer, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

W. D. Storey, for appellant. James Gartlan, for respondent.

ANGELLOTTI, J. By the decree of final distribution made December 13, 1904, in the matter of the estate of Rosalie Meyer, deceased, the sum of $691.56 was distributed to plaintiff corporation. The defendant executrix having failed to pay the same over, this action was instituted by plaintiff against such executrix to recover the same, with interest and costs. An answer having been filed, the plaintiff made a motion for judgment on the pleadings, and this motion was granted, and judgment was entered for plaintiff in accord with the prayer of its complaint. This is an appeal by the defendant from such judgment.

While the court in probate may, through the medium of contempt proceedings, compel an executor or administrator to deliver to the distributee property distributed by its order or decree (Ex parte Smith, 53 Cal. 204; In re Clary, 112 Cal. 292, 44 Pac. 569; Estate of Kennedy, 129 Cal. 384, 387, 62 Pac. 64), section 1666, Code Civ. Proc., in terms authorizes distributees to "demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession." Melone v. Davis, 67 Cal. 279, 7 Pac. 703; Wheeler v. Bolton, 54 Cal. 302; LeMesnager v. Variel, 144 Cal. 463, 77 Pac. 988, 103 Am. St. Rep. 91. Such an action against an executor or administrator is one against him individually, and not against him in his representative capacity. It is not an action against the estate. As against the estate, the rights of the distributee are fully adjudicated by the decree of distribution (see Melone v. Davis, supra). There being no claim to the contrary asserted in the briefs, we assume this may properly be held to be such an action against an executrix in her individual capacity, for refusal to pay over moneys which, under the decree, it was her duty as executrix to pay, and that the words "as executrix," etc., in the title of the action should be held to be merely descriptive. See Melone v. Davis, supra. It is, of course, true, as stated by counsel for defendant, that a motion for judgment on the pleadings can be properly granted only where the complaint is sufficient to warrant the granting of the relief sought, and the answer presents nothing either by way of denial or new matter, to bar or defeat the action.

It was alleged in the complaint that by the will of Rosalie Meyer, deceased, duly admitted to probate, "there was given and bequeathed to plaintiff, the sum of $1,000 to endow a bed for the poor, in memory of Seraphim Meyer, the husband of testatrix," and that on or about the 30th day of December, 1904, a decree of final distribution was made, by which "there was distributed to the plaintiff the sum of $691.56, in full discharge of said bequest of $1,000." Defendant claims that a material issue was made in this regard by certain allegations of her answer, which are as follows: "That the decree of distribution named in said complaint expressly provides and directs that the legacy sued for in this action is to be used for the endowment of a bed for the poor, in memory of Seraphim Meyer, deceased, and that plaintiff should take said legacy subject to that condition. That defendant is advised, and informed and believes, and on such information and belief alleges, that said decree provides that unless plaintiff should agree to permanently provide and maintain a bed for the poor, in memory of Seraphim Meyer, deceased, plaintiff should not be entitled to receive said legacy. That before the commencement of this action, defendant notified and informed plaintiff that defendant was ready to pay over said legacy to plaintiff, upon plaintiff agreeing to permanently provide and maintain such bed, but plaintiff replied that it declined to make such an agreement, and informed defendant that it would cost $5,000 to permanently endow such a bed, and that plaintiff could not, and would not provide and maintain such a bed, for such legacy, for a longer period than about 18 months. Whereupon defendant refused to pay over said legacy to plaintiff, and this is the only refusal to pay over said legacy that defendant has expressed."

It is manifest that the first paragraph quoted from the answer raises no material issue, and is substantially a reiteration of the allegations of the complaint, which, as we read them, show simply a distribution to plaintiff of the $691.56 in trust for the purpose mentioned in the will. The information and belief allegation of the answer, following this, considered in connection with the preceding provision, was clearly intended simply as an allegation of the defendant's opinion based on the advice and information received from others and her own belief, as to the legal effect of such a distribution in trust as had been positively alleged in the preceding paragraph, and must be so construed. It is inconceivable that an executrix having the knowledge as to the contents of the decree of distribution made and entered that she must be presumed to have, and that the positive allegation contained in the next preceding paragraph as to the express provisions of the decree shows her to have actually had, should base an allegation of fact as to the existence of other express provisions in the decree solely on advice, information, and belief. Under the circumstances, the change in the form of allegation from that used in the allegation as to the express provision of the decree shows the intent of the pleader and the proper construction of the information and belief allegation to be as above stated. It was, therefore, properly regarded by the trial court as making no issue of fact and being merely an allegation of a conclusion of law. The remaining allegations of the answer quoted above are, in the absence of express provision in the decree requiring the execution of an agreement by plaintiff before receiving the legacy, immaterial, unless it is the law that one to whom property is distributed in trust for any purpose must, before receiving the property from the executor or administrator, expressly agree with such officer to use the property for the purposes and in the manner declared in the decree defining the trust, or, at least, must not inform such officer of an intention not to so use the property. We know of no such requirement of law. The right of a legatee is finally and conclusively established by the decree of distribution. In the absence of appeal therefrom, it is the duty of the executor or administrator simply to deliver the property distributed to the distributees. Unless the decree expressly provides otherwise, he is entitled to nothing more than a receipt for the property from such distributee. If the decree gives the property in trust for certain purposes, the mere acceptance of the property under the decree by the distributee, with knowledge of the provisions of the decree, is an acceptance of the trust, under all the terms and conditions declared by the decree (see Civ. Code, § 2222; Elizalde v. Elizalde, 137 Cal. 634, 636, 66 Pac. 369, 70 Pac. 861), and no other acceptance is required. Proper performance of the duties appertaining to the trust is another and subsequent matter, with which the executor or administrator has nothing to do. If the legatee, having accepted the trust by accepting the legacy under the decree declaring it, and, therefore, subject to the terms and conditions thereby imposed, refuses to carry it out or diverts the money to other purposes, the law may afford a remedy to any one beneficially interested. That, however, is a matter of no concern here. Defendant executrix has no supervisory power in that regard, but is called upon by the decree simply to deliver the property distributed. She has no right to require from the distributee any agreement as to the performance of the trust as a condition precedent to delivery, and any statement by the distributee to her as to its intention in the matter of such performance is absolutely immaterial. This is the only matter as to which it is claimed that the answer sets up any effectual defense.

In cases of this character, the allowance of interest from the time the executor or administrator should have paid the money to the distributee is proper. Melone v. Davis, supra. Costs, of course, are allowable, as in other cases, and both costs and such interest are chargeable only against the executrix as an individual and not against the estate. Melone v. Davis, supra. It was not essential that the judgment in this action should declare the terms and conditions under which plaintiff takes the money; indeed, such terms and conditions would properly have no place in the judgment. They are declared in the decree of distribution, under which plaintiff takes when she enforces this judgment.

It follows from what has been said that the complaint was sufficient to warrant the relief granted by the judgment, and that the answer presented nothing either by way of denial or new matter to bar or defeat the action. The judgment on the pleadings was, therefore, properly granted. Loveland v. Garner, 74 Cal. 298, 15 Pac. 844; San Francisco v. Staude, 92 Cal. 560, 28 Pac. 778; Benham v. Connor, 113 Cal. 168, 45 Pac. 258; Weill v. Crittenden, 139 Cal. 488, 73 Pac. 238.

The judgment is affirmed.

We concur: McFARLAND, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.

152 Cal. 319

MONTGOMERY v. THOMSON. (S. F. 4,050.)

(Supreme Court of California. Nov. 29, 1907. Rehearing Denied Dec. 26, 1907.)

1. SALES—CONTRACTS—TERMINATION.

A contract of sale of brush for levee work required the seller to deliver 1,700 cords within 30 days, and as much more as he could, until stopped by notice from the buyer. The seller shipped the 1,700 cords, which the buyer received and paid for. The buyer then wrote stating that he would need about 1,700 cords more. The seller, at the time of receiving the letter, had shipped 1,100 of the additional 1,700 asked for. On the same day, the buyer sent a telegram directing the seller not to send more than 1,000. On the following day, the buyer, in a conversation with the seller, directed him to send the balance of the brush. *Held*, that the telegram was not such a complete termination of the contract as to preclude the buyer, with the consent of the seller, from varying the directions therein, and ordering further brush to be delivered under the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 234, 235.]

2. SAME—DELIVERY.

Where goods were delivered by a seller in the same manner as other goods had been delivered, which the buyer had accepted and paid for, and there was nothing for the seller to do to complete the delivery, the delivery was sufficient to constitute a complete sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 529.]

3. Same—Time as Essence of Contract.

A buyer of brush for levee work requested the seller to send an additional quantity, and asked about what time the seller could deliver it. The seller stated that it depended on how soon he could obtain a barge, but that he thought he could deliver it by a designated day. The seller procured a barge, and it reached the place of delivery about six days after the designated date. *Held*, that time was not of the essence of the contract, and the fact that the barge did not arrive until six days after the designated time was immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 222.]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by S. M. Montgomery against Thomas Thomson. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Booth & Bartnett and W. J. Bartnett, for appellant. C. W. Thomas and E. A. Bridgeford, for respondent.

McFARLAND, J. This is an action to recover $2,620.80 and interest for an alleged balance due plaintiff from defendant for the sale, by the former to the latter, of a certain amount of cords of brush, to be used by defendant in certain levee work at Sherman Island. The case was tried without a jury, and the court made findings, and rendered judgment as prayed for in the complaint. From the judgment, and from an order denying his motion for a new trial, defendant appeals.

On September 12, 1901, a written contract was executed between plaintiff, as party of the first part, and defendant, as party of the second part. The contract provided: "That the party of the first part agrees to furnish and deliver 1,700 cords of brush, at the Sherman Break, within 30 days from the date of this instrument, barring a flood, and further agrees to use all due diligence to furnish and deliver as much more as he can, until stopped by floods or by notice from party of the second part. It is distinctly understood that the brush will be landed on the bank of the Sacramento river in ample time to be delivered to Sherman, provided he can get the barges to load it on. The party of the second part agrees to pay, or cause to be paid, to the party of the first part, $3.90 per cubic cord for each and every cord delivered at Sherman Island, in the following manner: On the 5th day of each month $3.50 for every cord delivered in the previous month; the 40 cents per cord retained to be paid five days after the final delivery. All of the above mentioned brush to make into facines as per attached specifications." The contract then provides for the kind of brush to be used, and the manner of its preparation. The brush was to be procured by plaintiff in Yolo county, and shipped on barges down the river to Sherman Island, and received there and unloaded by defendant, and the barges returned. The plaintiff shipped the first 1,700 cords, and also some other brush, which was all received by defendant and paid for. The controversy here is only about the last shipment of 672 cords on the barge Nevada. Defendant contends that he ended the contract by notice given plaintiff before the shipment of this last lot of brush; and the main question in the case is whether this contention is maintainable.

On November 13, 1901, defendant wrote to plaintiff as follows: "November 13, 1901. Sam Montgomery, Esq., Woodland—Dear Sir: Enclosed please find check for $4,570.55, being the amount due for the brush delivered in the month of October. With good luck (that is if I get the rock) all of the Barge Oroville's brush will be sunk, and portion of the other put into mattresses. We will require from you about 1,600 or 1,700 more cords. The last time I saw you I understood that you were going to load about 1,200 cords. We will require 4 or 500 more than that, making in all about 16 or 1,700. I write this so that you could make two shipments, instead of one large and one small. Trusting to hear from you as early as possible, I remain, Yours respectfully, Thos. Thomson."

Plaintiff received this letter on the next day, November 14th, at 2:45 p, m., at which time he had shipped about 1,100 of the additional 1,700 asked for. On the same day on which he received this letter he also received a telegram from defendant dated 2:10 p. m., November 14th, as follows: "Darby has 600 cords, don't you send more than 1,000." But on the next day, November 15th, plaintiff went to San Francisco and saw defendant, and, according to plaintiff's testimony, the defendant took back what he had said in said telegram, and told plaintiff to send the balance of the brush down, and he "would make it all one payment next pay day." Defendant asked about what time he could get the brush down, and plaintiff said that it depended upon how soon he could get another barge, but he thought he could get it down by the 23d or 24th of November. Plaintiff went home and procured the barge, and the loading of it was completed at noon on the 23d. On November 20th defendant wrote up, "Don't ship your extra 600 cords of brush, have no use for it," but plaintiff, who was then sick at home, did not receive the letter until the 23d. Defendant also wrote another letter dated November 20th to the same effect, but plaintiff did not receive this letter until November 27th. The barge reached the place of delivery at Sherman Island about the 29th of November. The brush on it was measured by defendant's agent, but defendant afterwards refused to unload it, and did not use it.

Defendant contends that by the telegram of November 14th he definitely and conclusively terminated the contract, and that by his subsequent acts he did not, and could not, legally revive it. We do not think that this contention is maintainable. It is doubtful if the terms of the telegram could be construed, under the language of the instrument, as an absolute termination of the contract, or anything more than a desire that the sending of more brush be temporarily suspended; but it certainly did not preclude defendant, with the consent of plaintiff, from retracting or varying the direction given in the telegram, and ordering further brush to be delivered under the contract. To hold otherwise would be to take a view of the matter entirely too narrow, and altogether unreasonable.

There is no other point made by defendant which is tenable, or which calls for particular discussion. The delivery of the last brush was sufficient to constitute a complete sale; it was delivered in the same manner as the other brush had been delivered; and there was no other thing for plaintiff to do in order to complete it. The testimony of plaintiff was sufficient to show that the brush was of the kind mentioned in the contract, and prepared as there prescribed; moreover, defendant made no objection on that score, but refused to unload the brush solely because he did not want it. The fact that the barge did not arrive until about the 29th, and that it contained something over 600 cords, was not of the essence of the contract, and did not constitute the ground on which defendant refused to use the brush. We do not see any other point requiring special notice. It is to be observed that the brush which formed the subject of the contract was not a standard article in common use, and having a continuous market value. It was not prepared except in cases where it was specially required and ordered for the construction and repair of levees, dams, etc.; and this consideration should be kept in view when determining the rights of the parties in the case at bar.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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152 Cal. 344

WOOD, CURTIS & CO. v. MISSOURI PAC. RY. CO. et al. (Sac. 1,522.)

(Supreme Court of California. Nov. 29, 1907. Rehearing Denied Dec. 26, 1907.)

1. Appeal—Appealable Orders.

Appeal does not lie from an order sustaining a demurrer or striking out part of a pleading; but such order is reviewable only on appeal from the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 411.]

2. Same — Premature Appeal — Entry of Judgment.

Under Code Civ. Proc. § 939, authorizing the taking of an appeal "within six months after the entry of judgment," an appeal, taken before the actual entry of the judgment in the book wherein it is required by law to be entered of record, is premature, and cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1877.]

3. Judgment—Entry—Judgment Book.

A judgment for defendant on the sustaining of demurrers to the complaint and the striking out parts of it, and on plaintiff electing to stand on the complaint, though in terms "that the action be dismissed and defendants recover their costs," is a final judgment on the pleadings of the relative rights of the parties, and so required by Code Civ. Proc. § 668, to be entered in the judgment book, and not a simple order of dismissal, which, under section 581 as amended in 1879, may be entered in the minutes of the court.

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by Wood, Curtis & Co. against the Missouri Pacific Railway Company and others. Judgment for defendants, and plaintiff appeals. Dismissed.

L. T. Hatfield, for appellant. Devlin & Devlin, for respondents.

ANGELLOTTI, J. This is an action to recover the value of two car loads of potatoes, alleged to be worth $587.94, shipped by plaintiff over the railroads of defendants, common carriers, and alleged to have been damaged while in the custody of said carriers by reason of their negligence. Defendants interposed demurrers to the second amended complaint, on the grounds of want of facts to constitute a cause of action, want of jurisdiction over the persons of defendants, also of ambiguity, uncertainty, unintelligibility, and that the action is barred by a provision of our statute of limitations. On March 2, 1905, these demurrers, after argument, were sustained by the trial court, with leave to plaintiff to amend its complaint within 20 days. On the same day motions to strike out certain portions of such complaint were granted in part. Orders so disposing of demurrers and motions to strike out were thereupon entered on the minutes. On March 10, 1905, plaintiff having notified defendants and the court that it would not amend and elected to stand on the second amended complaint as to which the demurrers had been sustained, the court rendered judgment in the following form: "In the above-entitled action the respective demurrers of the defendants, Missouri Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company, to the second amended complaint having been sustained and plaintiff allowed 20 days in which to amend, and plaintiff having elected in writing not to amend, but to stand on the pleading as filed, it is ordered that the leave heretofore granted to amend be withdrawn, and, the demurrers having been sustained, it is ordered that the action be dismissed, and defendants recover their costs. J. W. Hughes, Judge. March 10, 1905." This judgment was on the same day spread at length in writing on the courtroom blotter or civil minutes of the court and on the register of actions, and prior to April 1, 1905, was spread at length in writing in the minutes of the court. It was not entered in the judgment book, the book designated by law for the entry of judgments (section 668, Code Civ. Proc.) until September 29, 1905. This appeal of plaintiff, taken to the District Court of Appeal, according to the notice of appeal "from the orders and judgment therein given, made and entered in the said superior court, on the 2d day of March, 1905," was taken prior to such entry, viz., in August, 1905. A motion was made to dismiss the appeal upon the ground, among others, that it was prematurely taken, and that the appellate court was therefore without jurisdiction to entertain it. The case being submitted to that court both upon the motion and upon the merits, the motion to dismiss was denied, and the judgment was reversed, with directions to the court below to modify the order to strike out and to overrule the demurrers. Upon petition of defendants, an order was made by this court within the time allowed by the Constitution, transferring the appeal to this court for hearing and determination. The motion to dismiss has been renewed here and submitted, with the appeal on the merits, for decision.

No appeal lies, under our law, from an order sustaining or overruling a demurrer, or from an order made on a motion to strike out portions of a pleading, and such orders are reviewable only on appeal from the judgment. It must be taken as settled that, under subdivision 1, § 939, Code Civ. Proc., prescribing that an appeal may be taken from a final judgment in an action or special proceeding "within six months after the entry of judgment," the appellate court cannot entertain an appeal from such a judgment where such appeal was taken before the actual entry of the judgment in the book wherein it is required by law to be entered of record. See Estate of More, 143 Cal. 493, 77 Pac. 407, and cases cited in concurring opinion therein. There is nothing contained in the record which can be held to operate as an estoppel upon defendants to show the date of actual entry of the judgment, as in the cases of Estate of Pichoir, 139 Cal. 694, 70 Pac. 214, 73 Pac. 604, and Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888. Neither judgment roll nor bill of exceptions states the date of entry of judgment in the judgment book or shows entry thereof anywhere. The stipulation at the end of the transcript is most carefully guarded in language, certifying only "that the foregoing is a full and true transcript of the pleadings, files, orders, and judgments that were agreed to be printed in the above entitled case, for use on appeal, without prejudice to motion of respondents to dismiss appeal for matters and reasons other than covered by stipulation." The stipulation in relation to printing transcripts, relied on by counsel for plaintiff, made long prior to the taking of any appeal, is destitute of anything that could be construed as an admission of any entry of judgment.

The judgment not having been entered in the judgment book prior to the appeal, it would appear, then, that the only question in this connection is whether such judgment book was the place designated by law for its entry. Section 668, Code Civ. Proc., provides: "The clerk must keep, with the records of the court, a book to be called the 'judgment book,' in which judgments must be entered." This section by its terms includes all final judgments in civil actions, and, in the absence of provision elsewhere applicable to the judgment here involved, must govern. It is urged that this judgment is simply one of dismissal of an action, and that, as to judgments of dismissal, special provision is elsewhere made, making the minutes of the court the proper place for the entry. The statute relied on is section 581, Code Civ. Proc., as amended in 1897, providing that an action may be dismissed or judgment of nonsuit entered in certain cases specified in various subdivisions, none of which is applicable here, and further providing that the dismissals mentioned in subdivisions 1 and 2 (voluntary dismissals) "are made by entry in the clerk's register," and those mentioned in subdivisions 3, 4, 5, and 6 "shall be made by orders of the court entered upon the minutes thereof, and shall be effective for all purposes when so entered." As to the cases specified by the subdivisions last named, it is clear that entry of the order of dismissal in the minutes is all that is required for the purposes of appeal, but this is so solely because of the special provision as to such cases, as is apparent from the decision of this court in Page v. Superior Court, 76 Cal. 372, 18 Pac. 385, a decision rendered prior to the incorporation of the provisions by amendment as to manner of dismissal. Subdivision 7 of the same section provides for the dismissal of an action by the court on its own motion or on motion of any interested party, unless summons is issued within one year, or served and return made thereon within three years after the commencement of the action, and no special provision as to manner of dismissal is made in such subdivision. In Marks v. Keenan, 140 Cal. 33, 73 Pac. 751, where there was a dismissal for failure to serve the summons within a reasonable time, a case not specified in any of the subdivisions of section 581 of the Code of Civil Procedure, it was held that as such section dealt with "the subject of orders of dismissals of actions," the special provision as to entry of the order on the minutes, "should be held to apply to all such dismissals," and that the entry of the order in the minutes in that case was sufficient for all the purposes of appeal. The same has been held as to dismissals under subdivision 7 above referred to. Pacific Pav. Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352; Matthai v. Kennedy, 148 Cal. 699, 84 Pac. 37.

The judgment before us, however, does not show a dismissal of the character referred to by these decisions as covered by the special provision of section 581 of the Code of Civil Procedure, a mere order of dismissal made by the court because of the failure of the plaintiff to appear at the trial, or to prosecute his cause with reasonable diligence, or to take necessary steps therein within the time prescribed by statute, or to comply with some requirement as to the giving of security (section 1037, Code Civ. Proc.), or because of his abandonment of the case, or because of other similar failure or neglect by reason of which he is held to have lost his right to be heard at all in the further prosecution of his action. With the single exception of the nonsuit on the trial provided for by subdivision 5 of section 581 of the Code of Civil Procedure, this is the character of cases in which orders of dismissal may be made by a court under our practice, and this is the kind of dismissal referred to by the decisions cited. Such an order of dismissal is not a judgment at all in the strict sense, but it is treated as such for all the purposes of taking an appeal, because it finally disposes of the particular action as effectually as would any formal judgment based on ruling on demurrer or on findings or verdict on the facts. While the judgment in the case at bar provides in terms "that the action be dismissed," it shows on its face that it is a final judgment in favor of defendants, given upon sustaining their demurrers to plaintiff's complaint, because of the insufficiency of such complaint in some respect designated by the statute as a ground of demurrer and specified in the demurrers filed, the plaintiff electing not to amend, but standing on its complaint as filed. Plaintiff is treating it as such a judgment; its only contention on this appeal being as to the correctness of the order striking out portions of its complaint, and the order sustaining the demurrers, matters that can only be considered on an appeal from such a final judgment, and that would not be the legitimate subject of inquiry on an appeal from any mere order of dismissal. When a demurrer to a complaint is sustained on any ground for which a demurrer will lie under our statute, and the complaint is not amended, the plaintiff electing to stand on the complaint as filed, the defendant is entitled to judgment in his favor. It is immaterial in this regard upon what statutory ground the demurrer is sustained. That would be a question of concern in determining to what extent the judgment so given operates as an estoppel, but it is not material to the present inquiry. It is also immaterial on this inquiry what particular relief the judgment gives to the defendant. Whether it declares that plaintiff shall take nothing, or that the action shall abate, or "that the action be dismissed and defendants recover their costs," as in the case at bar, it is in the strictest sense a final judgment, a final determination upon the pleadings of the relative rights of the parties so far as the particular action is concerned, and is essentially different from the order of dismissal of an action made without regard to the relative rights of the parties to the action as shown by the pleadings. It would be an unwarranted assumption of legislative power on the part of the courts to hold that the special provision of section 581 of the Code of Civil Procedure as to the manner of making certain dismissals is applicable to such a judgment simply because of the nature of the relief granted thereby. It has never been so held, and there is nothing in any of the cases cited that can reasonably be construed as supporting any such view.

We are satisfied that the place designated by law for the entry of this judgment was the judgment book provided by section 668 of the Code of Civil Procedure, and that, as no entry of the judgment in such book was made until after this appeal had been taken, the appeal cannot, in view of our well-established rule, be entertained.

The appeal is dismissed.

We concur: McFARLAND, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.

152 Cal. 327

In re LENNON'S ESTATE. (L. A. 1,951.)

(Supreme Court of California. Nov. 29, 1907.)

1. WILLS — PROBATE — GROUNDS OF REVOCATION.

It is not a ground for revocation of the probate of a will that the will is contrary to Civ. Code, § 1313, restricting devises and bequests for charitable uses, since, if any will falls under the inhibition of section 1313, that section itself provides that the estate shall go to the residuary devisee or legatee, next of kin or heirs, according to law.

2. PLEADING—LEGAL CONCLUSION.

An allegation that a will was contrary to Civ. Code, § 1313, restricting devises and bequests for charitable uses, is not the allegation of any fact, but is merely a legal conclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 12-17.]

3. CHARITIES—CHARITABLE TRUST DEFINED.

A "charitable trust" is a gift for the benefit of an indefinite number of persons, either by bringing them under the influence of education or religion, or relieving them of disease, suffering, or constraint, by assisting to establish them for life, by erecting or maintaining public buildings, or in other ways lessening the burdens or making better the condition of the general public or some class thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Charities, § 1.

For other definitions, see Words and Phrases, vol. 2, p. 1074.]

4. SAME.

A bequest to a bishop to be expended in the saying of masses for the testator's soul is not a bequest to a charitable use within Civ. Code, § 1313, restricting devises or bequests for charitable uses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Charities, § 40.]

In Bank. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Francis Lennon and others filed a petition asking for the revocation of the probate of the will of Patrick Lennon, deceased. From a judgment denying their petition, and the decree settling the final account and ordering distribution, Francis Lennon and others appeal. Affirmed.

O. V. Eaton, E. T. Maples, and F. D. McClure, for appellants. H. C. Dillon and J. Wiseman Macdonald, for respondents.

HENSHAW, J. The will of the deceased having been admitted to probate, appellants, as next of kin, filed a petition asking for the revocation of the probate upon three grounds: "First, That said alleged last will and testament is invalid and contrary to the laws of the state of California as made and provided by section 1313 of the Civil Code of said state, relating to charitable uses; second, that the decedent was unduly influenced in the making of the will; third, that the will was not entirely written, dated, and signed by the hand of the testator." The second and third grounds were not supported by evidence and seem to be abandoned upon this appeal. The first is not a ground for revocation of the probate of a will, since, if any will falls under the inhibition of section 1313 of the Civil Code, that section itself provides for the disposition of the assets of the estate which must follow. Estate of Willey, 128 Cal. 13, 60 Pac. 471.

Appellants undertake to bring to this court two appeals; one apparently from the decree settling the final account and ordering distribution, and the other from the judgment of the court following their petition to have the will of the deceased set aside upon the grounds above stated. The record upon these appeals is fragmentary, uncertain, and incomplete. No evidence is presented against the rulings and decision of the court. Yet the record does contain the statement that proofs were taken upon the account and petition for distribution and submitted to the court, and that oral and documentary evidence was introduced which the court considered, and the trial by jury was expressly waived, and the matter was heard and tried before the court without a jury. The statement of the appellants "that the will is contrary to the laws of the state of California as made and provided by section 1313, Civ. Code," is not the allegation of any fact, but is merely a legal conclusion which the pleader draws, a conclusion which, even if sound, as has been said, does not call for the revocation of the probated instrument. Section 1313 restricts charitable devises and bequests, and provides that if such bequests are found in a will made within 30 days of the testator's death they are void. If in a will executed more than 30 days before the testator's death, they are valid to the value of one-third of the testator's estate. If he has left more than one-third of his estate to such charities, a pro rata reduction from them all shall be made to the value of one-third of his estate. We proceed to consider the proposition which in the transcript and in the appellants' brief is declared to be "the nub of the case," namely, whether a bequest to Bishop Conaty of $3,500 "to have the same amount of masses celebrated as soon as possible for my soul" is a charitable bequest.

It will be noticed that the limitation and restriction imposed by section 1313, Civ. Code, is upon charitable uses and trusts. The reason for the law has often been expounded. It is that a man's fears or superstition, or his deathbed hope of purchasing a blissful immortality, shall not be allowed to influence the disposition which he may thus make of his property, to the injury of his heirs. The law therefore limits the time within which such a testamentary disposition may be made, and also limits the value and amount of such disposition. But the only inhibition of the section is that such devises or bequests shall not be made to charity or in trust for charitable and benevolent purposes. "Charity" and a "charitable use" have often been defined by this and other courts. A "charitable trust" is defined to be a gift for the benefit of an indefinite number of persons, either by bringing their hearts and minds under the influence of education or religion, by relieving their bodies of disease, suffering, or constraint, by assisting to establish themselves for life, by erecting or maintaining public buildings, or in other ways lessening the burdens or making better the condition of the general public, or some class of the general public, indefinite as to names and numbers. In short, it is a gift to a general public use. Eaton, Equity, § 181; Perry on Trusts, § 697. The bequest here lacks every element of a devise for charity or charitable use. It is not for the benefit of the public or of any class or division of the public. It is entirely lacking in the elements of continuance and perpetuity which characterize a charitable use. It is a bequest, not for the benefit of the Bishop, but for the benefit alone of the testator, and the direction is that the money shall be expended as expeditiously as possible in the saying of masses for the testator's soul. Such a bequest, as has been said, is lacking in every attribute which characterizes a charity. In England, masses for the dead are called "a superstitious use" and are forbidden by statute. St. 1 Edw. VI, c. 14; In re Blundell's Trust, 30 Beav. 360. But in this state, and in the states of this Union generally, there is no statute designating such bequests superstitious uses, and generally like bequests are not prohibited as superstitious if they are for the observance of any ceremonial, the efficiency of which is recognized by the church of which the donor is a member. "No religious observances can be deemed as matter of law superstitious." Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420. In this state there is no law prohibiting such a bequest, and no law which declares such a bequest to be in its nature a superstitious use, and, as clearly it is not a charitable use, it does not come within the inhibition of section 1313 of the Civil Code, although the amount should exceed one-third of the value of the testator's estate.

If authority were needed in support of a proposition so plain, it may be found in abundance. Thus, in the case of Sherman, Adm'r, or the Estate of John Baker, deceased, v. Baker et al., 20 R. I. 449, 40 Atl. 12, 40 L. R. A. 717, Baker by his will gave $100 to the parish priest of St. Patrick's church to say masses for the repose of his soul, and $100, the income of which was to be used in ornamenting and keeping in proper repair his burial lot. The court said: "This will presents an example both of a gift in perpetuity for a private trust; that is, for the care of the testator's burial lot, and an outright gift for masses. The former is invalid [citing cases]. The latter, the gift for masses, is valid as one which takes effect at once like any personal bequest for a legal object." See, also, Harrison v. Brophy, 59 Kan. 7, 51 Pac. 883, 40 L. R. A. 721; In re Howard's Estate, 5 Misc. Rep. 295, 25 N. Y. Supp. 1111; Moran v. Moran, 104 Iowa, 257, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443; In re Zimmerman's Will, 22 Misc. Rep. 411, 50 N. Y. Supp. 395; Hoeffer v. Clogan, 171 Ill. 462, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241.

The judgment and orders appealed from are therefore affirmed.

We concur: LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.; McFARLAND, J.

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7 Cal. Unrep. 370

LOS ANGELES NAT. BANK v. CHANDLER et al. (Civ. 45.)

(Court of Appeal, Second District, California. Oct. 21, 1907.)

APPEAL — RECORD — SCOPE AND CONTENTS — DOCUMENTARY EVIDENCE.

Where the record purports to contain copies of an undertaking on appeal and of an affidavit alleging that the cause in which such undertaking was given had been affirmed, and asking judgment against the sureties on such undertaking, and the documents are not embodied in the bill of exceptions or otherwise authenticated, they cannot be considered on appeal.

Appeal from Superior Court, Los Angeles County; W. H. Clark, Judge.

Action by the Los Angeles National Bank against Burdette Chandler and others. From a judgment for plaintiff, Thomas B. Clark and J. K. Skinner appeal. Judgment affirmed.

Del Valle & Munday, for appellants. Flint & Barker and Gray, Barker & Bowen, for respondent.

SHAW, J. Appeal from judgment. The transcript in this case was filed August 15, 1898. No points have ever been filed by appellants, and the appeal is probably abandoned.

The record contains what purports to be copies of an undertaking on appeal and an affidavit, wherein it is averred that the cause in which such undertaking on appeal was given had been affirmed, and asking judgment against the sureties in said undertaking. These documents are not embodied in a bill of exceptions or otherwise authenticated, and therefore cannot be considered.

The record contains no other document, except the judgment, which is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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6 Cal. App. 417

LEVEY et al. v. HOCKWALD et al. (Civ. 357.)

(Court of Appeal, First District, California. Sept. 13, 1907.)

LANDLORD AND TENANT—LEASES — PROVISION AGAINST SUBLETTING.

A lease prohibited the subletting of the whole or any part of the premises. One of the lessees, a corporation, allowed one of its officers to transact his private business in the company's office by paying part of the janitor hire and telephone and gas bills. Another person was allowed to carry on his business of selling steamship tickets on the premises by paying a commission on his sales for the privilege. *Held*, that there was a subletting in violation of the condition in the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 228.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action in unlawful detainer by Lewis C. Levey and others against A. Hockwald and others. From a judgment for defendants and an order denying a motion for a new trial, plaintiffs appeal. Reversed.

P. L. Benjamin, for appellants. E. L. Forster, for respondents.

KERRIGAN, J. This is an action in unlawful detainer to have, among other things, a lease declared forfeited for the violation of a provision thereof forbidding subletting. The trial was had by the court sitting without a jury, and judgment was entered in favor of plaintiffs and against certain of the defendants for the amount of the rent unpaid. A forfeiture of the lease and possession of the premises were refused. The plaintiffs moved for a new trial, which was denied, and from the judgment and the order denying such motion this appeal is prosecuted.

November 16, 1903, A. Hockwald and the West Disinfecting Company, a corporation, by an instrument in writing became the lessees for a term of five years, commencing December 1, 1903, of the ground floor of a certain building on Fillmore street in San Francisco. The lease contained a provision against subletting the whole or any part of the premises. The sole question for decision is whether the evidence shows a subletting by the lessees or either of them. No evidence was introduced on behalf of the defendants. In May, 1906, W. V. Bryan & Co. went into possession of a portion of the premises, 14½ feet by 6½ feet in size, and conducted there a real estate and a railway handbook business. Bryan, a member of this concern, about this time was elected secretary of the West Disinfecting Company, and, as the record shows, it was then agreed by the directors that Mr. Bryan should occupy desk room on the premises in the company's office and transact the company's business, and, for and in consideration of allowing him to transact his private business outside of the company's business, Bryan was to pay one-half of the expense of a janitor, and telephone and gas bills, whatever they might be from month to month. He received a salary from the West Disinfecting Company of $100 a month. From June 5 to September 5, 1906, a small portion of the premises, 10 feet by 5 feet in size, was occupied by one D. Rigdon. He carried on there the business of selling railroad and steamship tickets. He testified, in substance, as follows: "My arrangement with Mr. Hockwald was that I could not take the place unless I gave him a commission on the business. That is what Mr. Hockwald said to me. I agreed to give him a commission on the business. The commission I agreed to give him was a certain percentage on each ticket I sold. After I made the arrangement with Mr. Hockwald, I entered into possession of the portion of the premises I have mentioned. * * * During that time I made no payments of anything, except that I paid the commission on each ticket. My talk about the possession of the place I occupied was first with Mr. Hockwald. He said that I could have it only on a commission basis, and he referred me to Mr. Bryan. I completed the arrangements with Mr. Bryan. Each month that I was in possession I paid the commission to Mr. Bryan for that portion of the premises occupied by me." This witness was given receipts for the payments thus made by him, one of which reads as follows: "$20.00. San Francisco, June 5, 1906. Received of D. Rigdon twenty dollars, commission, office No. 1732 Fillmore street, for and during the term of one month, commencing on the 5th day of June, 1906, and ending on the 4th day of July, 1906, both days inclusive.—Wm. V. Bryan Co., Agents." A Mrs. Wiserwitch, a stenographer, had desk room in a portion of the premises, and in consideration of her services as a stenographer for the West Disinfecting Company and Hockwald she paid no rent for the space occupied by her, and was permitted to use the same in the business of a public stenographer. Up to April 18, 1906, no part of the premises in question was occupied by D. Rigdon or Wm. V. Bryan & Co. or Mrs. Wiserwitch. The premises were first occupied by people other than the lessees about a month after the fire in San Francisco of April 18, 1906. July 5, 1906, plaintiffs served upon the defendants the three days' notice prescribed by section 1161, subd. 4, Code Civ. Proc., in which notice it was asserted that parts of the premises in question had been sublet contrary to the conditions of the lease, the lease was declared terminated, and possession of the premises was demanded.

The contract under which W. V. Bryan & Co. went into possession of part of the premises was against the provision of the lease concerning subletting. The lease contained a prohibition not merely against subletting for a consideration in money, but against any subletting. Such a provision is violated by the creation of any subtenancy irrespective of the nature of the rent reserved. Clarke v. Cobb, 121 Cal. 596, 54 Pac. 74; Jones on Landlord & Tenant, § 6; 24 Cyc. pp. 1137, 1191. This condition of the lease was again violated by the arrangement under which Rigdon held possession of a part of the premises. He was to pay each month in money a percentage of the profits of the business done by him. This clearly shows a subletting.

These two instances showing that the condition of the lease against subletting had been violated, and that a forfeiture of the lease should be declared, it is unnecessary to pass on other points discussed in the briefs.

The judgment and order appealed from are reversed.

We concur: COOPER, P. J.; HALL, J.

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6 Cal. App. 637

UNION SAVINGS BANK OF SAN JOSE v. RINALDO. (Civ. 367.)

(Court of Appeal, First District, California. Oct. 16, 1907.)

1. Appeal—Objections to Pleadings.

Complaint may not be made, for the first time on appeal, of a complaint because of its containing redundant and immaterial matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1226.]

2. Corporations — Collection of Assessments—Immaterial Findings.

The finding, in an action by a corporation to collect an assessment of a stockholder, that the directors passed a resolution to waive further proceedings for such collection by a sale of the delinquent shares, is immaterial, the corporation being insolvent and no longer a going concern, so that there was nothing to sell; the material finding being that the directors elected to proceed by action to collect the assessment.

3. Trial—Reception of Evidence—Matters Admitted in Absence of Proper Objection.

An affidavit of the publication of a notice of assessment by a corporation, admitted in evidence, without proper objection, is evidence in support of a finding, though it was not, as it should have been, certified by the secretary of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 261, 264.]

4. SAME—SCOPE OF OBJECTIONS TO EVIDENCE.

An affidavit being objectionable only because it was not certified by the secretary of a corporation, there was no error in admitting it in evidence, over the objection that it was "incompetent, immaterial, and irrelevant, and not admissible under the pleadings."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 194, 198, 199, 208.]

5. APPEAL—FINDINGS OF FACT—CONCLUSIVENESS.

In the absence of specification to part of a finding, that the evidence is insufficient to sustain it, it is binding on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2978.]

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by the Union Savings Bank of San Jose against Tob. Rinaldo. Judgment for plaintiff. Defendant appeals. Affirmed.

C. D. Wright, for appellant. E. M. Rea and Heney & Cobb, for respondent.

COOPER, P. J. Action to recover the amount of an assessment levied upon the capital stock of plaintiff to the extent of the pro rata due upon the number of shares owned by defendant. The case was tried by the court, and findings filed, upon which judgment was entered for plaintiff. This appeal is from the judgment and order denying defendant's motion for a new trial.

There is no question raised as to the judgment being the legal conclusion from the facts found, nor is there any claim that the court erred in any ruling during the trial. It has been repeatedly held, that the plaintiff being insolvent, its directors may assess the shareholders on the unpaid capital stock, for the purpose of liquidating the indebtedness and winding up its affairs. Union Savings Bank v. Dunlap, 135 Cal. 628, 67 Pac. 1084; Union Savings v. Leiter, 145 Cal. 696, 79 Pac. 441; Union Sav. Bank v. Willard (Cal. App.) 88 Pac. 1098. Defendant was a shareholder, and has not paid the assessment or call upon which the action is based.

It is claimed that the complaint does not state facts sufficient to constitute a cause of action. It states that plaintiff is an insolvent corporation; that the amount of its capital stock is 10,000 shares of the par value of $100 each, and that defendant is the owner of 55 shares thereof; that the whole of the capital stock has not been paid up, and that it is indebted to its depositors and other creditors in the sum of over $500,000; that its board of directors duly made an order levying an assessment of $10 per share upon its capital stock, payable immediately to its secretary at its banking house in the city of San Jose, and fixed June 26, 1899, on which the unpaid assessments should be delinquent; that notice of said assessment was duly published for four successive weeks in the San Jose Daily Herald, and sent through the United States mail to each stockholder, including the defendant, postage prepaid, addressed to each stockholder at his place of residence; that no part of defendant's assessment has been paid, and the amount thereof is $550; that an order was duly made by the board of directors for the collection of said delinquent assessments by action. No demurrer to the complaint was filed, and the court's attention was not in any way called to any defect in it. No objection appears to have been made to the evidence when offered, and the question is raised here for the first time. We therefore hold the complaint sufficient under the record before us. In fact, the main criticisms in regard to it relate to redundant and immaterial matter therein.

It is claimed that the evidence is insufficient to sustain two of the findings, and we can consider only those two findings in regard to the specifications wherein it is claimed that the evidence is insufficient. The first specification is directed to finding 12. It appears from the record that the board of directors had, in the first place, proceeded to advertise the delinquent assessments, under the provisions of the various sections of the Code, with a view to selling the shares of capital stock in order to recover the assessments. Finding 12 is to the effect that the board of directors passed a resolution to waive further proceedings for such collection by a sale of the delinquent shares, and elected to proceed by action to recover the amount of the assessments; that the assessment on the delinquent stock of defendant, with costs and expenses, amounted to the sum of $552.75. The specification of insufficiency is directed to the fact that the resolution was wholly insufficient as a waiver of the right to sell, because the sale had been advertised to take place at 1:30 p. m. of August 12, 1899, and the resolution was made at 2 o'clock p. m., after the time advertised for the sale. In our opinion the finding in the respects in which it is said the evidence fails to support it is wholly immaterial. The corporation being insolvent, and in the hands of the bank commissioners, it had ended; it was no longer a going concern, and there was nothing to sell. Bank of National City v. Johnston, 133 Cal. 185, 65 Pac. 383; Union Savings Bank v. Dunlap, 135 Cal. 628, 67 Pac. 1084. The material part of the finding is that the board of directors elected to proceed by action to recover the amount of the assessment. This part of the finding is not attacked in the specification.

The second specification is directed to finding numbered seven, which sets forth a copy of the notice of assessment, and finds that such notice was published in the San Jose Daily Herald. The specification points out that the evidence is insufficient to sustain the finding for the reason "that the affidavit offered to prove said fact was never certified by the secretary of said corporation in order to entitle it to admission as evidence in this cause." If it is the law that the affidavit in such case "must be certified by the secretary of the corporation," defendant should have objected to the introduction of the affidavit when it was offered in evidence because not so certified. If the court in such case had overruled the objection, and exception had been taken, the ruling could be reviewed as an error of law, but the affidavit, even if erroneously admitted, is evidence, and it does not follow that evidence does not support a finding because improperly admitted. We find in the bill of exceptions that when the affidavit was offered in evidence it was objected to upon the ground that it was "incompetent, immaterial, and irrelevant, and not admissible under the pleadings in this case." The court's attention was not called to the fact that the affidavit was not certified by the secretary of the corporation. Not only this, but the affidavit is not set forth in the bill of exceptions, and we fail to find it in the record. In such case we could not pass upon its admissibility, even if the question were properly before us.

It is claimed that the meeting of the directors of August 12, 1899, was an adjourned meeting, and that two of the directors were not present, and hence the order to collect the assessment by suit is void. The court finds that "the said board of directors, by a resolution and order duly made, given, and entered upon the corporate minutes and records, elected * * * to proceed by action to recover the amount of such assessments," etc. There is no specification as to the portion of the finding quoted, and we are bound by it.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

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6 Cal. App. 646

MANN v. MONTGOMERY. (Civ. 257.)

(Court of Appeal, First District, California. Oct. 19, 1907.)

COVENANTS — INCUMBRANCES — BREACH — LEASE.

A grantee of a grant, bargain, and sale deed had, at the time of the grant, knowledge of a lease on the property, and that rent was receipted for the term on the margin of the lease, and requested and obtained an assignment of the lease to himself. *Held*, that such lease was not a breach of the implied covenant against incumbrances, though under the direct provisions of Civ. Code, § 1113, a lease is an incumbrance, and is within the covenants implied from the word "grant," in a conveyance of an estate in fee simple.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenant, §§ 111–113.]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action for breach of covenant by William Mann against George S. Montgomery. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Reversed.

F. A. Berlin, for appellant. Fred L. Krause, for respondent.

HALL, J. Plaintiff sued to recover for an alleged breach of the implied covenant against incumbrances of a grant, bargain, and sale deed, and obtained judgment for the sum of $600 as damages therefor. This appeal by defendant is from the judgment and the order denying defendant's motion for a new trial. Plaintiff, after alleging the execution and delivery by defendant to plaintiff, on the 9th day of January, 1904, of a grant, bargain, and sale deed of a certain tract of land situate in Contra Costa county, set up a breach of the implied covenants thereof in this, that on the 5th day of October, 1903, defendant had leased the said premises to one Thomas Fowler for the period of one year ending September 30, 1904, for the sum of $600, which it is alleged had been collected by defendant, and that plaintiff had been deprived of the possession of said premises by the lessee under said lease. Defendant in his answer admitted the execution and delivery of the said grant, bargain, and sale deed, but set up that at the same time, and as a part of the same transaction, he assigned and set over to plaintiff said lease to Fowler, and that it was fully understood and agreed that the conveyance of said premises was subject to said lease, and that defendant should have the full benefit of the rents thereby reserved, and that it appeared upon the face of said lease, which was in writing, at the time of said assignment and delivery thereof to plaintiff, that the rent had been fully paid to defendant. Defendant also alleged that it was fully understood that the rents, issues, and profits referred to in said deeds were the rents, issues, and profits to arise from the said premises after the expiration of said lease, and he denied that he had failed to perform any of the covenants of his said deed.

The court did not find upon the allegations of defendant's answer that the said lease was assigned to plaintiff at the time of the delivery of the deed and as a part of the same transaction, but did find in effect that said conveyance and deed was not made subject to said lease, and that it was not understood that defendant should have the benefit of the rents collected thereon, and that plaintiff had not waived any of the rents of said premises, and that defendant had failed to perform the covenants of his said deed. All of these findings are attacked by appellant as not supported by the evidence.

Plaintiff and defendant never met until after the execution and delivery of the deed, but all their negotiations were conducted through one White. The transaction was in fact an exchange of lands, and the papers were finally delivered through the Central Bank of Oakland. Plaintiff was fully aware of the existence of the lease, and that the rent had been prepaid thereon, before the consummation of the trade. In fact, he testified that he saw the lease, and saw the indorsement thereon of a receipt for the rent. There is no pretense on his part that he did not know, before the trade was consummated, of the lease, and that the rent thereon had been fully prepaid at the execution of the lease, and that on the face of the lease there was a receipt therefor from the lessor (defendant) to the tenant, of even date with the lease. Speaking upon this subject plaintiff testified: "It was before any deeds were passed and before I left my deed in escrow. I was fully aware of the lease." Prior to the consummation of the trade defendant had executed a writing, and placed it in the hands of Mr. White, and plaintiff had signed a writing and delivered it to Mr. White as agent of defendant; the combined effect of which it may be conceded for the purposes of this discussion bound the parties to an exchange of lands free of all incumbrances. Thereafter plaintiff placed the papers executed by him with the Central Bank of Oakland for delivery to defendant, accompanied with the following letter to the teller of the bank: "Glenwood, Jan. 9th. Mr. Harris—Dear Sir: Mr. Montgomery has leased the Contra Costa ranch. Kindly see that he leaves an assignment of it for me with the deed and oblige. Yours truly, Wm. Mann." Accordingly, Mr. Harris, the teller of the bank, when he delivered plaintiff's deeds to defendant, obtained from defendant not only the deed upon which this suit is predicated, but also an assignment of the lease indorsed thereon from said Montgomery to said Mann. It thus clearly appears that at the time of the delivery of the deed, and as a part of the same transaction, plaintiff required and obtained an assignment of the lease, the existence of which the court found to be a breach of the implied covenants of the deed. In this we think the court fell into an error.

A lease is an incumbrance, and is within the covenants implied from the use of the word "grant" in a conveyance of an estate in fee simple. Section 1113, Civ. Code. But where the grantee, at the time of taking his grant, and as a part of the same transaction, takes an assignment of such lease, the assignment and the deed must be read and construed together. They have the same effect as though contained in one instrument. If in this case the assignment had been contained in the deed, no one, we apprehend, would have doubted that the conveyance would have been understood as taken subject to the lease, notwithstanding any general covenants against incumbrances implied in the deed. Two written instruments, executed between the same parties as a part of the same transaction, and concerning the same subject-matter must be read and construed together as one instrument. So reading the deed and the assignment of the lease, it should be held that the conveyance in the deed was taken and accepted subject to the lease and all the conditions thereof appearing upon its face. The lease was for a term ending September 30, 1904, so plaintiff had no cause to complain that he did not obtain immediate actual possession of the premises. The action was brought April 16, 1904. The indorsement on the margin of the lease of the receipt of the rent, signed by the lessor, had the same effect as though contained in the body of the lease, so plaintiff had no cause of complaint that he received no rent during the term of the lease.

What we have said in this discussion does not in the least militate against the rule that parol testimony may not be received to vary or contradict the terms of a deed or any other written contract, but is simply an application of the old and well understood rule above announced as to the construction of two writings executed as a part of the same transaction.

No case in this state has been called to our attention where the precise point involved in this appeal has been decided; but in Pease v. Christ, 31 N. Y. 141, the point was decided in accordance with the views herein expressed. In the New York case plaintiff and defendant entered into a written contract, whereby plaintiff agreed to execute to defendant, on or before the 1st day of April then next, a good and sufficient warranty deed of a certain 80-acre tract of land, free and clear of all incumbrances except two described mortgages, and defendant agreed in consideration of the premises, upon the execution of such deed and the payment of $350 cash, to assign to plaintiff a lease of premises known as "390 Broadway, New York," made by James Stone to John J. Sevin, and by Sevin assigned to the defendant. It was further provided in the agreement that the title was to be perfect in each case. On the 1st day of April, 1853, the parties met to consummate the trade. Plaintiff executed the deed to the farm, and paid the $350 cash. Defendant assigned the lease from Stone to Sevin, "and the assignment contained a covenant on the part of the assignor [defendant] that the assigned premises were then free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments, and incumbrances whatsoever." On the 19th day of May, 1852, defendant had executed two separate leases for portions of said premises, one for a term of six years, and the other for a term of five years. On the same 1st day of April, 1853, and in execution of the agreement for exchange, and at the time of the assignment of the lease of said Broadway premises held by defendant, he made and executed to plaintiff two several assignments of the said subleases. It was contended on the part of the plaintiff that the existence of the two subleases was a breach of the covenant against incumbrances contained in the assignment of the lease of the Broadway premises. It was held that, reading the three assignments together, it was clear that the covenant against incumbrances contained in the assignment of the lease of the Broadway premises did not apply to the two subleases, assignments of which were accepted by plaintiff, and that the existence of said two subleases was no breach of such covenant. To the same effect is Haldane v. Sweet, 55 Mich. 196, 20 N. W. 902, where it was held that a grantee could not complain because of the existence of two leases on the granted premises, which had been turned over to such grantee.

For the foregoing reasons we think the findings complained of are not sustained by the evidence, and the court should have ordered a new trial.

We discover no merit in the contention of appellant that the court should have sustained defendant's demurrer to the complaint.

The judgment and order are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

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6 Cal. App. 651

DE LAVAL DAIRY SUPPLY CO. v. STEADMAN. (Civ. 365.)

(Court of Appeal, First District, California. Oct. 19, 1907.)

1. SALES — DELIVERY — EVIDENCE — SUFFICIENCY.

In an action for the purchase price of machinery, evidence examined, and *held* to show that the machinery described in the contract of sale was delivered as agreed therein to a common carrier for the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 486.]

2. EVIDENCE — PAROL EVIDENCE — CONTRACTS OF SALE.

Where a contract for the sale and delivery of machinery has been reduced to writing by the parties, it canot be varied by parol evidence, unless clear and convincing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1778–1793.]

3. SALES — MISREPRESENTATION BY SELLER — RESCISSION BY BUYER—NEGLIGENCE.

Where defendant contracted with plaintiff to purchase certain machinery, and not only signed the contract for the sale and delivery thereof, but took a duplicate, which he retained in his possession, and failed to examine or make any objection to the contract as signed until sued for the purchase price of the goods, he cannot escape liability thereunder on the ground of misrepresentation, or that the contract as signed did not contain the agreement between the parties, since a court of equity will not relieve a party from the consequences of his own inattention and carelessness.

4. EVIDENCE — BURDEN OF PROOF — AFFIRMATIVE DEFENSES.

Where defendant pleads new matter as a defense, the burden is upon him to establish such defense by a preponderance of evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 119–121.]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by the De Laval Dairy Supply Company against M. B. Steadman. There was judgment for defendant, and, from an order denying a motion for a new trial, plaintiff appeals. Reversed.

C. M. Fickert (W. W. Burnett, of counsel), for appellant. Zabala & Wyatt, for respondent.

KERRIGAN, J. This is an action upon contract to recover the purchase price of certain dairy machinery sold by appellant to respondent under a written contract. Appellant claims that the goods described in the contract were shipped from San Francisco to respondent at Monterey on the steamship Gypsy, and were lost with that steamer in the Bay of Monterey September 28, 1905. The contract provided, among other stipulations, that the sale of the machinery set forth therein was f. o. b. San Francisco; that, in case of the injury or destruction by fire or any other agency whatsoever of the property mentioned in the contract, the purchaser would sustain the full loss, and make full payment for the same in the same manner as he would have done if the goods had not been injured or destroyed. Appellant alleged that it delivered the goods to respondent on board boat at San Francisco, and that it had duly performed all the conditions on its part to be done and performed.

The respondent denied that he had ever entered into the contract set out in the complaint, or that the goods mentioned therein were ever delivered to him on board boat in San Francisco or elsewhere, and for a further and separate defense alleged that the agreement which he made with appellant's agent, William Hartford, respecting the machinery, was as follows: That the appellant should send said implements and machinery, with a skillful man to set up and operate the same, to respondent's dairy, and allow him to try same for 30 days, and, if at the end of that period he was entirely satisfied, he was to purchase said articles at a price specified, otherwise he was to pay the expenses incurred, and appellant would retain and remove the goods. He further alleged that appellant's agent fraudulently inserted other stipulations in the contract not mentioned or agreed upon, and procured him to sign the same by falsely representing that it contained only the matters actually agreed to between them, and asked that said contract be reformed to make it conform to the true agreement between the parties. Appellant contends that the evidence is insufficient to establish the special defense. The respondent, while not conceding this, asserts that appellant was required to prove the delivery of the machinery described in the contract, and that he did not do so; that, not having proved delivery, the respondent was entitled to judgment whether he proved facts sufficient to establish his affirmative defense or not.

In view of this contention, we will first discuss the question of whether the record shows a delivery of the machinery described in the contract. The secretary of the appellant corporation testified: "I had charge of the shipment of the goods mentioned in the contract. They were invoiced and shipped September 25th. * * * I think I saw the goods go out of the house on this instant. * * * I directed the shipping clerk to have them shipped, and they were shipped from the house in some shape to somewhere." The freight clerk of the Pacific Coast Steamship Company, which operated the steamship Gypsy between San Francisco and Monterey, testified that on September 25th the said company, at its wharf in San Francisco, received from appellant, for respondent, the goods set forth in the shipping receipt. Conceding that, by a comparison of the shipping receipt with the contract, it is not clear that the articles described in the one are the same as those called for in the other, yet there is sufficient in the record to justify the conclusion that they were the same. For example, we find in the contract an item, "1 300 gal. Curtis Channel bottom vat"; and another, "1 75 gal. Curtis channel bottom vat." In the shipping receipt we find an item: "2 vats (crated) 75 gal., 300 gal." In the contract we find articles described as: "1 8 H. P. Economist boiler complete." "1 No. 1—6 to 8 Jewel Automatic Cutoff engine." "2—18/11-16 S. O. adjustable drop hangers." "1-1 11/16 S. O. Adjustable B. & S. post hangers," and "1 Size B. B. Victor combined churn." And in the shipping receipt we find the following items: "1—8 H. P. boiler," "1 Engine," "3 Hangers, wood, checks one door," and "1 B. churn, crated." We think that the testimony of the secretary of the appellant, taken together with the testimony of the freight clerk, made a prima facie case of delivery to the common carrier for the respondent of the goods enumerated in the contract.

The next question is: Was the evidence sufficient in support of defendant's affirmative defense to warrant a reformation of the contract? The respondent testified substantially that he was to try the machinery for 30 days, and that, if it was satisfactory, it would be accepted; if not, it was to be returned, respondent to pay the expenses incurred. No such provision is in the written contract. Respondent, in support of his contention that the written contract contains terms that were not discussed, and to which his attention was not called, testified: "He [William Hartford, the agent of appellant] did not say anything to me about having the goods delivered in San Francisco; or in regard to paying for the goods if they were lost in transit. I did not read the printed part of the contract. I thought it was some printed matter extolling the virtues of their machinery. I signed the order without reading it, upon his assurance that it was the same as we agreed upon the day before." On cross-examination he said (referring to the contract): "He gave me a duplicate, and I filed it immediately." The contract, having been reduced to writing by the solemn act of the parties, cannot now be swept aside by parol evidence of a doubtful character. The general rule is that parol evidence is not admissible to vary its terms. In all cases where such evidence is admissible under the pleadings, it must be clear and convincing. In this case the contract was reduced to writing, and signed by the parties. The respondent not only signed it, but took a duplicate, which he retained in his possession. He does not appear to have made any objection to it until he desired to escape from his liability under it.

"It is a general principle that if the means of knowledge be at hand, and equally available to both parties alike, and there be no fiduciary relations, the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he was deceived by the misrepresentations of the other." Champion v. Wood, 79 Cal. 20, 21 Pac. 535, 12 Am. St. Rep. 126. In Slaughter v. Gerson, 80 U. S. 379, 20 L. Ed. 627, it is stated: "This misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement must not only relate to a material matter constituting an inducement to the contract, but must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge, and it must be a misrepresentation upon which he relied, and by which he was actually misled to his injury. A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by over confidence in the statements of another." See, also, Crane v. McCormack, 92 Cal. 181, 28 Pac. 222; Placer County Bank v. Freeman, 126 Cal. 94, 58 Pac. 388.

The evidence was manifestly insufficient to sustain the special defense. The jury may have been satisfied from the evidence that the machinery described in the contract was delivered, and may have based its verdict entirely upon the evidence introduced to sustain the special defense (which, as we have just seen, was insufficient for the purpose). It therefore follows that the case must be reversed.

Assuming that there was sufficient evidence to support the affirmative defense, and that that defense, being an equitable one, was a proper matter for the consideration of the jury, then the court erred in giving the following instructions over the objection of appellant: "In civil cases the affirmative issue must be proven. The affirmative here is upon the plaintiff. Upon the plaintiff therefore rests the burden of proof." The respondent pleaded new matter by way of defense to plaintiff's cause of action, and it was incumbent upon him to establish such defense by a preponderance of evidence.

The judgment and order appealed from are reversed.

We concur: COOPER, P. J.; HALL, J.

6 Cal. App. 678

OCEAN PARK BANK v. ROGERS et al.

(Civ. 319.)

(Court of Appeal, Second District, California. Oct. 21, 1907. Rehearing Denied by Supreme Court Dec. 19, 1907.)

1. BANKS AND BANKING — DEPOSITS OTHER THAN MONEY—ENTRY TO CREDIT OF DEPOSITOR.

Where a customer of a bank hands the receiving teller a check drawn by another person upon the same bank and at the same time hands him her pass book, and the teller receives the check, stamps it "Paid," enters a credit for the amount in the pass book, and the check is entered to the credit of the depositor, and charged to the account of the drawer on the books of the bank, and nothing else is said or done, the bank may at the close of the business day, if the funds of the drawer are then insufficient to satisfy the check, charge back the amount to the depositor and return the check to her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 307.]

2. SAME—ESTOPPEL.

Where a bank, after receiving for deposit and refusing to credit a check drawn on a depositor of the bank whose account is overdrawn, cashed a small check drawn by him, it was not estopped thereby to refuse to give credit for the first check.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Ocean Park Bank against Lora C. Rogers and husband. From a judgment for defendants, and an order denying plaintiff's motion for a new trial, plaintiff appeals. Reversed.

Tanner, Taft & Odell, for appellant. Works, Lee & Works, for respondents.

SHAW, J. The defendant Lora C. Rogers and one A. B. Widney each kept a general deposit account with the plaintiff, which was a corporation engaged in a general banking business at the city of Ocean Park, of which city said Rogers was a resident. About July 19, 1905, and while the accounts of both said Rogers and Widney were overdrawn, Widney in due course of business drew his check upon said bank for the sum of $1,000, payable to the order of Rogers, who immediately went to the bank, and, after indorsing the check, entered the amount thereof, with the further sum of $75.35, upon a deposit tag or slip, and with her pass book presented the same to the receiving teller of the bank, who credited her pass book with the amount of $1,075.35, stamping the check paid and returning the pass book to Rogers. Nothing was said regarding said check or deposit by either party. The custom of the bank was to post the checks received for deposit in a bank ledger in alphabetical order, and the $1,000 check was by the bookkeeper credited upon this ledger to the account of Mrs. Rogers, and it was not discovered that Widney's account was overdrawn until the bookkeeper turned to Widney's account for the purpose of charging it with the amount of the check, whereupon he referred the matter to the cashier, and the amount of the check was immediately charged back to the account of Rogers, and the check, with a printed notice, "Not sufficient funds," together with a letter to Mrs. Rogers, signed by the cashier, stating, "We charge your account $1,000," was inclosed in an envelope, duly addressed and mailed to her at the address written upon the signature card given by her to the bank, on June 10, 1905, when she opened her account. There was no delivery of mail by carrier at Ocean Park, and Mrs. Rogers did not call at the post office until July 25th, on which date she received said letter and inclosures, and then learned for the first time that the check was dishonored. From June 10, 1905, to and including July 19, 1905, exclusive of said $1,000 check, Mrs. Rogers deposited with the bank the sum of $15,179.16, and up to and including said last-mentioned date drew from the bank against her account the sum of $16,156.33, leaving her account overdrawn on that date in the sum of $1,377.17, unless credited with the amount of said check; or, if credited therewith, overdrawn in the sum of $377.17. On July 25th she deposited the sum of $400, reducing her overdraft, excluding said check, to $977.17, for which sum the bank brought suit. After the deposit of this check, and with knowledge of the fact that his account was overdrawn, the bank cashed a check drawn upon Widney's account, presented by another party, for the sum of $90. Widney made no deposits in the bank applicable to the payment of either check. The sole question involved is whether or not the bank received the check without qualification as a deposit of cash to the credit of Mrs. Rogers. If it did, this fact must appear from the acts of the parties, as the record discloses nothing said upon the subject by either party to the transaction.

Upon the foregoing facts, the court found, in effect, that the acceptance of the check was equivalent to a deposit in cash to the defendant's credit, and that plaintiff assumed the payment thereof. In so finding we think the court erred. The facts in the case of National Gold Bank, etc., v. McDonald, 51 Cal. 64, 21 Am. Rep. 697, are almost identical with those in the case under consideration. McDonald, the defendant therein, and one Barton each kept an account with the bank, both of whose accounts at the time in question were overdrawn. In the regular course of business, Barton gave his check upon the bank to McDonald, who presented the check with his pass book to the receiving teller of the bank, who entered therein a credit for the amount of the deposit. About 3 o'clock of the same day (the deposit having been made at 2 o'clock), the bank returned the check to McDonald, notifying him that the same was dishonored for want of funds. McDonald refused to make good the amount of the check, claiming that it had been accepted by the bank as cash. The trial court found that McDonald presented the check for deposit as cash, that the bank so received it and entered the same in McDonald's pass book as cash, and gave judgment for him. Upon appeal, the Supreme Court reversed the case, saying: "On the motion for a new trial, one of the grounds specified and relied upon was that this finding was not justified by the evidence. It is not pretended that there was any evidence of an express agreement to the effect that the check was offered and received as a cash deposit; and the court must have reached that conclusion, as a deduction from the facts above stated. * * * We think the court erred in the deduction, and that the finding is not supported by the evidence." The fact that the amount of the check, with other sums, was entered upon a deposit slip, that the check was stamped "Paid," and impaled upon a check file, are mere memoranda adopted in aid of the convenient dispatch of business. They do not distinguish this case from the facts in Bank v. McDonald, supra.

There was nothing said or done in connection with the transaction which supports the conclusion that the bank accepted the check as cash. Had it been drawn upon another bank, and payment thereof refused, the bank could have charged it back to Rogers, notwithstanding the fact that she had received credit therefor in her pass book. Why should a different rule apply when drawn upon the bank which receives the check and enters the credit in the pass book? In either case, in the absence of any agreement to the contrary, it is received for collection. If, in the one case it be paid, the amount is placed to the credit of the depositor; in the other, if there are sufficient funds to the credit of the drawer, the amount of the check is transferred on the books of the bank from the account of the drawer to the account of the depositor. If upon presentation of the check the account of the drawer is insufficient to cover it, he may nevertheless make deposits during business hours of the day in amount sufficient to pay it, in which case such funds, to the amount of the check, should be transferred to the account of the party presenting the check. If, however, at the close of banking hours on the day when the check is presented the account of the drawer is insufficient to pay it, the bank must then elect to either pay the check itself, charging the amount thereof to the account of the drawer as an overdraft, or return the check to the party presenting it as unpaid for want of funds. If the check is drawn upon another bank, the bank wherein it is deposited has a reasonable time within which to present it for payment, and when drawn upon the bank wherein it is deposited the bank likewise, in the ordinary transaction of business, has a reasonable time to ascertain the condition of the drawer's account, and, in the absence of a demand for cash, the bank has until the close of banking hours on the day of the deposit, for the reason that the drawer of the check may deposit funds during banking hours sufficient to pay it. This is not an unreasonable rule, inasmuch as the depositor may by inquiry ascertain the condition of the drawer's account, or call for cash in payment of the check.

When a check on the same bank is presented to the receiving teller for deposit by a depositor, with his pass book, together with a deposit slip upon which the amount of the check, together with other deposits, is entered, and said teller receives the same and enters the amount thereof in the pass book to the credit of the depositor, stamps the check "Paid," and impales the same upon a file, nothing more being said or done, this does not of itself raise the presumption that such check was received as cash or otherwise than for collection, and the bank has until the close of banking hours on the day of deposit to ascertain whether the account of the drawer will permit of a transfer of the amount of the check to the depositor's account. If it will not, then, in the absence of any element of estoppel (and there is none here), the bank may charge back the amount to the depositor and return the check. Notwithstanding the fact that there are no funds to pay the check, the bank may elect to honor it as an overdraft, in which case a transfer of the amount from one account to the other is made upon the books of the bank. To constitute such transfer two acts are necessary, namely, charging the one account, and crediting the other, with the amount of the check. In the case at bar, it appears that the books of the bank were posted in alphabetical order, and that Mrs. Rogers' account was credited with the check, but no charge or entry was made against the account of Widney for the reason that he had no funds therein. Under these circumstances, the credit given Rogers did not constitute any transfer of the amount of the check to Rogers' account, nor did the act show an intent on the part of the bank to recognize the check as a cash deposit. "The fact that the depositor's account is credited with the amount of the items taken for collection does not of itself operate to transfer the title to the paper, for, by the custom of bankers, the collection is charged back at once if not paid." 3 Am. & Eng. Ency. of Law (2d Ed.) p. 817.

The fact that the bank on the same day cashed one of Widney's checks for $90 is wholly immaterial. It might be willing to advance him a small sum, and for obvious reasons unwilling to grant a like accommodation for another or larger sum. There would be no limit to the hazard of banking under a rule that required it to pay all overdrafts made by one to whom it had extended some slight favor of this character.

On the day of its deposit the check, with notice of its dishonor, was mailed to Mrs. Rogers at her admitted address. She did not call at the post office until five days later, when she received it and retained possession thereof until the trial of the case. It is contended by respondent that sending the notice by mail was insufficient; that it should have been given in a manner to have assured its immediate delivery. It is unnecessary to pass upon the sufficiency of the service by mail, for, conceding the depositor to be entitled to notice, and that mailing it was improper, it is not pretended that she sustained any damage by reason thereof. In any event, the bank's liability could only extent to the damage which was caused by the delay in sending it through the mail. None being claimed, it is immaterial how the notice was served. There are no facts presented by the record which would constitute an estoppel against the bank, or render it liable for the payment of this worthless check.

We are aware the courts of other states have rendered opinions apparently in conflict with Bank v. McDonald, supra. As a rule, however, they are easily distinguishable from the case under consideration. The case of Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160, cited by respondent, is not in point, for the reason that on the day upon which the check was deposited the drawer thereof made a deposit in amount sufficient to cover the check. This rather supports the theory that the rights and liabilities of the parties must be measured by the transactions occurring during the business day as a whole, rather than the particular time of the receipt of the check. In Montgomery Co. v. Cochran, 126 Fed. 456, 62 C. C. A. 70, the county treasurer in his official capacity accepted a check in payment of certain bonds which he caused to be delivered to the one from whom he received the check. The treasurer was held liable for the amount of the check upon the ground that he received it as cash. We fail to perceive any analogy between the facts in that case and the one at bar.

The judgment and order are reversed.

We concur: ALLEN, P. J.; TAGGART, J.

152 Cal. 450

FRESNO CANAL & IRRIGATION CO. v. HART et al. (S. F. 4,372.)

(Supreme Court of California. Dec. 3, 1907.)

1. Estoppel — Claim under Written Contract—Execution and Delivery.

Defendant's contention that the contract sued on was never executed, in that it was never delivered, is overcome by his claim of rights under the contract, since he may not claim any rights thereunder, unless it were, in fact, executed, of which execution delivery is an essential.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 163.]

2. Reformation of Instruments—Evidence —Sufficiency.

In a suit on a written contract for furnishing water, in which contract the maturity of the first payment was left blank, *held*, under the evidence, defendant could have it reformed so as to show that payment was not due until he should require and use water in irrigating his lands.

3. Evidence — Parol—Admissibility to Explain Incomplete Written Contract.

In a suit on a written contract for furnishing water, in which contract the time when the first payment was to fall due was left blank, defendant could show by parol testimony that payment was not due until he should require and use water in irrigating his lands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1882.]

4. Waters and Water Courses—Irrigation —Contracts.

While parties to an irrigation contract could agree that payment should begin when the irrigation company had complied with its contract and was ready to furnish water, it was equally competent for them to agree that payments should begin only when water was actually used.

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Fresno Canal & Irrigation Company against Marcus Hart and others. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed and remanded.

J. C. Bates and William Ede, for appellants. Frank H. Short and F. E. Cook, for respondent.

HENSHAW, J. This was an action to recover certain annual payments alleged to be due under a contract made between plaintiff and defendant (whereby plaintiff agreed to furnish water for use upon defendant's land), and to foreclose the lien upon this land in accordance with the terms of the contract. Defendant pleaded a nonexecution of the contract, and further pleaded its incompleteness, and prayed for its reformation in the following particular: The contract declared as follows: "The party of the second part, for himself, his heirs and assigns, covenants and agrees that he and his successors in interest and estate in said land will pay annually to the party of the first part, at their office, in gold coin of the United States, on the first Monday in September of each year, until the year 1920, and during the existence of said corporation, the sum of one hundred dollars ($100.00), the first payment to be made ——— and this instrument shall be deemed equivalent to notice. ———" The reformation for which defendant contends was that it was mutually understood and agreed that the blank space should be filled by inserting the words, "after the said party of the second part should require and use water in the irrigation of said lands," or words of similar import. Upon the trial the court found against the defendant's contention, and gave judgment for plaintiff, from which defendant appeals. Most of the propositions advanced upon the appeal must be taken as conclusively answered by the cases of Fresno Canal & Irrigation Company v. Rowell, 80 Cal. 116, 22 Pac. 53, 13 Am. St. Rep. 112; Fresno Canal & Irrigation Company v. Dunbar, 80 Cal. 530, 22 Pac. 275; Fresno Canal & Irrigation Company v. Park, 129 Cal. 327, 62 Pac. 87. The contracts under consideration in the foregoing cases were in all important particulars identical with that in the case at bar, and the propositions advanced were, after elaborate discussion, decided in those cases against the contention of appellant here.

As to the argument by appellant that the contract was never executed, by which it is meant that it was never delivered, defendant's own testimony is destructive of the contention. Upon the trial, he states that he does claim water rights from the plaintiff under and by virtue of the contract in suit. He could not claim any rights under such contract unless it were, in fact, executed, of which execution delivery is, of course, an essential. What, in fact, appellant means is that he did not execute the contract with the construction upon it contended for by respondent, namely, that he was to pay for water each year from the date of the contract, whether or not he actually used the water, that the contract which he actually entered into was a contract for annual payments for the water after it was delivered to his land, and that, if the contract in suit does not carry this meaning, it should be reformed so as to do so. The court admitted evidence upon this matter, and the evidence, without conflict, made wholly for defendant's contention in this regard. The testimony consists of the deposition of Mr. Minor, who was the secretary of Dr. Perrin, the then president of the plaintiff company, who testifies that the president of the company stated that the rental was not to paid until the water was placed upon the land, and that the blank was left to be filled in at such time as the water was placed upon the land. Robert Perrin was a resident director of plaintiff's company, and testifies to the same effect, that such was the express understanding between the defendant and Dr. Perrin, president of the company, saying: "Dr. Perrin, as president of the company, assured Mr. Hart that he would not be required to make any annual payments under the rights until he actually used water on his land, and the blanks in the water rights would be filled in to that effect. They both admitted in my presence that it was the original agreement." The defendant Hart's testimony is in accord with that of the other witnesses. Notwithstanding this undisputed testimony, the court's finding was against the defendant upon this proposition, and in this particular it fell into error. The contract itself showed an omission of some term. Defendant's pleading was appropriate for the supplying of that omission, and the evidence upon the subject was all one way. The question presented is whether the defendant was entitled to reformation under his answer and evidence, or whether, without reformation, the ambiguity caused by the omission might be proved and supplied by parol. As to this we entertain no doubt that it could be done. The proposition, then, to be determined is not, as is so elaborately argued, whether payments could be enforced if the water was not used. This proposition is completely answered in Fresno Canal & Irrigation Co. v. Rowell, 80 Cal. 117, 22 Pac. 54, 13 Am. St. Rep. 112, where it is said: "The fact that the defendant did not use the water if the plaintiff complied with the contract, and this was found to be the fact, is immaterial. The land was then bound whether the water was used or not." But the question here is as to when payments were to commence; for, while it was competent for the parties to contract that payments should begin when plaintiff had complied with the terms of its contract and was ready to furnish the water, it was equally competent for them to contract that payments should begin only when the water was actually used upon the land.

The judgment and order appealed from are therefore reversed, and the cause remanded.

We concur: McFARLAND, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.

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152 Cal. 453

FRESNO CANAL & IRRIGATION CO. v. WILLIAM EDE CO. (S. F. 4,376.)

(Supreme Court of California. Dec. 3, 1907.)

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Fresno Canal & Irrigation Company against William Ede Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed and remanded.

J. C. Bates and William Ede, for appellants. Frank H. Short and F. E. Cook, for respondent.

PER CURIAM. This action is in all respects like the action of Fresno Canal & Irrigation Company, Plaintiff and Respondent, v. Marcus Hart et al., Defendants and Appellants, No. 4,372 (this day decided), 92 Pac. 1010. The defendant was the successor in interest to certain lands originally owned by Hart and affected by the water contracts in suit. The cause has been submitted to follow the determination in the Hart Case; and for the reasons there given the judgment and order are reversed and the cause remanded.

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152 Cal. 383

SPRECKELS v. GORRILL. (S. F. 4,226.)

(Supreme Court of California. Nov. 30, 1907. Rehearing Denied Dec. 30, 1907.)

1. Pleading—Defects—Aider by Findings.

In an action to recover money paid for shares of stock sold by misrepresentation, where the complaint alleges that defendant stated that the company owned a certain patent, and that plaintiff, after the sale, discovered that it owned no such patent, and alleges that defendant's statements were made "falsely and fraudulently," but does not directly allege that the statements were untrue, nor that they were made with fraudulent intent, if there is no special demurrer raising the objection, and the case is tried on the theory that the complaint is sufficient in those respects, the omission is cured by findings of the court that the statements were not true, and were not warranted by information possessed by defendant, and the objection cannot be urged for the first time on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1459, 1460.]

2. CONTRACTS—VALIDITY—FRAUD — INTENT — RESCISSION.

Under Civ. Code, § 1572, subds. 1, 2, making it actual fraud for a party to a contract to make statements knowingly untrue, or to make statements which he believes to be true in a positive manner not warranted by his information, where one makes materially false statements to another to induce him to buy an article, and which do induce him to buy to his injury, the defrauding party, knowing them to be untrue or not having sufficient ground for believing them to be true, cannot avoid liability on the ground that he acted in good faith without actual intent to deceive, since the intent which is an element of the fraud is the intent to induce another to enter into the contract, and not the intent to deceive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1162.]

3. SAME—PECUNIARY DAMAGE.

While fraud in inducing another to enter into a contract which has produced and will produce no injury will not support an action for rescission, nor for damages, the injury need not be accurately measurable in money, but it is sufficient if it is of a pecuniary nature.

4. CORPORATIONS—SALES OF STOCK—FRAUD—PECUNIARY DAMAGE.

Where a person bought shares of stock on the misrepresentation that the company owned the patent on, and had the exclusive right to make and sell, a device which had been in common use for many years, he suffered a pecuniary injury from the misrepresentation, since his stock would have been of greater value with that right than without it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 506.]

5. CONTRACTS—RESCISSION—ACTIONS—PLEADING—ALLEGATIONS OF DAMAGE.

As the fraud is the essential thing in an action to recover money paid on misrepresentation, and the precise amount of damage of secondary importance, if defendant desires a more explicit statement showing the amount of pecuniary loss, he should demur for uncertainty in that particular.

6. CORPORATIONS—SALES OF STOCK—FRAUD — RESCISSION—ACTIONS—DEFENSES.

In an action against the seller of shares of stock for misrepresentations as to the property of the company, the real question is whether or not the value of the stock, if the representations had been true, would have been substantially greater than its value under the actual conditions, and it is no defense that the stock, in spite of the misrepresentations, is worth the price paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 506.]

7. SAME—ELEMENTS OF CAUSE OF ACTION.

The price actually paid for the stock is immaterial as an element in the cause of action.

8. SAME—PLACING OTHER PARTY IN STATU QUO.

Civ. Code, § 1691, provides that a party rescinding a contract shall restore to the other party everything of value which he has received from him under the contract. Plaintiff purchased stock in a company, in connection with an executory agreement that a new company was to be formed and the old stock exchanged for stock in the new company, and that the parties concerned should co-operate in carrying on the operations of the new corporation. Before the contract was completely executed, and while the executory enterprise remained so that it could be carried out as originally intended except that plaintiff would no longer co-operate, plaintiff offered to return all that he had received by reason of his purchase, and demanded the return of his money, on the ground of misrepresentation. It did not appear that the value of the stock had been reduced by the reorganization. *Held*, that it was not essential to a rescission of the contract that the other party be placed in precisely the position he had previously occupied, but it was sufficient if he be placed substantially in the same position, at the time of the attempted rescission, which he at that time would have occupied, if the sale had not taken place, and he had retained the stock himself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 506.]

9. SAME—APPLICATION OF EQUITABLE PRINCIPLES.

Where an offer of rescission of a contract to buy shares of stock has been made and refused, equitable principles apply to an action brought to enforce the right, and under Civ. Code, § 3408, providing that on adjudging the rescission of a contract the court may require the party to whom relief is granted to compensate the other as justice may require, if it should appear that the value of the stock has decreased since the sale, and defendant should not in equity suffer the loss, the court might abate part of the consideration, and give judgment for such a portion of it as it should deem just.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 506.]

10. ACTION—FORMS OF ACTION—ABOLITION OF DISTINCTION — EQUITABLE RELIEF IN ACTION AT LAW.

Under a form of procedure in which the distinction between forms of actions is abolished, where a suit to recover money paid for stock is in effect one to enforce a rescission, the court may administer equitable relief, regardless of whether, under other systems, the action would be deemed an action in assumpsit for the money paid or in equity for a rescission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 147–149.]

11. CORPORATIONS—SALES OF STOCK—FRAUD—RESCISSION—ACTIONS—DEFENSES.

It is no defense to an action to recover money paid for shares of stock sold by misrepresentation that the buyer, had he suspected the seller of falsehood, could have learned of the falsity of the seller's statements by inquiry of a person whom he knew to be cognizant of the truth, since he had a right to rely upon the statement of the seller.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 506.]

12. SAME—STATEMENTS CONSTITUTING FRAUD —STATEMENTS OF FACT OR OPINION.

The statements of a person selling stock in a company that the company owns a certain patent, and that the device patented is a novel one, are statements of fact, and not matters of opinion merely.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 506.]

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Rudolph Spreckels against R. W. Gorrill. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Reversed.

Bishop, Wheeler & Hoefler and Charles S. Wheeler (J. F. Bowie, of counsel), for appellant. Van Ness & Redman (Ralph C. Harrison, of counsel), for respondent.

SHAW, J. This is an action to recover money alleged to have been paid by the plaintiff to the defendant as the price of certain corporate stock. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The complaint alleges that Gorrill was the manager of a corporation known as the Pacific Car Equipment Company; that on the 15th day of April, 1899, he offered to sell to Spreckles 300 shares of the stock of said company at the price of $22,500; that, for the purpose of inducing Spreckles to buy said stock, Gorrill at that time falsely and fraudulently represented to Spreckles that said company was the owner of a certain United States patent for a metal cap or thimble for use on the journals of car axles, that said patent also covered the manner of affixing the same to the journal, that said device and the manner of attaching it was new and theretofore unused, and that said patent gave the company the exclusive right to make, use, and sell said contrivance; that Spreckels was without knowledge and information on the subject and relied wholly on the said statements of Gorrill, as Gorrill well knew; that Spreckels believed said statements and relied thereon, and was thereby induced to, and thereupon did, buy from Gorrill the said stock and pay him therefor the said sum of money; that in December, 1899, Spreckels discovered that in fact no patent for such cap or thimble, or for the manner of attaching the same to the journals, ever belonged to said company, that the said contrivance was not new, but, on the contrary, that the same had been in use for months and was not, and could not be, the subject of a United States patent; that Spreckels, promptly upon such discovery, gave notice to Gorrill that he rescinded said contract of purchase, and tendered and offered to restore the said stock to Gorrill upon the condition that Gorrill would restore to Spreckels the money paid therefor; that Gorrill refused to accept the stock or restore the money, and that Spreckels was still ready and willing to restore said stock and offered to do so upon the payment of the money. The prayer of the complaint was for judgment against Gorrill for $22,500, and for such other, further, different, or additional relief as should be found proper.

The respondent contends that the complaint is deficient in its statement of facts. It is claimed that it fails to allege that Gorrill knew the statements he had made were false, or that he did not believe them to be true and intended to deceive Spreckels, or that the statements were not true. There is no direct averment that the alleged representations by which Spreckels was induced to buy this stock were not true. The allegation is that in December, 1899, Spreckels discovered that no such patent belonged to the company, and that the device described was not new or patentable. This allegation, however, necessarily implies that the statements of Gorrill were untrue. Spreckels could not "discover" that the company did not own the patent or that the device had been in previous use and was not patentable, if, in fact, it did own the patent, or if the device was new and patentable. He could not discover facts that did not exist. Furthermore, it is alleged that the statements were made "falsely and fraudulently," and this also implies that they were not true. If the objection had been raised by a special demurrer for uncertainty, perhaps it might have been held fatal, but no demurrer was filed to the complaint. The defendant answered, denying practically all the substantial allegations of the complaint, the case was tried apparently upon the theory that the complaint was sufficiently direct and positive in this respect, and findings were made by the court stating directly that said statements were made by Gorrill to Spreckels, and that they were not true and were made in a manner not warranted by the information possessed by Gorrill. The lack of a direct allegation that the statements were untrue, conceding it to be a defect, is one of that character which, in the absence of a special demurrer, is cured by the verdict of the jury or the finding of the court, and which cannot be taken advantage of when urged for the first time on appeal. Sukeforth v. Lord, 87 Cal. 402, 25 Pac. 497; Doble v. Keystone Co., 145 Cal. 494, 78 Pac. 1050; Santa Barbara v. Eldred, 108 Cal. 297, 41 Pac. 410; Treanor v. Houghton, 103 Cal. 54, 36 Pac. 1081. The same rule applies to the defective allegation of fraudulent intent on the part of Gorrill. While the allegation that he made the statements "falsely and fraudulently" to induce Spreckels to buy might not, in the face of a proper special demurrer, supply the place of a direct allegation that Gorrill knew them to be untrue or made them in a manner not warranted by his own information, although he believed them to be true, nevertheless, it implies all this, and, where no special demurrer is interposed, it will be held sufficient after the verdict or decision upon the merits. The lack of a more definite averment of an intent to deceive is immaterial. If one makes material false statements to another, to induce that other to buy an article and which does induce him to buy to his injury, the defrauding party either knowing them to be untrue, or believing them to be true, but having no sufficient ground for such belief, he will not be protected from liability for his fraudulent conduct by the fact that he did not intend to deceive the other party. Having actually deceived such other party and having profited by such deceit, he cannot be allowed to retain the advantage, or defeat liability, on the ground that he acted in good faith without actual intent to deceive. Nor is such intent, in such a case, a necessary element of the fraud which forms the basis of the cause of action. The intent which is essential is the "intent to induce another party to enter into the contract." Civ. Code, § 1572. This intent is specifically alleged in the complaint.

It is also claimed that the complaint is insufficient because of the absence of any showing therein that any pecuniary damage was caused by the fraud alleged. It is true that there is no express allegation that plaintiff suffered pecuniary damage therefrom, but in cases of this character this is not necessary. That fraud which has produced, and will produce, no injury will not justify a rescission, nor support an action either for rescission or damages, is an established principle of law and equity. But there is no rule that the injury must be of such a nature that it can be accurately measured in money. And we know of no rule of pleading which, in an action based upon a rescission between the parties or seeking to enforce such rescission, requires a statement that the fraud complained of had caused or would cause a specific amount of damages. It may be conceded that it must be shown that the plaintiff, by reason of the fraud, suffered an injury of a pecuniary nature—that is, an injury to his property rights, as distinguished from a mere injury to his feelings—but it will be sufficient if the facts alleged show that material injury will necessarily ensue from the fraud, although the amount of the pecuniary loss is not stated. Such injury is shown by the facts alleged in the present case. Upon the contract as made plaintiff was entitled to that for which he bargained and which, by means of the representations made to him, he was led to believe he purchased by his bargain. This was 300 shares of stock of a corporation which owned, as part of its capital stock, a patent for the device described, a patent which would secure to it the exclusive right to make and sell that device. If, by reason of the falsity of the statements, or, in other words, by reason of the fact that the company did not own and could not obtain this patent, the plaintiff received shares of stock which did not represent any interest in such patent, and which, therefore, would be worth that much less than otherwise, he was injured and damaged to the extent of the difference between the value of his stock with the property of the corporation as it actually existed and the value of his stock as it would have been had the corporation actually owned the patent. The value of such a patent is not stated, nor is the actual value of the stock averred. It is not contended, however, that the supposed patent would not have added materially to the value of the stock, and it is distinctly alleged and found that Spreckels would not have bought or paid for the stock if he had not believed that the company owned the patents. This sufficiently discloses the fact that the possession of these patents was to him a material element in the bargain. It further appears that the device had been in common use for many years, and from this it necessarily follows that the exclusive right to make and sell it would have been valuable, and that the possession of such right by the corporation would have made the stock of greater value than it was without that right. Hence it follows that it is not true that the pleading does not show pecuniary injury. Mr. Pomeroy says: "If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury. It is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable." 2 Pom. Eq. Jur. § 898; Wainscott v. Occidental Ass'n, 98 Cal. 255, 33 Pac. 88. If the defendant desired a more explicit statement showing the amount of the pecuniary loss, he should have presented the objection by means of a demurrer for uncertainty in that particular. The fraud is the essential thing; the precise amount of damage being of secondary importance. Wainscott v. Occidental Ass'n, 98 Cal. 257, 33 Pac. 88. In this connection we may notice a further proposition, which also arises upon the findings. The court finds, as a fact, that plaintiff suffered no damage by reason of the representations of the defendant, except as damage is to be inferred from the facts found. The plaintiff paid $22,500 for the stock, and it is neither alleged nor found that the stock was actually worth less than that sum. It is urged in argument that, as there is no presumption that it was worth less, it must be presumed that it was and is worth at least that amount; that plaintiff is therefore as well off with stock of the cash value of $22,500 as he was with the money in his possession with which he bought the stock at that price and hence that he has suffered no detriment. If this proposition were correct, it would at once put an end to actions founded on injury from a purchase induced by fraudulent representations as to the character or quality of the property purchased, except in cases where the purchaser could show that he had made a bad bargain independent of the false representations. One who buys property is lawfully entitled to all the benefit of the purchase; that is, to the full value of the property he buys, regardless of the price he paid. And it is a fundamental principle of the law of fraud that where one has, by false and fraudulent representations as to the quality of property, led another to believe it to be possessed of valuable qualities, and thereby wrongfully induced the other to buy the property, presumably in order to obtain the benefit of property possessing those qualities, the seller will not be allowed to show as a defense to an action for such fraud that the property, in its actual condition, was worth the price paid, or more. The real question in all such cases is whether or not the property, if it had been as represented, would have been of substantially greater value than its actual value in its real condition. The price actually paid is immaterial as an element in the cause of action, though it may be admissible evidence on the question of value. Cruess v. Fessler, 39 Cal. 336; Murray v. Jennings, 42 Conn. 9, 19 Am. Rep. 527; Estes v. Odom, 91 Ga. 600, 18 S. E. 355; Antle v. Sexton, 137 Ill. 410, 27 N. E. 691; Medbury v. Watson, 47 Mass. 246, 39 Am. Dec. 726; Williams v. Kerr, 152 Pa. 560, 25 Atl. 618; Nysewander v. Lowman, 124 Ind. 584, 24 N. E. 355; MacLaren v. Cochran, 44 Minn. 261, 46 N. W. 409; Harlow v. La Brum, 151 N. Y. 278, 45 N. E. 859; Martin v. Hill, 41 Minn. 343, 43 N. W. 339; Smith v. Countryman, 30 N. Y. 670; 4 Suth. on Dam. § 117 and cases cited; 23 Am. Dig. columns 1810, 1811, citing many cases. For example, in Murray v. Jennings, supra, the plaintiff exchanged a pair of oxen for a horse upon the representation of the defendant that the horse was sound. The horse proved unsound, and the plaintiff sued for damages for the deceit. The horse, in its unsound state, was worth $125. If it had been sound it would have been worth $225. The oxen were worth only $100. Plaintiff recovered $100 as the difference between the value of the unsound horse and its value if it had been sound. This was said to be correct and the value of the oxen held immaterial; the court saying: "The law gives her [plaintiff] the benefit of the contract, and places her with respect to it, and to all her rights under it, in the same position as if no fraud had been practiced upon her, and as if the horse was as sound and valuable as she had a right, from the defendant's representations to her, to believe it was." There are some courts of high authority which adopt a different rule in regard to suits for damages for deceit, and take the difference between the price paid and the real value of the thing bought as the measure of damages. 4 Suth. on Dam. § 1172. But we know of no case where such a rule has been applied in equity in suits to rescind contracts where the suitor has been induced by fraud to buy property which he would not have purchased but for the fraud. Some of the cases above cited, indeed, go further, and hold that the question of the comparative value of the property as it was, and as it was represented to be, is not important in cases of rescission, nor at all, except in an action at law for damages for the deceit, and that in equitable actions a party will be relieved from a contract induced by such fraud if it appears that he was led into it by a false statement as to a fact affecting the property which he himself deemed material, although others may think the fact would not add to the value of the property or to the benefit to be derived therefrom. We need not go so far in this case. It is enough that the rule above stated is the one particularly applicable to the present case, and that the pleadings, evidence, and findings upon this point make a case in favor of the plaintiff. At the conclusion of its findings the court below stated that, by reason of the facts previously found, the plaintiff did not restore, or offer to restore, to the defendant everything of value which he had received from defendant under the contract, and that he could not do so, and that for said reason only the court finds that the plaintiff did not rescind the contract. This statement seems to have been the basis of the judgment in favor of the defendant. We think this statement is incorrect, and that the judgment is not supported by the facts found. The findings are much more elaborate than the pleadings, and, in order to make the complaint clear, it will be necessary to state the additional facts referred to.

At the time of the sale of the stock to plaintiff it was understood and agreed by and between the plaintiff, the defendant, and certain other persons who also bought shares of the stock that a new corporation should be formed by them, that the assets of the Pacific Car Equipment Company should thereupon be transferred to such new corporation, and that the shareholders of the Pacific Car Equipment Company should receive shares of the new corporation in lieu of their shares in the old company. This agreement was consummated in part. A new corporation was formed, called the National Car Equipment Company. The original company had 2,500 shares of stock of the par value of $100 each. The new corporation had 100,000 shares of the par value of $100 each. All of the assets of the old company were transferred to the new corporation, and it was agreed that each stockholder of the old company should receive shares in the new corporation in the proportion of 20 shares of the new stock in exchange for one share of the old stock. There the enterprise appears to have halted. No stock of the new corporation has ever been issued, nor have any of the certificates of stock in the old company ever been surrendered to be exchanged for the new stock. Among the assets of the old company transferred to the new corporation was the sum of $8,125.57 in money. At the time Spreckels offered to rescind the contract the new corporation had expended of this money for advice of attorneys regarding the property transferred from the old company the sum of $666.26 and had incurred debts to the amount of $2,608.77, which remained unpaid. It is claimed that, by reason of these transactions, the conditions had so materially changed that it was impossible for Spreckels to restore to Gorrill everything of value which he had received under the contract; in other words, that the delivery to Gorrill of the stock he sold to Spreckels would not have restored Gorrill to the position he was in immediately before the sale, which is the form in which defendant's counsel prefers to state the proposition. This latter, however, is not an accurate statement of the rule. Under the Code it is only necessary that the rescinding party shall "restore to the other party everything of value which he has received from him under the contract." Civ. Code, § 1691. If such restoration is possible, rescission can be accomplished and will be enforced even if the party is not placed in precisely the position which he previously occupied. In considering the question whether or not such restoration has been made or offered, regard must be had to the entire contract under which the property bought was received, and to the purposes and objects of the parties in making that contract, so far as they are disclosed by the agreement. The agreement in question was more than a mere contract for the purchase and sale of the stock. That was a material part of the agreement, but it was supplemented by and connected with an additional understanding that a new corporation was to be formed, that the assets of the old company were to be transferred to the new one, and that each shareholder was to receive a proportionate share of the new stock in exchange for the old stock held by him. It is also apparent from the circumstances disclosed by the agreement and the facts found that there was an understanding that the parties concerned should co-operate in carrying on the operations of the new corporation. The stock received by Spreckels under the contract was held by him subject to all the terms of the agreement, not perhaps as conditions subsequent, but as conditions of the contract by which he obtained the stock and which were binding upon him as part of his agreement. The fact that, prior to the offer of rescission, part of the original agreement had been performed as contemplated, did not so change the conditions as to give the defendant the right to object that he could not be placed in statu quo because thereof. It was the identical change for which he had contracted. The obligation to accede to and carry out these objects was, in conscience at least, a burden on the ownership of the stock, and, when Spreckels offered to return it subject to the same burden so far as it was not discharged by performance, he did, in fulfillment of every demand of equity and good conscience, offer to restore to Gorrill everything that he had received of value under the contract. By accepting the stock, Gorrill would have obtained every right pertaining thereto which Spreckels possessed under the agreement upon which he bought it. The contract was in reality of an executory nature, and before it was completely executed the injured party offered to return all that he had received by reason of it to the other party; and this occurred while the executory enterprise still remained in such a condition that it could be carried out as originally intended, except that Spreckels would no longer co-operate therein. The facts that some of the money transferred to the new corporation had been expended in the business which it was to carry on, and that it had incurred some indebtedness in the transaction of the business, would give Gorrill no right to object to the restoration. It was intended that the new corporation should be a going concern, and this implied that it should expend money and incur current expense in the transaction of its business. There is no finding that the expenditure of this money, or the existence of these debts, had reduced the value of its stock. In the absence of anything to the contrary, the presumption clearly is that the corporation had received full value for the money expended and the debts incurred, and that the stock thereafter was worth at least as much as before. Nothing is shown to the contrary. It is usually impossible after the lapse of a considerable time to place a person exactly in the position he was in at the time he made the contract. This is not what the rule contemplates in an enterprise such as that here in question, where it was understood that the parties should continue to co-operate to carry out its purposes. If the defrauding party can be placed substantially in the same position at the time of the attempted rescission, which he at that time would have occupied if the sale had not taken place and he had retained the stock himself, the demands of equity are fully satisfied and the defrauded party is entitled to be relieved.

Furthermore, the complaint asks for a judgment for the money, or "for such other, further, different, or additional relief as may be meet in the premises." Where an offer of rescission has been made and refused and the party is compelled to go into court to enforce his right to rescind, the principles of equity apply. The rule laid down in section 3408 of the Civil Code may be resorted to, and, if the court finds that the other party cannot be placed wholly in statu quo, it "may require the party to whom such relief is granted to make any compensation to the other which justice may require." In effect, this is a suit to enforce a rescission which has been offered and refused, and it is of equitable origin and nature. Under our form of procedure whereby the distinction between forms of actions is abolished, the court could in this action administer equitable relief, regardless of the question whether, under former systems of jurisprudence, the action would be deemed an action in assumpsit for the money paid, or an action in equity to compel rescission and a return of the consideration. Therefore, even if it should appear that the value of the new stock had materially depreciated and that the circumstances were such that the defendant should not in equity be made to suffer the loss, the court could do complete justice by abating a part of the consideration and giving judgment for such part thereof only as it should deem just. Green v. Duvergey, 146 Cal. 379, 80 Pac. 234, and cases there cited; Cal. Farm & Trust Co. v. Schiappa-Pietra (Cal.) 91 Pac. 593. The findings state that one George H. Strong, an attorney in San Francisco, was acting in behalf of the Pacific Car Equipment Company in the matter of obtaining the patents mentioned; that, before he bought the stock, Spreckels was informed by Gorrill that Strong was acting as such attorney for that purpose; and that Spreckels made no inquiry of Strong as to the truth of the representations of Gorrill. This neglect, if it can be so called, would not preclude Spreckels from complaining of the fraud practiced upon him by Gorrill. It does not appear that Spreckels at the time had any cause or reason to doubt the veracity of Gorrill, or the truth of his statements, nor that he was referred to Strong for further information or confirmation of the statements. One who makes statements false in fact, and induces another to buy property, cannot defeat liability for the false statements by showing that, if the other party had suspected him of falsehood or doubted the accuracy of the statements, such party, by ordinary diligence and by inquiry of persons whom he knew to be cognizant of the truth, could have learned of the accuracy or falsity of the statements. "Every contracting party has a right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify the statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." Mead v. Bunn, 32 N. Y. 275, quoted and approved in Dow v. Swain, 125 Cal. 683, 58 Pac. 271; Smith v. Countryman, supra. And see, also, cases cited below.

There is no merit in the claim that the statements as to the ownership of the patent and the novelty of the device described were matters of opinion merely, upon which Spreckels had no right to rely. It is well settled that they constitute matters of fact. Rose v. Hurley, 39 Ind. 83; David v. Park, 103 Mass. 502; McKee v. Eaton, 26 Kan. 226; Tabor v. Peters, 74 Ala. 97, 49 Am. Rep. 804; Hicks v. Stevens, 121 Ill. 187, 11 N. E. 241.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

ALLEN v. GORRILL. (S. F. 4,403.)

(Supreme Court of California. Dec. 6, 1907. Rehearing Denied Jan. 2, 1908.)

Department 2. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Francis W. Allen, executrix, etc., against R. W. Gorrill. Judgment for defendant, and plaintiff appeals. Reversed.

Page, McCutchen & Knight, for appellant. Van Ness & Redman and T. C. Van Ness, for respondent.

PER CURIAM. The points in this case are the same as those disposed of in the case of Spreckles v. Gorrill (S. F. No. 4,226, decided November 30, 1907) 92 Pac. 1011, and upon the authority of that case, and for the reasons given in the opinion therein, the judgment and order appealed from in the case at bar are reversed.

152 Cal. 488

HOPPER et al. v. KEYS et al. (S. F. 4,780.)

(Supreme Court of California. Dec. 5, 1907.)

CHATTEL MORTGAGES—REMOVAL OF PROPERTY TO ANOTHER COUNTY—RECORDING MORTGAGE.

Under Civ. Code, § 2965, providing that, when personal property mortgaged is thereafter by the mortgagor removed from the county in which it is situated, it is, except as between parties to the mortgage, exempted from the operation thereof, unless either (1) the mortgagee, within 30 days after such removal, causes the mortgage to be recorded in the county to which the property has been removed, or (2) the mortgagee, within 30 days after such removal, takes possession of the property as a pledge, the mortgaged property having been removed by the mortgagor from the county where the mortgage was given and recorded to another county, though surreptitiously, and the mortgagee not having within 30 days thereafter taken possession of the property or recorded the mortgage in such other county, the mortgage is ineffectual against other creditors of the mortgagor, though they knew of the mortgage, and their claims antedated the mortgage, and the mortgage was recorded in the county to which the property was removed more than 30 days after the removal, but before any process lien was executed on the property, and this notwithstanding section 3431, providing that, in the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 166.]

In Bank. Appeal from Superior Court, Sonoma County; A. G. Burnett, Judge.

Action by W. L. Hopper and another against James A. Keys and another. Judgment for defendants. Plaintiffs appeal. Affirmed.

J. R. Leppo and J. A. Barham, for appellants. T. J. Butts, for respondents.

PER CURIAM. This case was originally before the District Court of Appeal for the

Third Appellate District, and a rehearing ordered by this court after decision rendered there.

The opinion of said District Court [per HART, J., in which CHIPMAN, P. J., and BURNETT, J., concurred] stating the facts and applying the law is as follows:

"This is an action to recover the value of certain personal property alleged to have been wrongfully converted by the defendants. Judgment went for the defendants, and this appeal is from the judgment upon the judgment roll alone.

"According to the facts, as exhibited by the findings, and upon which to a large extent the parties agreed in the lower court, one George W. Emerick, who was, at the time of the original transaction out of which this controversy arises, a resident of Napa county, made on the 21st day of July, 1902, his promissory note, bearing date of June 16, 1902, in the sum of $600 in favor of and payable to W. L. Hopper, one of the plaintiffs herein, and T. A. Light, intestate of plaintiff, C. A. Stevens, and on the same day executed and delivered to them a chattel mortgage upon certain personal property to secure the payment thereof. The property upon which the mortgage was executed consisted of one Champion Giant hay press, one Lightning platform scales, and one Buck rake, and was at the time of the execution of the note and mortgage situated in Napa county. The mortgage was in due form, and was recorded in the office of the recorder of Napa county on the 25th day of July, 1902. In the month of August, 1902, Emerick removed the mortgaged property to Sonoma county, where it remained in his possession, and was kept by him until the month of May, 1903—covering approximately a period of nine months. The plaintiffs, during all this time the owners and holders of the note and mortgage, did not cause the mortgage to be recorded in Sonoma county at any time, and did not take possession of the mortgaged property after its removal thereto. The plaintiff Hopper was at this time a resident of the city of Santa Rosa, in Sonoma county, and the court below found that said Hopper, within two or three weeks after the mortgaged property had been removed from Napa to Sonoma county, knew and had knowledge of such removal of the property into Sonoma county. In fact, Emerick used the hay press for bailing purposes in Sonoma county, in the vicinity of Santa Rosa, for several weeks in the month of October, 1902, and on one occasion, in the month of April, 1903, removed the press to a blacksmith shop in Santa Rosa, situated directly opposite the livery stable of the plaintiff Hopper. Previous to this occasion the property had been stored in a barn of a brother-in-law of Hopper's, about two miles west of Santa Rosa. In the month of May, 1903, Emerick removed the hay press and scales to Solano county. The defendant Southerland had instituted an action in the justice court of Santa Rosa township, Sonoma county, against said Emerick and one Miller to recover upon an indebtedness claimed to be due from said defendants in said action to Southerland, which said indebtedness, it is admitted, was 'incurred, created, and existing prior to the date of the execution in Napa county of the note and chattel mortgage' involved in the case at bar. The court below found that at the time he recorded the mortgage in Solano county 'plaintiff Hopper had knowledge of and knew that the defendant R. G. Southerland had commenced the action in the justice court of Santa Rosa township, Sonoma county, and had made an ineffectual attempt to attach the said property.' The defendant James A. Keys was at the time of which we are now speaking sheriff of Solano county. On the 22d day of July, 1903, said defendant Keys, in his capacity as sheriff, levied upon, seized, and took and carried away a portion of said mortgaged property—the hay press and platform scales—then in the possession of said Emerick in Solano county, by virtue of a writ of attachment placed in his hands by said R. G. Southerland for service, issued in the action then pending in the justice court of Santa Rosa township, Sonoma county, in which, as heretofore explained, Southerland, one of the defendants here, was plaintiff and Emerick and Ed. Miller were defendants. The attachment thus executed by defendant Keys appears to have been irregularly issued by the justice court, because of some fatal defect in the undertaking, and, upon the application of defendant Emerick in that action, the writ was discharged and the property released by the sheriff. It should be stated that on the 21st day of July, 1903, and, as admitted by the plaintiffs herein, more than 30 days after the removal of said property to Solano county, plaintiffs caused their mortgage to be recorded in the office of the recorder of Solano county. When the sheriff seized the property under the authority of the aforesaid writ of attachment, the plaintiffs herein served upon that officer written notice of the existence and recordation in Solano and Napa counties of their said mortgage, and made a demand upon said sheriff that he pay to said Hopper and Light the amount of the mortgage debt due them. This fact is stated here for the purpose of showing that at that time the defendants were given and had actual notice of the recordation of the mortgage in both Solano and Napa counties. Defendant Southerland on the 17th day of October, 1903, as plaintiff in the aforesaid justice court action, obtained judgment for the sum of $314.45, and, after causing an abstract of his judgment thus obtained to be filed in the office of the county clerk of Sonoma county, and the same docketed in the judgment docket of the superior court of that county, he caused on the 6th day of November, 1903, to be issued out of said superior court an execution, which he placed in the hands of defendant Keys, as sheriff, and thereupon directed him, as such officer of Solano county, to seize and levy upon said mortgaged property, still situated in that county, and to sell the same on execution to satisfy his judgment so obtained in the justice court of Sonoma county, as aforesaid. The hay press and scales, a portion of the property in controversy, were thereupon by said defendant Keys, in his capacity as sheriff, levied upon and taken by virtue of said execution, and on the 19th day of November, 1903, sold by him, under the authority thus vested in him, to the defendant Southerland, who, in payment therefor, canceled and satisfied his said judgment against the said defendants Emerick and Miller.

"The facts thus detailed, and concerning which, as we have stated, there is no dispute between the parties, present for solution, we think, the single question of the effect of a failure to record a chattel mortgage within the time prescribed by law in a county to which the mortgaged property has been removed from that in which the property was situated and the mortgage recorded at the time of the execution of the instrument. In other words, it may be inquired: Does such failure to record the mortgage in the county to which the mortgaged property has been removed have the effect of exempting the mortgaged property for all time from the operation of the mortgage, in so far as it concerns creditors of the mortgagor? This question may, we think, be determined with little difficulty by an examination of the sections of the Code relative to chattel mortgages and their bearing upon the particular point presented by the facts in this case.

"Section 2957 of the Civil Code reads: 'A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless: (1) It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay or defraud creditors; (2) It is acknowledged or proved, certified and recorded, in like manner as grants of real property.' Section 2965, supra, provides: 'When personal property mortgaged is thereafter by the mortgagor removed from the county in which it is situated, it is, except as between the parties to the mortgage, exempted from the operation thereof, unless either: The mortgagee, within thirty days after such removal, causes the mortgage to be recorded in the county to which the property has been removed; or (2) the mortgagee, within thirty days after such removal, takes possession of the property, as prescribed in the next section.' The 'next' section points out that the property may be taken by the mortgagee and disposed of as a pledge for the payment of a debt, 'though the debt is not due.' It will, however, be observed that under the provisions of section 2957, supra, one of the requisites of a chattel mortgage, and without which it would be void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, is that it shall be recorded. At common law and under our own early statutes delivery to and possession by the mortgagee of the mortgaged chattel were required. 'There is thus no room left for doubt that the law of 1850 rendered void, at the instance of creditors, a chattel mortgage, unless it was accompanied by an immediate delivery and by an actual and continued change of possession of the property affected.' Ruggles v. Cannedy, 127 Cal. 295, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371. After referring to several of our Code provisions, changing the law of chattel mortgages as it existed in the early history of our jurisprudence, and quoting section 2957 of the Civil Code, the Supreme Court in the case cited says: 'Thus, in the case of the articles of personal property enumerated in section 2955 of the Code, recordation became a substitute for delivery and change of possession. The recording of the mortgage is therefore made by the Code the equivalent of an immediate delivery and continued change of possession'—citing Berson v. Nunan, 63 Cal. 550, and Martin v. Thompson, 63 Cal. 3.

"But it is urged by appellants that the time within which the mortgage must be recorded after its execution is not material; that creditors of the mortgagor whose claims accrued prior to the execution of the mortgage and who have actual knowledge or notice of its existence and proper certification cannot question the validity of the mortgage upon the ground of its nonrecordation. And to support this view we are referred to the opinion of some of the justices in the case of Ruggles v. Cannedy, supra, and the case of Summerville v. Kelliher, 144 Cal. 157, 77 Pac. 889. These cases have no application to the question here. They deal entirely with section 2957 of the Civil Code, which contains no express provision fixing a time within which the mortgage shall be recorded in the first instance; that is to say, in the county in which the mortgaged property was situated at the time of the execution of the mortgage. And it may here be stated that in an elaborate and signally able opinion by Justice Henshaw in Ruggles v. Cannedy, supra, it is held that the recordation of the mortgage, having been designed by the statute as a substitute for and equivalent of immediate delivery and continued change of possession under the former system in vogue in this state, should be had immediately, or as near thereafter as practicable, upon the execution of the mortgage, in order to give notice to and bind third parties. It must be conceded that the authority for the creation of chattel mortgages in this state derives its force from the statutory provisions relating to the subject, and that all rights accruing by virtue of such mortgages can be protected and preserved only by fully meeting the requirements of the statute and strictly observing its provisions. That the recordation of the mortgage, under our present system, is one of the necessary and indispensable requisites to protect the rights of the mortgagee against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, is a self-evident proposition. 'It must be remembered, in general, that the policy of the law is against secret liens and charges to the injury of innocent purchasers or incumbrancers for value, and in particular that mortgages of personal property are permitted only in certain specified cases, and then only upon the observance of certain formalities, designed to insure good faith, and to give notice to the world of the character of the transaction.' Palmer v. Howard, 72 Cal. 293, 13 Pac. 858, 1 Am. St. Rep. 60. What 'notice to the world' is must be and is committed to the legislative judgment. In some states, we have observed, the recordation of the mortgage in the county in which the mortgaged property was situated at the time of the execution of the instrument was all that was required by the statutes of such states, and the courts have held that that was 'notice to all the world,' even though the mortgaged property be removed to another county. The Legislatures of those states having so declared, their judgment thereon is binding and conclusive upon the courts. In California, however, the Legislature has gone farther, and has said that the recordation in the first instance is not sufficient, if, after the execution and recordation of the mortgage in the county where the property was situated at the time, the mortgaged property be removed from that county. The mortgagee, in the event of the removal of the property out of the county where the mortgage is properly recorded, to protect his rights under the mortgage, may, under the law, proceed in either one of two ways: He may, within 30 days after the removal of the mortgaged property into another county take possession of the property and dispose of it as a pledge, or he may, within the same limit of time, cause the mortgage to be recorded in the county to which it has been removed. These are his remedies, under the circumstances mentioned, expressly pointed out to him by the statute. According to the evidence the plaintiffs availed themselves of neither. Did they, therefore, forever forfeit their lien upon the property, so far as it affected the rights of the creditors of the mortgagor? We think the Code sections bearing upon the point and to which we have referred are susceptible of no other construction than that the recordation of the lien, within the time prescribed, in the 'county to which the property has been removed,' is indispensably necessary to preserve the rights of the mortgagees against creditors, unless possession is taken of the property by the mortgagees as provided by section 2965. In fact, the language of section 2965 of the Code is so plain and unambiguous that construction is unnecessary. The failure of the appellants to do either of the things in Sonoma county required by that section had the effect, in our opinion, of exempting ipso facto, the property from the operation of the mortgage, so far as it affected creditors of the mortgagor. The recordation of the mortgage after the time prescribed by the statute could not have the effect of reviving the mortgage so as to render it operative against the creditors of the mortgagor, because there is no provision in the statute which provides that any such power rests in such act of recordation. We can neither add to nor take from, by construction, any force which a statute possesses, and therefore, if we were to accept the contention of appellants, we would be compelled in defiance of the power to which courts are thus limited, and in direct violation of an express rule of construction (section 1858, Code Civ. Proc.), to either eliminate and totally disregard the time limit clause contained in section 2965 of the Civil Code, or, in the language of counsel for respondents, read into the section the words, 'so long as the mortgage remains unrecorded.' Counsel for appellants admit that, 'if the property had been attached in Sonoma county 30 days after the same had been removed thereto, the lien of the attachment would have been good, because the mortgage was not recorded there at all.' We think, with counsel for respondents, that this concession is a complete surrender of their case. But they insist that, the property having been removed to Solano county and the mortgage recorded therein before any process lien was executed upon it, the lien thereunder was thus revived and again became operative as against the world. There is, as we have said, no warrant for any such construction of the statute. The fact of the removal of the property into Solano county cannot in any conceivable view affect the question. If the Legislature does not mean what it plainly says as to the time limit prescribed in section 2965, supra, what can it mean? Must it be presumed that the lawmakers employed that language idly and without purpose? The reason upon which rests our whole system of chattel mortgages, as it now exists and was established by our Legislature in lieu of the former system in this state, satisfactorily and conclusively answers the question. The law is designed to protect the rights of all classes. It plainly and clearly points the way to the mortgagee for the protection of his rights. But he is by the law chargeable with vigilance, and will not be permitted to sleep upon his rights. He must watch, follow, and pursue the safeguards accorded him by the law. It is no answer to say that the mortgaged property has been surreptitiously removed from the county by the mortgagor. It is the duty of the mortgagee to guard against such removal, and, if he fails in this duty and thus forfeits and loses his rights, is there any reason why he should be restored thereto and favored as against others, who, having equal claims and equal equities against the unencumbered property of his mortgagor, take advantage of his neglect and default to enforce their own rights? We know of no just reason. We, therefore, conclude that the failure on the part of the mortgagees to pursue either remedy afforded them by the statute within the prescribed time in Sonoma county was fatal and lost to them their lien and rights under the mortgage, so far as the respondent Southerland, as a creditor of the mortgagor, was concerned; that the recordation in Solano county was nugatory and a futile act as to creditors of the mortgagor, because, as we have shown, there is no provision of the law which gives such force to such recordation under the circumstances present in this case as would revive or vitalize the mortgage as to creditors.

"But it is argued that section 3431 of the Civil Code affords protection to the mortgagee as against the claims of creditors, notwithstanding that the mortgage has not been recorded in the county to which the property has been removed within the time prescribed by the statute. That section reads: 'In the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract.' That section can be of no assistance to appellants; for, if our position as to the effect of failure to record the mortgage in the county to which the mortgaged property has been taken is correct, then, in such case, it must be perceived that the mortgage, thus unrecorded, does not and cannot constitute a 'contract of a debtor (mortgagor) valid against all his creditors,' because such contract has ex necessitate ceased to affect the property involved in the mortgage. It is conceded, and indeed the statute clearly enough so provides, that as between the parties themselves the mortgage is valid, but, as we think we have shown, where there has been a failure to comply with any of the essential requirements of the statute to impart full validity to the mortgage, and of which recordation in the county to which the property has been removed is one, the mortgage then cannot be construed to be a contract valid against creditors, unless, by judicial interpretation and construction, we legislate out of section 2965 of the Civil Code the clause prescribing the time within which the mortgage must be recorded in the county to which the property has been removed.

"The appellants seem to attach considerable significance to the fact that respondents had actual notice and knowledge of the existence and recordation of the mortgage in Napa and Solano counties at the time of the taking of the mortgaged property under the execution lien. But this question of actual notice by creditors of the mortgagor has been settled by the Supreme Court against the position of appellants in the case of Cardenas v. Miller, 108 Cal. 252, 39 Pac. 783, 41 Pac. 472, 49 Am. St. Rep. 84. It is there held that our 'statute makes a very plain distinction between creditors and subsequent purchasers and mortgagees.' 'The latter,' says the court in that case, in denying a rehearing, 'are protected against the prior unrecorded mortgage only when they take their conveyances "in good faith and for value"; and, of course, they do not take them in good faith if they have actual notice of the prior mortgage. But not so as to creditors. As to them good faith is not made a condition, but such a mortgage is declared void without qualification. As to them the question of actual notice is made wholly immaterial under the statute, and consequently knowledge on their part of the existence of such unrecorded mortgage will not protect their claims. The plain import of the statute is that nothing but a compliance with its terms will protect a mortgage of chattels against creditors.' If a question of 'good faith' were involved in this discussion, it is suggested that the admitted facts in this case are not such as to impress us that the conduct of the mortgagees in this transaction was characterized by any such quality. They undoubtedly knew the property had been removed to Sonoma county, and, even if this knowledge was obtained after the time to which they were limited for the recordation of the mortgage or taking possession of the property, they had ample opportunity to make new arrangements with the mortgagor by the cancellation of the note and satisfaction of the mortgage executed in Napa county in consideration of a new note and mortgage in Sonoma county, where they could have recorded the new mortgage and thus probably have protected their rights. But they did not do this, or make any effort to protect themselves until they had learned, according to the findings, of the proceedings of respondent Southerland against the mortgagor Emerick and of the 'ineffectual attempt' to attach the property.

"Of course, these observations have no bearing or influence upon the conclusions here reached by us, but, as we have said, if the question of 'good faith' could be injected into the discussion as a necessary element to determine upon which side the 'equities' are to be found, there would be little difficulty, under the admitted facts, in turning the scale on that score against appellants.

"The judgment will be affirmed."

The rehearing granted by this court from the above decision was ordered mainly that the cause might be reconsidered in this court in connection with the case of Himmels v. Sentous et al., in which a rehearing had previously been granted from a decision of the District Court of Appeal for the Second Appellate District, where the question was also involved as to the effect of a failure to record a chattel mortgage within 30 days after the removal of the property to a county other than where originally situated and mortgaged. The Himmels Case, while involving such effect, did not necessitate a consideration of the question to the extent presented by the case now under consideration (Himmels v. Sentous et al. [Cal.] 91 Pac. 327), and to the extent that the question is involved here, after full consideration of the matter, we are satisfied with the conclusion reached by the District Court of Appeal. This cause was not reargued, and no new points for consideration are urged now, which were not presented to and passed on by that court. We are satisfied that the opinion rendered and which is here set forth in extenso clearly and correctly states the law, and we adopt it as doing so.

Appellants, it is true, insist here in the petition for a rehearing that the District Court of Appeal did not consider the point urged by them, that no one could raise the question of the validity of the mortgage lien, except one who had an attachment or execution lien on the property under a levy made prior to the recordation of the mortgage. In other words, to state the point concretely, it is insisted that, as no lien was obtained by Southerland on the mortgaged property until after the mortgage was recorded in Solano county, such recordation defeated any attack he might make on the mortgage, notwithstanding such recordation was not had till more than 30 days had elapsed after the property had been removed to Solano county from Sonoma. As we read the decision, however, while it does not particularly discuss this point, it disposes of it adversely to appellants, and correctly does so. As the District Court says, the failure of the mortgagee to record the mortgage in Solano county within 30 days after its removal there ipso facto exempted the property from the lien of the mortgagee in favor of the creditors of the mortgagor. The exemption having attached, no subsequent recordation of the mortgage could relieve from it or restore the mortgage lien. The requirement that the mortgage, when the property is removed, shall be filed in the county to which such removal takes place, is for the protection of creditors and bona fide purchasers and incumbrancers, and not for the purpose of prolonging the lien as between the parties. Want of recordation was of no consequence as between the parties, because, independent of it, the lien as to them was good. As to the creditors, however, upon failure to record the mortgage within the time fixed by the statute, it became a dead lien, and no action of the mortgagee could revive it. The property once exempted from the lien continued to remain so, and was just as effectually exempt from it upon recordation after the expiration of the 30 days as it would have been after such period had expired if no recordation had been had, and Southerland was entitled to attack the validity of the mortgage as soon as he levied an execution upon the property embraced in it, and was thereby placed in a position to do so, and the recordation in Solano county, made after the 30 days, was of no force against that attack.

The judgment is affirmed.

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152 Cal. 376

BURDELL v. GRANDI et al. (S. F. 4,392.)

(Supreme Court of California. Nov. 30, 1907. Rehearing Denied Dec. 30, 1907.)

1. APPEAL—FINDINGS—EVIDENCE—PRESUMPTIONS.

Where there is no bill of exceptions in or statement accompanying an appeal, and the validity of the judgment appealed from is presented on the judgment roll alone, the court must presume that the findings are supported by sufficient evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3762–3771.]

2. DEEDS—CONDITIONS—VALIDITY.

A condition in a deed, prohibiting the sale of intoxicating liquors on the premises conveyed, under penalty of forfeiture of the estate, inserted with a view of restricting the sale of intoxicating liquors in aid of the social and moral welfare of the community by preventing intemperance, is valid and enforceable.

3. SAME.

A condition in a deed, prohibiting the sale of intoxicating liquors on the premises conveyed, under penalty of forfeiture of the estate, inserted for the purpose of restricting the sale of liquor in order that the grantor may enjoy a monopoly in the business, is void as against public policy; the retail liquor business conducted under the limitations imposed by law being a lawful business, and not subject to monopoly by restrictive conditions.

Department 2. Appeal from Superior Court, Marin County; T. J. Lennon, Judge.

Action by Galen Burdell against S. Grandi and another. From a judgment for defendants, plaintiff appeals. Affirmed.

J. R. Brandon, for appellant. E. B. Martinelli, for respondents.

LORIGAN, J. This is an action of ejectment, wherein plaintiff seeks to recover possession of a lot of land in the town of Point Reyes Station, in Marin county, for an alleged breach of a condition subsequent imposed in a deed made by plaintiff to the predecessor in title of the defendants.

The court found: That in June, 1883, plaintiff was the owner of a tract of land in Marin county, upon which the town of Point Reyes Station now stands. That upon said date, for the purpose of establishing and building up said town, he laid out said tract into blocks and lots and made sales of the latter to individuals. That all deeds executed by plaintiff of lots therein contained the following clause: "It is hereby expressly understood and agreed between the parties hereto and their respective heirs, executors, administrators and assigns, and all claiming or to claim under them, that this conveyance is made and received solely and expressly on the condition that no saloon, barroom, liquor store, beer hall or any place where intoxicating liquors, or beer shall be sold at retail, shall be opened, established, allowed or permitted to exist on the said premises conveyed or any part thereof; nor shall any liquor, beer, wine or intoxicating drink be sold, bartered or exchanged thereon at retail without the express permission in writing of the party of the first part, his heirs, executors or administrators, and that upon the breach of said condition the estate hereby granted shall immediately cease, determine and be void and revert to the grantor, his heirs or assigns, together with all improvements which may have been erected on the premises." That said condition was not inserted in said deeds to said lots pursuant to any general scheme or plan of building up said town, or for the benefit of the lands therein, or for the benefit of persons who purchased lots therein, or as an inducement for persons to purchase the same. That in July, 1883, plaintiff, in consideration of the construction and erection of a store by one A. P. Whitney on a lot in said town (being the same premises involved in this action), made a grant of said lot to him; the deed containing the condition and provision heretofore referred to. That said Whitney constructed and erected a store on the said premises, and thereafter by sundry mesne conveyances the title to said lot passed from said Whitney to the defendant S. Grandi, who in 1888 conveyed a portion thereof to his codefendant, Q. Codoni. That in March, 1902, the defendant Grandi, without the consent of plaintiff, opened and established a saloon on the portion of the lot retained by him for the sale of intoxicating liquors, and has since continued to conduct said saloon thereon and to sell intoxicating liquors therein, without the consent of plaintiff. That no saloon exists, or has existed, on the portion of the lot sold by said Grandi to said Codoni, nor is the latter at all interested in the saloon business carried on by the former. That for many years immediately preceding the commencement of this action plaintiff was the owner of a hotel situated on a lot owned by him in said town of Point Reyes Station as originally platted and laid out by him, and for many years the plaintiff leased said hotel building to divers tenants successively, who, with the consent and permission of plaintiff, opened and maintained continuously a saloon and barroom in said hotel where intoxicating liquors were sold at retail. That at all times from the said 19th day of July, 1883, while intoxicating liquors were sold at said hotel as aforesaid, plaintiff refused to permit any other persons who had bought lots from him in said town to open or establish saloons or barrooms thereon, where intoxicating liquors might be sold at retail. That during all said time plaintiff reserved to his several tenants the exclusive right and privilege of opening and maintaining a saloon and barroom where intoxicating liquors were sold at retail at said hotel, and reserved for the said tenants the exclusive right to sell intoxicating liquors at said hotel, and during all said time the exclusive sale of intoxicating liquors in said town was reserved to be carried on at said hotel. That it was the intent and purpose of the plaintiff in inserting said clause in the conveyance from himself to Whitney, and in all other conveyances made by him to lots in said town of Point Reyes Station, to thereby reserve to himself the exclusive control of the sale of intoxicating liquors in said town. As a conclusion of law from said findings, the court decided that the purpose and effect of said condition, as set forth in the deed from plaintiff to Whitney, was to create a monopoly in the sale of intoxicating liquors in the town of Point Reyes Station in the plaintiff, and in consequence thereof said condition was and is against public policy and void, and judgment was accordingly entered for defendants. The plaintiff appeals from this judgment, and its validity is presented here upon the judgment roll alone. There is no bill of exceptions or any statement accompanying the appeal; the sole point urged being that the findings do not warrant the judgment. Under these circumstances, it must be assumed that the evidence in the case was amply sufficient to sustain the findings as made by the court.

It is insisted by appellant that a condition inserted in a deed that intoxicating liquors shall not be sold on the conveyed premises, and providing that for a breach thereof the estate granted shall be forfeited, is entirely lawful, and that there is nothing in the other findings made by the court in this case—the condition and the breach being found—which warranted the court in awarding judgment for the defendants, and in refusing to sustain the forfeiture. As an abstract proposition, the contention of appellant that such conditions are lawful and enforceable is undoubtedly correct. The books are full of cases in which restrictions as to the use of property have been sustained. It has been uniformly held that conditions inserted in deeds precluding the establishment of various occupations or industries—as, for instance, distilleries, machine shops, livery stables, and saloons, or places where intoxicating liquors might be obtained—in certain specified localities intended for and desirable as places of residence, have been sustained; the intent and purpose of the restriction being, as to the industries, to free such localities from offensive sights, disturbing noises, or noxious vapors, and, as to saloons, in aid of the social and moral welfare of the community by preventing intemperance, which is universally recognized as a social evil. Under this general rule, and confining ourselves now to the condition in the deed relative to the sale of intoxicating liquors, broken by the defendant Grandi, if the plaintiff in the formation of the town of Point Reyes Station, and in pursuance of a scheme to prevent intoxicating liquors being sold within its limits, had by condition in all deeds made by him provided against it, and for forfeiture of the land conveyed in case it was done, no contention could arise as to the validity of such condition and the consequent forfeiture of the property if it were violated. Or if the plaintiff, under a general scheme for establishing such town, had contemplated and intended that the sale of intoxicating liquors should be confined and restricted to some given locality or territory within the town, and restricted it to such given locality by imposing conditions against its sale elsewhere, we are not prepared to say that such a scheme would not be entirely proper, and conditions in deeds harmonizing therewith lawful and enforceable. But nothing of this kind appears to have been intended or designed by the plaintiff, according to the findings. Whatever his views may have been on the question of temperance, or the restriction of the liquor traffic, he neither intended by the imposition of these conditions to entirely prohibit the sale of such liquor within the town laid out by him, nor to confine its sale within any given district or locality for the benefit of the community or its individual members. His purpose was, so the court finds, and we must assume it has so found on sufficient evidence, that he intended, by the imposition of such conditions, to reserve and create solely in himself a monopoly of the sale of intoxicating liquors within the town of Point Reyes Station. The court not only finds that this was the intent of the plaintiff, but that, in effect, he, through his agents, was in the actual enjoyment of a monopoly as to such business. It hardly needs any citation of authority to the proposition that, in the scheme of establishing a town or village, all forfeitures inserted in deeds to lots therein solely for the purpose of restricting a lawful occupation, in order that the grantor may himself enjoy a monopoly in it, is against public policy and void. The retail liquor business, conducted under such restrictions and limitations as are imposed by law, is a lawful business in this state, and no more subject to monopoly by restrictive conditions imposed for such purpose, as the lower court finds they were here, than restrictive conditions affecting any other lawful business, and, when the intent and purpose of such conditions is to effect a monopoly of any lawful business or occupation in the person imposing them, they are void.

This question, under practically the same circumstances as it is presented here, was before the Supreme Court of Michigan in the case of Chippewa Lumber Co. v. Tremper, 75 Mich. 36, 42 N. W. 532, 4 L. R. A. 373, 13 Am. St. Rep. 420. There the manager of the Chippewa Lumber Company, by consent of the company, plotted the village of Chippewa Lake in Mecosta county in that state. The company sold lots, and inserted in its deeds a condition that intoxicating liquors of any kind should not be sold on any lot conveyed by the company for 30 years after the date of the conveyance, with a provision for forfeiture should the condition be violated. The owner of a lot conveyed by the company and containing the said provision having violated it by the sale of intoxicating liquors, suit was brought by the company to recover the lot for breach of the condition. Evidence was offered on the trial by defendant for the purpose of showing that this condition in the deeds to lots in the village, including the deed to him, was inserted for the purpose of giving the company, or its manager, the right of exclusive sale of liquor in the village, and that the company or its manager were interested in a drug store enjoying such exclusive sale. The lower court rejected the evidence offered. The Supreme Court held that it should have been received. In discussing the matter, one of the justices, speaking for the court, said: "The selling or giving away of intoxicating liquor in this state is a lawful business, if carried on in conformity with the statutes governing the traffic in intoxicating liquors. It does not seem to me that the Chippewa Lumber Company could, in the platting and sale of lots in the village of Chippewa Lake, so convey its lots as to grant for 30 years, in effect, a monopoly of the sale of liquor in themselves, or any other person or persons. This would be contrary to public policy. * * * I am satisfied that no forfeiture of lots under the condition in defendant's deed, or the deed to his grantor, should be permitted for any such purpose, and that the facts offered, if proven, would have been a perfect defense to this action. * * * It would appear that the alleged benefit of this condition to the company in preventing the sale of liquor to its mill hands was not the reason of the insertion of the condition, or for its enforcement, but that the condition was for the purpose of profit to the company or its manager in the exclusive sale of liquor in the village. I am well satisfied it would be against public policy to permit an owner of a village plot to insert a condition in the conveyance of his lots that no bread should be sold upon the premises for 30 years, in order that he might himself have a monopoly in the village of the sale of bread. Liquor is not a necessity, like bread, and is generally regarded as of damage by the general community; but I know of no good reason why a person should be permitted to have a monopoly in selling poison to a community any more than food, unless it be that no other person can be found fit to handle and dispense it. I do not believe, however, that any man or company should be permitted by the law and aided by the courts to create a monopoly in himself, either in the sale of bread or whisky. The right to insert such a condition as the one in this case, for an honest and beneficial purpose, cannot be denied, and is within the public policy of the state. * * * But courts will not enforce such a condition, inserted for a dishonest purpose, and to the end that the grantor may thereby obtain a monopoly in any business, and all others be restrained therefrom; and there can be no difference in this regard, whether the business so sought to be centered in one person in a community is one acknowledged by every one to be of great benefit to mankind, or one regarded by many good people of detriment to the community, provided both are lawful. * * * Courts will not enforce forfeitures for any such purpose." This authority appears to have direct application to the case at bar. The reasoning is clear, and the doctrine announced is sound. In fact, it is the only authority cited on either side (and the citations are few) which has any direct application to the principle involved under the findings in the case at bar.

Counsel for appellant suggests many reasons which may have actuated the plaintiff in imposing the condition in question in his deeds. We make no question by that such considerations as he urges might influence one laying out a village or town. Entertaining the view, which is unquestionably sound, that intemperance is a social evil, the founder of a town, in his general scheme to establish it, would have a right to protect against intemperance therein by inserting conditions in his deeds of lots prohibiting the establishment thereon any place where intoxicating liquors might be sold. He would be justified in the view that prohibiting its sale on the lots he disposed of would increase the value of his remaining property; that persons would be more disposed to purchase property and build and improve it for residence purposes in a community where the liquor traffic was prohibited than where it was not. Many other equally good considerations might actuate him in imposing the condition. The property was his, and he could dispose of it as he saw fit, imposing such restrictions upon its use as he chose; his right to impose them being limited only to the extent that such conditions should be imposed to effect a lawful purpose. The trouble, however, in the present case, is that the proper and lawful motives which might have actuated the plaintiff were not those which governed him in the imposition of these conditions. The court finds that he imposed them to create a monopoly in his own behalf in the sale of intoxicating liquors upon other property in the town owned and leased by him to those who, with his consent and protection, did sell it and enjoyed under his leave the exclusive right to do so. Conditions imposed to attain that end are, as we have seen, against public policy and void.

It follows therefore that the judgment of the lower court declaring this condition in the deed of defendants void was correct, and the judgment in their favor is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

152 Cal. 479

TROWER v. CITY & COUNTY OF SAN FRANCISCO. (S. F. 3,798.)

(Supreme Court of California. Dec. 5, 1907.)

1. Payment—Recovery of Payments—Claim or Color of Right.

Where certain executors, being required to file their inventory and appraisement within a given time, were required by the county clerk to pay the sum of $90 fees, as a condition precedent to such filing, as authorized by Act March 28, 1895 (St. 1895, p. 267, c. 207), which was thereafter declared unconstitutional, such payment was not voluntary because the executors might have compelled the filing, without payment of the fees, by mandamus, and they were entitled to recover such payment under the rule that where illegal fees are exacted by one in official authority, preventing the immediate exercise of an undoubted right, except on their payment, they may be recovered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 282–290.]

2. Same—Voluntary Payment.

Where an illegal demand is made against the person or property of an individual, which can be enforced only by a judgment therefor in an action at law, wherein he may contest its legality, or if made under a threatened sale of his property, and he can contest the validity of the proceedings whenever an attempt is made to disturb his possession, and he pays the claim or demand rather than be subjected to such action or to have his property sold, such payment is voluntary, and cannot be recovered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 282–290.]

In Bank. Appeal from Superior Court, City and County of San Francisco.

Action by Charles E. Trower against the city and county of San Francisco. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Edward H. Stearns and Albert H. Elliott, for appellant. Franklin K. Lane, City Atty., and James G. Gallagher, for respondent.

LORIGAN, J. Plaintiff brings this action against the city and county of San Francisco upon 58 assigned causes of action set forth in separate counts, the allegations of which are identical with the exception of the names, dates, and amounts. The first count is for the recovery of $90 only, but the aggregate sum for which judgment is sought on all the counts in the complaint amounts to $5,400. The action involves certain fees alleged to have been demanded and collected by the county clerk of the city and county of San Francisco, and thereafter paid to the county treasurer of said city and county, for the filing of inventories and appraisements in estates of decedents, infants, and incompetents mentioned in the various counts of the complaint under the provision of an act of the Legislature of this state entitled, "An act to establish the fees of county, township and other officers and of jurors and witnesses in this state," approved March 28, 1895. St. 1895, p. 267, c. 207. Subsequent to the payment of such fees this act was declared unconstitutional (Fatjo v. Pfister, 117 Cal. 83, 48

Pac. 1012), and thereupon this action was brought to recover them back. For the sake of brevity, reference will be made only to the first count in the complaint. It is there alleged that on February 2, 1897, the executors of the estate of William Andrew, deceased, pursuant to the provisions of said act, paid to the county clerk of the city and county of San Francisco upon filing the inventory and appraisement in said estate the sum of $90; that said sum was demanded from said executors as the fee provided by law for the filing of said inventory and appraisement by said county clerk, who refused to file the same until and unless said sum was paid; that said sum was paid by reason of said demand and refusal to file said inventory and appraisement unless it was paid, and not otherwise, and that said sum so paid was in excess of all fees required by law in said estate. Then follows an allegation of the assignment of said claim to plaintiff, his presentation of a verified claim and demand to the board of supervisors of said city on December 22, 1897, within one year after the discovery that said fees had been illegally collected and the rejection of said claim by said board. The defendant answered, specifically denying the allegations of the complaint, but before the case came on for trial made a motion for judgment on the pleadings which was granted, and, from the judgment pursuant thereto in favor of defendant, the plaintiff appeals.

The only question presented for consideration on this appeal is whether or not a cause of action is stated in the complaint. No brief is filed on behalf of the respondent, but we make no question that the trial court granted the motion on the theory that, as the county clerk had no authority to collect the fees alleged to have been paid for filing the inventories and appraisements, because the act requiring their payment was unconstitutional, and as the assignors of plaintiff could have compelled their filing by proceedings in mandamus, the payment of such fees, without taking such proceedings, amounted to a voluntary payment which plaintiff was not entitled to recover back; that as the fees were paid with knowledge of the illegality of their exaction, and were not paid by the assignors of the plaintiff to protect their property or persons from detention or seizure, or to prevent the threatened exercise of power against either, the payments were not involuntary or compulsory so as to give plaintiff any right of action. In the absence of any brief by respondent, we assume this to have been the ground urged in support of its motion and to be the view taken by the trial court in granting it, as, in our opinion, it is the only one which could be asserted or assumed to sustain the correctness of the judgment rendered. We are satisfied, however, that the trial court misconceived the true principle of law applicable to the facts alleged in the complaint; that the facts stated with reference to the payment of the fees exacted show a cause of action, under the authorities, for their recovery as involuntary and compulsory payments. The act under which the fees were exacted by the county clerk being unconstitutional, the assignors of plaintiff had a right to have the inventories and appraisements in the various estates which they represented filed without payment of any separate fee therefor. The exaction of the fee provided under the unconstitutional act was illegally made by the clerk by virtue of his official position, and against the right of the assignors of plaintiff to have such documents filed immediately on their presentation. The law required that they be filed within a given time. It was necessary that they be filed in order to proceed with the administration of the respective estates. The executors would be deemed culpable in delaying their filing, and be subject at least to proceedings for removal from office for failure to do so. The only alternative left to the assignors of plaintiff was to commence mandamus proceedings to compel the filing of the documents, or pay the illegally exacted fees. They chose the latter alternative, and we are satisfied that, under the authorities, such payment was none the less involuntary, and that their right to recover it back was not at all affected by their failure to bring such mandamus proceedings.

While the brief of appellant is replete with authorities from other jurisdictions supporting the right of recovery under the facts detailed in the complaint, it is unnecessary to consider them, because the rule determining when payments are or are not voluntary, and hence recoverable or not recoverable, is clearly defined in this state in a case in all respects similar to the one at bar. We refer to the case of Lewis et al. v. San Francisco (decided by the District Court of Appeals for the First Appellate District), 2 Cal. App. 113, 82 Pac. 1106. This action was brought by the executors of the estate of M. W. Lux, deceased, to recover back fees for filing an inventory and appraisement in such estate exacted and paid under the same unconstitutional act under which they were exacted from the assignors of plaintiff, and from a judgment of recovery the defendant appealed. The same grounds were urged in the appellate district court against the right of recovery as we assume were urged in the court below on the motion for judgment on the pleadings in the case at bar—that the payment was voluntary and not compulsory. The court there lays down the rule under which it shall be determined when payments are deemed to have been voluntarily made and not recoverable, and when they shall be deemed involuntarily paid and subject to recovery. It declares: "When an illegal demand is made against the person or property of an individual which can be enforced only by a judgment therefor in an action at law wherein he can contest its legality, or if made under a threatened sale of his property, and he can contest the validity of the proceedings whenever an attempt is made to disturb his possession, and he pays the claim or demand rather than be subjected to such action or to have his property sold, such payment is voluntary, to the extent that it cannot be recovered in an action therefor. If, however, an illegal demand is made by any person holding an official position, with the color of authority to enforce the same, and such demand operates as a restraint upon the exercise of an undoubted right or privilege, and in its enforcement there is no opportunity of contesting its validity, a payment of the demand in order to remove such restraint is compulsory, and not voluntary. The distinction to be observed is between a payment made for the purpose of protecting or securing the present enjoyment of a right to which the person is immediately entitled and a payment made to prevent a threatened disturbance of such right where there is no authority to interfere with its enjoyment until the right of the threatening party shall be established in a judicial proceeding in which the rights of the respective parties may be presented and determined. In the latter case a payment to avoid such threatened contest is regarded as voluntary, while in the former case it is compulsory. The exaction by a clerk or other official against the protest of a party of illegal fees as a condition for filing a document in his office which the party presenting it is entitled to have filed by him renders the payment of such fees compulsory, and it is none the less compulsory that the party could have procured a writ of mandate compelling him to file the document without paying the fees demanded. His right to file the document was immediate, and the payment of the fee under the alternative of bringing such action and incurring the expense and delay thereof is not voluntary." We think there can be no question of the accuracy of the rule as thus clearly laid down by the District Court of Appeal, and which is sustained by numerous authorities, many of which are cited in the opinion of the court.

The allegations of the complaint at bar, in our judgment, square exactly with the rule laid down above as to the right of recovery where illegal fees are exacted by one in official authority, preventing the immediate exercise of an undoubted right unless upon their payment. They show a case of compulsory payment within the rule, and the action of the lower court in ordering judgment upon the pleadings was erroneous.

The judgment is reversed, and the cause remanded for further proceedings.

We concur: SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.

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152 Cal. 249

In re SUTRO'S ESTATE. (S. F. 4,768.)

(Supreme Court of California. Dec. 5, 1907.)

1. APPEAL — REQUISITES — BOND — NOTICE — TIME.

Notice of appeal from a decree of distribution was served May 31, 1906, and June 4th another notice identical with the first, except as to the date, was served. On June 5th appellants filed an undertaking, reciting that they were about to appeal from the decree, etc., but failing to specify whether the appeal referred to was the one taken by the notice of May 31st or June 4th, and on June 9th a second undertaking was filed, which also contained a similar omission. *Held* that, under St. 1906, p. 8, c. 5, providing that any act, which according to law should have been done in the month of June, 1906, could lawfully have been done on or before July 10, 1906, the time for filing an undertaking on appeal pursuant to the notice of May 31, 1906, had not expired on June 9, 1906, so that the undertaking filed on that date was sufficient to perfect the appeal, if intended to support either notice.

2. SAME—SEPARATE NOTICES—SINGLE APPEAL.

Notice of appeal from a decree was served May 31, 1906, and on June 4th another notice, identical with the first, except as to the date, was served. On June 5th an undertaking was filed, which failed to specify which notice it related to, and on June 9th a second undertaking containing a similar omission was filed. At the time the first notice was given, and before the giving of the second, a series of legal holidays declared by the Governor had extended the time for taking the appeal, which otherwise would have expired on May 31, 1906, so that it did not expire until June 3, 1906, on which date St. 1906, p. 8, c. 5, providing that any act which should have been performed in June, 1906, could lawfully be done on or before July 10, 1906, again extended the time to that date. *Held* that, since neither notice was filed too late, the two notices and undertakings constituted but one appeal; the last in point of time being a mere repetition of the first, and hence respondents were not entitled to a dismissal because neither of the undertakings indicated the notice to which they related.

On petition for rehearing. Petition denied. For former opinion, see 92 Pac. 486.

PER CURIAM. In the opinion in this case, we held that the undertaking given on June 5, 1906, was void for uncertainty because at that time the two notices of appeal, given May 31, 1906, and June 4, 1906, respectively, were both running and capable of being perfected, and the undertaking did not specify which notice it was intended to support. We also held that the undertaking of June 9, 1906, was valid because at that time the supposed separate appeal of May 31, 1906, had lapsed, and there was then but one appeal in existence to which the undertaking could be taken to refer, namely, that taken by the notice of June 4, 1906.

In the petition for a rehearing our attention is, for the first time, called to the statute of June 3, 1906, whereby any act which, according to the law relating to it, should have been done in the month of June, 1906, could lawfully have been done on or before the 10th day of July, 1906. St. 1906, p. 8, c. 5. The effect of this statute is that the time for filing an undertaking on appeal, in pursuance to the notice of appeal of May 31, 1906, had not expired on June 9, 1906, and the undertaking on that day would have been good if intended to support either notice, and, as it did not specify the notice to which it related, it was subject to the same defect as that of June 5. Upon this proposition the respondents, in their petition for rehearing, contend that the appeal under the notice of June 4 should also have been dismissed. In reaching the conclusion that the first undertaking was invalid and the second one valid, we cited a number of decisions to the effect that where appeals have been taken from two or more orders or judgments, and an undertaking is filed which, by its terms, could apply to either, but which fails to designate the one to which it is intended to apply, it is void as to both. Not having in mind the statute above referred to, we assumed for the purpose of the decision, that this rule was applicable to this case.

On further consideration, we are satisfied that the rule of those decisions does not apply to the facts of this case, and should not be extended to include it. Without exception, the decisions establishing that rule refer to cases in which two or more appeals had been taken, each from a separate and distinct order or judgment, as, for example, from an order denying a motion for new trial and from an order re-taxing costs, or from a judgment and from an order refusing to set aside a default. In each case there were in fact or in effect two notices of appeal, each relating to a separate matter, each requiring a separate or distinct undertaking, and each at the time capable of being made effectual by a valid undertaking. In this case the facts are materially different. So far as this point affects the case, there was but one judgment, from certain parts of which appellants sought and intended to appeal. The two notices of appeal refer only to this one judgment and specify identically the same parts thereof. They were indeed identically the same, word for word. The only mark by which they could be distinguished from each other was the different date which occurred after the signature of the appellants' attorneys. Either proceeding would have to be supported by the same record. So far as we can perceive, it would be entirely immaterial to the sureties whether the undertaking was meant to support one notice, or the other, or both, for each would be an appeal by the same parties from the same parts of the judgment and served upon the same parties as respondents. The effect would be the same in all particulars. The time for filing the transcript in this court might have been different if there had been no proceedings then pending for a new trial, or to settle a bill of exceptions. Such proceedings were, in fact, pending, and consequently the transcript under either notice of appeal would be due at the same time; that is, under our rule, within 40 days after the determination of the motion for a new trial, an event which occurred on January 9, 1907. The respondents would not even be prejudiced by the necessity to determine which of the undertakings they would elect to rely on, for both were filed after the two notices of appeal were filed, the amount of each was the same, the surety was the same, the liability would be the same and would depend upon the same breach, and both could be joined in one complaint. The statute of limitations, therefore, would begin to run at the same time in either case.

At the time the first notice was given, and before the giving of the second, a series of legal holidays, declared by the Governor, had extended the time for taking the appeal, which otherwise would have expired on May 31, 1906, so that it did not expire until June 3, 1906. On that day the statute above referred to again extended the time to July 10th. It follows that the respondents could not object that either notice was filed too late, and in that respect also the difference between the two notices is to them immaterial. We are reminded by this fact that these holidays had caused much uncertainty in the minds of the profession as to the right to take an appeal while they continued, and that the terms of the act extending the time were probably not well understood at the time the appellants were required to take these proceedings. In such circumstances the courts should not be too insistent upon the observance of trivial and useless technicalities. The objections to the undertakings are about as barren of substantial foundation or merit, or even of technical importance, as can well be conceived.

Our conclusion is that the two notices and undertakings constituted, in substance, but one appeal from the parts of the judgment referred to, and that the last in point of time were, in effect, mere repetitions of the first, taken out of abundance of caution because of the uncertainty in regard to the effect of the first proceeding, and that this court has jurisdiction of that appeal. As the judgment dismissing the supposedly distinct appeal of May 31, 1906, has already been made by this court and the case can be as well presented and the court has jurisdiction, without aid from that notice, it is unnecessary to make any change in that judgment. The dismissal will serve to dispose of the notice of May 31 and the undertaking of June 5, 1906. The appeal will rest on the notice of June 4 and the undertaking of June 9, 1906. And this, we presume, was precisely what the appellants and their surety intended. It would have been more regular to have stricken out the first notice and undertaking, leaving the appeal to stand on those filed last, but the irregularity of the other method is wholly immaterial in the present case, and too trifling to require a change in the order already made.

The petition for rehearing is denied.

(152 Cal. 484)

BUCHNER v. MALLOY et al. (Sac. 1,590.)

(Supreme Court of California. Dec. 5, 1907.)

1. APPEAL—BOND—DEFECTS—AMENDMENT.

Where an appeal bond recited an appeal from appellant's "motion" for a new trial, entered, etc., on July 2, 1907, instead of from the "order" denying such motion, which was made and entered on that day, the defect was not ground for dismissal of the appeal, where appellant tendered a sufficient undertaking containing a proper recital approved by a justice of the Supreme Court before the hearing of the motion to dismiss, as authorized by Code Civ. Proc. § 954.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2077, 2081.]

2. SAME—REVIEW OF TWO DECISIONS—SINGLE BOND.

Only one undertaking, in the sum of $300, is required to give the Supreme Court jurisdiction of an appeal both from a judgment and from an order denying a motion for a new trial of the action, the appeals for all purposes of the undertaking being one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2097.]

3. SAME—LIABILITY OF SURETY.

An undertaking on appeal recited an appeal from a judgment and from an order denying a motion for a new trial, and bound the sureties to pay "all damages and costs which might be awarded on the appeal or on a dismissal thereof." *Held*, that the word "appeal," as used in the undertaking portion of the bond, meant the whole appeal as described by the instrument, including the appeal from the judgment, and the appeal from the order denying the new trial, and therefore bound the sureties for any and all costs and damages that might be awarded on either of such appeals.

4. SAME.

Where an undertaking on appeal recited appeals from a judgment and from an order denying appellant's motion for a new trial, and bound the sureties to pay all damages and costs which might be awarded on the appeal or on a dismissal thereof, if a portion only of such appeal be decided against appellant or dismissed, the sureties would be liable only for the costs and damages awarded as to that portion; while if both judgment and order be affirmed, or the appeals from both dismissed, or one affirmed and the other dismissed, the sureties would be liable for all costs and damages awarded on the whole.

In Bank. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by C. F. M. Buchner against Daniel Malloy and others. From a judgment against defendant Malloy, and from an order denying his motion for a new trial, he appeals. On motion to dismiss. Denied.

Gillis & Tapscott and Charles J. Luttrell, for appellant. Coburn & Collier, for respondent.

ANGELLOTTI, J. This is a motion to dismiss the appeal of Daniel Malloy from from the judgment given against him in the above-entitled action, and from the order denying his motion for a new trial in said action, upon the ground that no sufficient or any undertaking on appeal was filed upon either of said appeals.

It will be assumed for the purposes of the decision that it appears from the record before us that the only undertaking on appeal filed in the superior court was the one of which a copy is contained in the moving papers. So far as is material, that undertaking is as follows: "Whereas, Daniel Malloy, one of the defendants in the above-entitled action, is about to appeal to the Supreme Court of the state of California, from a judgment and decree made and entered against him in said action, in the said superior court in favor of the above-named plaintiff, * * * on the 8th day of February, A. D. 1907, * * * and from *said defendant, Daniel Malloy's motion for a new trial herein made, entered, and filed on the 2d day of July, A. D. 1907:* Now, therefore, in consideration of the premises and of such *appeal*, we the undersigned Peter Blake and and E. J. Eller, both of the county of Siskiyou, state of California, do hereby jointly and severally undertake and promise on the part of said appellant, Daniel Malloy, that the said appellant Daniel Malloy, will pay all damages and costs which may be awarded against said appellant, Daniel Malloy, *on the appeal or on a dismissal thereof,* not exceeding three hundred and $^{00}/_{100}$ ($300.00) dollars to which amount we acknowledge ourselves jointly and severally bound." The italics are ours.

So far as the imperfection in the recital of the appeal from the order denying a motion for a new trial is concerned, the undertaking reciting an appeal from the appellant's motion for a new trial made. entered, etc., on July 2d, 1907, instead of from the order denying such motion, which the record shows was made and entered on that day, there can be no doubt that the matter could be remedied under section 954 of the Code of Civil Procedure by the filing in this court before the hearing of the motion to dismiss the appeal of a good and sufficient undertaking, containing the proper recital, approved by a justice of this court. Under the circumstances, there could be no question as to the true intent and meaning of the recital in the undertaking, and the defect is purely technical. A good and sufficient undertaking in all respects, containing a proper recital in this regard—the words "the order of said court denying" being inserted after the word "from" and before the words "said defendant"—executed by the sureties on the original undertaking and approved by the chief justice of this court, was filed herein prior to the hearing of the motion to dismiss.

The claim of respondent is that the original undertaking was void both as to the appeal from the judgment and the appeal from the order denying a new trial, for the reason that it recites the two appeals, and is expressly limited to one, without designating which one. The error in this contention is in the assumption that the undertaking, by reason of the use of the singular term "appeal," is limited to one only of the appeals. Under our well-settled practice, one undertaking in the sum of $300 is all that is required to give this court jurisdiction of an appeal both from a judgment and from an order denying a motion for a new trial of the action. This is an exception to the general rule which requires a separate undertaking for each appeal taken; but it is thoroughly established in this state (see Bell v. Staacke, 137 Cal. 308, 70 Pac. 171, and cases there cited), and is not disputed by respondent. The effect of this rule of practice is that for all the purposes of the undertaking on appeal the appeals from the judgment and order denying a new trial are practically one appeal only. It is essential, of course, that the single undertaking so given shall refer to each of the appeals and show on its face that it is given in consideration of both, and if it recites merely one, the other appeal will be dismissed. Dodge v. Kimple, 121 Cal. 580, 54 Pac. 94. But where, as in the case at bar, it recites both appeals, and shows that it is given in consideration of both, the undertaking to pay "all damages and costs which may be awarded on the appeal or on a dismissal thereof," fairly construed, holds the sureties for any and all costs and damages that may be awarded on either of the two appeals in consideration of which the bond is given. The word "appeal" as used in the undertaking portion of the bond means the whole appeal before mentioned and described in the instrument, namely, the appeal from the judgment and the appeal from the order denying a new trial, thus embracing both appeals. If a portion only of such appeal be decided against the appellant or dismissed, the sureties are liable only for the costs and damages awarded as to that portion, while if both judgment and order are affirmed, or the appeals from both dismissed, or one is affirmed and the appeal from the other dismissed, they are liable for all the costs and damages awarded on the whole. This is the only possible reasonable construction of the undertaking as a whole. The precise question here presented appears to have been decided by this court in Granger v. Robinson, 114 Cal. 631, 46 Pac. 604. The undertaking there was in all material respects the same as the one here involved, and it was held sufficient to cover both the appeal from the judgment and the appeal from the order denying a new trial. In denying the motion to dismiss, this court there said: "If * * * both appeals are referred to in the undertaking, and made the consideration for its execution, a single undertaking for $300 will be sufficient. In the present case the undertaking recites that the defendant has appealed from the judgment, and also from the order denying a new trial, and is executed 'in consideration of the premises and of such appeal.' Under the rule of practice held in the above-cited cases to be well settled" the rule authorizing a single undertaking on such appeal "this undertaking is sufficient." We have not been referred to, nor have we been able to find, any decision of this court that is in conflict with the views we have expressed, or with the decision of Granger v. Robinson, supra.

From what has been said, it follows that the motion to dismiss the appeals must be denied, and it is so ordered.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

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152 Cal. 454

BALDWIN v. MILLER & LUX et al. (S. F. 3,657.)

(Supreme Court of California. Dec. 4, 1907.)

1. CORPORATIONS—DIVIDENDS FROM CAPITAL.

Civ. Code, § 309, providing that directors of corporations must not make dividends, except from surplus profits, and must not divide any of the capital stock among the stockholders, and that, for violation thereof, the directors shall be personally liable to the corporation, merely restrains the directors doing this of their own motion, and does not restrain the "corporation" from paying dividends out of the capital stock; and has no reference to a case where the main purpose of the corporation, expressed in the contract for its organization, and in its articles of incorporation, is to distribute its property to the stockholders, and to liquidate its business as speedily as possible without loss; a purpose for which, under section 286, declaring that corporations may be formed for any purpose for which individuals may lawfully associate themselves, a corporation may be legally organized.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 566, 571, 584.

For other definitions, see Words and Phrases, vol. 3, pp. 2077, 2078.]

2. SAME—CAPITAL STOCK—PROPERTY HELD IN TRUST.

Where owners in common of property, which had been used in the business of a partnership, dissolved by the death of a member, finding that they could not, without great loss, close out the business and divide the property at once, as they desired, entered into a contract reciting those facts, and that, during the period required for liquidation, it would be necessary, in order to prevent depreciation of the property, to carry on the business; and agreeing to organize a corporation to acquire such property, and dispose of it as speedily as could be advantageously done, and in the meantime, solely for the purpose of preventing depreciation, to carry on the business of the late partnership; and providing that the tenants in common of the property should convey their rights in the property to the corporation, the stock of which should be issued to them in proportion to their ownerships of the property—the corporation, as regards its stockholders, does not take an absolute unqualified interest in the property so conveyed to it, but takes it in trust, so that the payment to each stockholder of his pro rata share of the property, as fast as converted into money, is not a division of the capital stock among the stockholders, but a mere distribution of the trust property according to the terms of the trust.

3. SAME—AMENDMENT OF ARTICLES OF INCORPORATION.

Under the agreement by which a corporation was formed by the owners of property to dispose of it and distribute the proceeds among them, providing that certain of the articles, including one that "the net profits of the corporation shall be divided in money, at least annually, among the stockholders as dividends," could be amended by vote of the stockholders representing four-fifths of the stock, such article can be amended to provide that the sum of $360,000 shall be so divided annually, and that if the "earnings" of the corporation prove insufficient to make up that sum it shall be raised by sales of property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 119–124.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Alexander R. Baldwin against Miller & Lux and others. Judgment for plaintiff. Defendant Melissa A. Potter appeals. Affirmed.

The following was the opinion of McFARLAND, J., in department, in which LORIGAN and HENSHAW, JJ., concurred:

The plaintiff, as owner of 50 shares of the stock of the corporation known as Miller & Lux, brought this action against said corporation and its directors and all its stockholders, other than plaintiff. The purpose of the action is to have the corporation and its directors ordered to pay the sum of $360,000 to the stockholders, and to pay, as his proportion thereof, the sum of $150 to plaintiff, also to have it judicially determined and declared that said corporation carry out and perform the obligation imposed on it by a certain agreement of the date of February 6, 1903, and by the amended articles of incorporation, to annually, on April 1st until the year 1907, make payment and distribution of $360,000 to the stockholders, in proportion to their shares of stock, the first payment being in the year 1902; to have it adjudged and declared that certain amended articles of incorporation are lawful, valid, and binding; and to have other relief adjudged. Two of the directors answered, admitting the averments of the complaint, and united in the prayer thereof. The corporation of Miller & Lux, and the other directors, answered, admitting the averments of the complaint, and averring their willingness and readiness to pay said sum of $360,000 in the year 1902, and the subsequent years, and stating that the only reason for not doing so was their doubt of their power to make such payments, and asking the court to determine whether or not such payments would be legal. All the stockholders answered, joining in the prayer of the complaint, except Melissa A. Potter, who demurred to the complaint, and filed an answer and cross-complaint, in which she contested and denied the validity of the proposed distribution of the $360,000 among the stockholders. The judgment was for plaintiff, and substantially in accordance with the prayer of the complaint. From this judgment, the defendant Melissa A. Potter appeals. There is no appeal by any other party or person.

The transcript consists of the judgment roll, a considerable amount of documentary evidence, and some stipulated facts; but, as appellant makes only one point for reversal, a brief summary of the facts will be sufficient for the purposes of this decision.

On the 15th day of March, 1897, and continuously for many years prior thereto, there was in existence a copartnership consisting of Henry Miller and Charles Lux, which did business under the firm name of Miller & Lux. This firm owned a large amount of real and personal property consisting mainly of lands, water rights, and live stock; and it conducted a large business in buying, raising, and selling cattle and other live stock, and carried on both a wholesale and retail butchering business, and raising fruit, and doing other kinds of farming. On said 15th day of March, 1897, this copartnership was dissolved by the death of said Charles Lux, and all its property passed into the ownership of a large number of persons, who held the same as tenants in common. These owners were desirous of closing the business of the late firm, and dividing the property among themselves in proportion to their interests, but found that this could not be done immediately without great loss. Therefore, all these co-tenants entered into a certain written contract, marked "Exhibit A." In this contract it was stated, among other things, that: "Whereas the parties hereto are desirous of settling and liquidating the said business, and of selling all the property of said late copartnership, and converting the same into money, and dividing the same between the parties hereto in proportion to their respective interests; but, owing to the long continued depression in business, and the great amount of property owned by said partnership, and the complicated nature of the business thereof, it will probably require an extended period to complete such liquidation, during which period it will be necessary, in order to prevent depreciation of the said property and other losses, to continue to carry on the business of said late partnership: Now, therefore, for the purposes of carrying out the objects aforesaid, the parties hereto do covenant and agree each with the others: That the parties hereto shall cause to be formed, under the laws of the state of California, a corporation, under the name and style of Miller & Lux, for the purpose of acquiring the property of the said late firm of Miller & Lux, and of gradually disposing of the same as speedily as, in the judgment of a majority of the board of directors of said corporation, such disposition can fairly and advantageously be effected, and of dividing the proceeds thereof among the stockholders; and, in the meantime, and solely for the purpose of avoiding depreciation in the value of said property, and consequent loss, the said corporation shall, as subsidiary to said main purpose, carry on the said business of the said late copartnership." It was further provided in the contract that the tenants in common shall convey all their respective rights in said property to said corporation, and that the stock of the corporation should all be issued to said co-tenants, in proportion to their ownerships. The contract was completed by the formation of said corporation of Miller & Lux, the conveyance of the property to the corporation, and the issuance of its stock to the said copartners. It was provided that the articles of incorporation, which were adopted, might be amended by the unanimous vote of all the directors, and the vote or written consent of stockholders representing, at least, four-fifths of the stock. Afterwards, by the unanimous vote of the directors, and the written consent of the stockholders representing more than four-fifths of its stock, the articles of incorporation were amended so as to provide that annually, on the 1st day of April, 1902, and annually thereafter on the 1st day of April until the year 1907, there should be divided and distributed to the stockholders, in proportion to their shares, the sum of $360,000, and that if the profits in any one year did not amount to that sum then the balance should be procured by sales of assets of the corporation. The appellant Potter did not agree to these amendments. It was further provided that the proceeds of sales of lands of the corporation should be considered as profits, and divided among the stockholders.

The corporation, the directors, and the stockholders also entered into a written contract, by which "the corporation" covenanted and promised to divide annually among the stockholders the said sum of $360,000, as provided by the amended articles. No rights of creditors are involved in the case; and it appears, among the stipulated facts, that the property and assets of the corporation exceed in value the amount of $12,000,000, over and above all debts and liabilities.

We think that the foregoing is a sufficient statement of the facts for the determination of this appeal. The only point which appellant makes in her short brief is stated therein as follows: "The amended articles expressly provide for a violation of law, and the judgment of the court does so also. The authorities are practically unanimous that the capital of a corporation, except upon dissolution, cannot be distributed among the stockholders." To this statement, section 309 of the Civil Code and other authorities are cited.

Respondent contends that, under any view, the appellant is not an aggrieved party, and is not in a position to contest the validity of the proposed distribution, because her predecessor in interest signed the original contract and articles of incorporation, which provided that the articles might be amended in manner as they were afterwards amended; but we do not consider it necessary to discuss this contention, or to pass upon certain other contentions of respondent; because, in our opinion, the contention that section 309 of the Civil Code does not apply to the case at bar must be maintained. Said section relates to the "powers of directors," and that part of it, material here, is as follows: "The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they create any debts beyond their subscribed capital stock; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, except as hereinafter provided, nor reduce or increase the capital stock, except as herein specially provided. For a violation of the provisions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen) are, in their individual or private capacity, jointly and severally liable to the corporation, and to the creditors thereof, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced, or debt contracted; * * * provided, however, that where a corporation has been heretofore or may hereafter be formed for the purpose, among other things, of acquiring, holding and selling real estate, water and water rights, the directors of such corporation may, with the consent of the stockholders representing two-thirds of the capital stock thereof, given at a meeting called for that purpose, divide among the stockholders the land, water, or water rights so by such corporation held, in the proportions to which their holdings of such stock at the time of such division entitle them." It is to be observed that this section is aimed at the directors alone, and evidently relates to an ordinary corporation organized for the purpose of continuously carrying on some business as a going concern, and its purpose is to prevent the directors of such corporation from, of their own motion, distributing and crippling such business by diminishing the capital stock, and thus lessening the capacity of the corporation to successfully carry on its business. And the section does not make such acts of the directors void, but declares, merely, that certain consequences shall follow such acts—namely, that the directors shall personally be liable "to the corporation" and the creditors for the amount of the capital stock so divided. But the section does not restrain "the corporation" from paying dividends out of the capital stock, and has no reference to a case, like the one at bar, where the main purpose of the corporation, expressed in the contract for its organization, and declared in its articles of incorporation, is to distribute the property of the corporation to the stockholders, and to liquidate its business as speedily as liquidation could be accomplished without loss to the owners. To say that this could not be legally done is to say that a corporation cannot be legally organized for such purpose—a proposition not maintainable. "Private corporations may be formed for any purpose for which individuals may lawfully associate themselves." Civ. Code, § 286. The owners as tenants in common of the property and assets of the former copartnership of Miller & Lux, being desirous of closing the business as soon as possible and dividing the property, could have formed a new partnership for that purpose, although it would have been an unwieldy method of accomplishing the result; or they could have appointed natural persons as their agents for liquidation and distribution. They concluded, however, to create a corporation as their agent to carry out their said intentions as to said property and business; and there was no legal obstacle to their adopting this plan. See Underhill v. Santa Barbara Co., 93 Cal. 300, 28 Pac. 1049, and authorities there cited; Chater v. S. F. Sugar Co., 19 Cal. 219; Shorb v. Beaudry, 56 Cal. 446. The judgment in the case at bar is founded upon the agreement and contracts of the organizers of the corporation, and of their agent the corporation itself; and the distribution of the $360,000 annually for a certain period will not be the result of any misconduct of the board of directors.

The judgment appealed from is affirmed.

James F. Peck, for appellant. Charles S. Wheeler, Alex. R. Baldwin, Mastick, Van Fleet & Mastick, and W. B. Treadwell, for respondent.

SHAW, J. Upon further consideration of this case upon rehearing before the court in bank, we adhere to the opinion of Justice McFARLAND, formerly rendered in department. In addition to what is there said, we add some remarks concerning the points urged upon the rehearing:

1. The proposition that a corporation cannot, except in the manner provided by law, divide its capital stock among its stockholders, has no application to this case. The property formerly belonging to the firm of Miller & Lux, which was, by the successors in interest of that firm, conveyed to the newly formed corporation, also named "Miller & Lux," was, in no proper sense, within the meaning of the law and the public policy forbidding such division, the capital stock of that corporation. In order to determine the character of the estate which the corporation Miller & Lux held in that property, it is necessary to consider together, as parts of one transaction, the deeds of conveyance of the respective parties to the corporation; the written agreement of the same parties, providing for the formation of that corporation, with a prescribed form of articles of incorporation, and for the execution of said deeds conveying to it the said property, and the articles of incorporation under which that corporation was formed. These instruments clearly show that the corporation did not take an absolute unqualified estate in the property so conveyed to it, but, on the contrary, that it took the legal title in trust for the purposes declared in the agreement and in its articles, and that the grantors in the deeds were the beneficiaries of the trust. The main purpose of the trust was the conversion of the property conveyed to it into money, and the division of it, in that form, among the beneficiaries, who were also its stockholders, according to their interests. The other powers given to the corporation were merely incidental and subsidiary to the main purpose. It is of no consequence that the agreement does not use the word "trust," or "trustee," nor expressly declare that the corporation is to take and hold the property as trustee in trust. It does declare with much detail the purposes for which it shall take the property and the disposition thereof to be made by it; and these elaborate provisions show clearly and conclusively that the corporation took no interest, beneficial to itself, in the property, but only the title, custody and control of it, for the benefit of others. The thing created by the entire transaction was, in fact, a trust, and the corporation was in fact constituted a trustee of the property, and it matters not that the agreement does not call it by that name.

The fact that the corporation did, as provided in the agreement, issue stock to each interested party, having a nominal par value equal to the estimated value of the interest of the particular person in the property conveyed to it, did not convert the trust property into the absolute property of the corporation, did not prevent it from becoming trust property, nor in any respect add to the estate of the corporation therein, nor to its powers to deal therewith. For convenience of distribution, the nominal capital stock of the corporation was fixed at $12,000,000, divided into 120,000 shares of the par value of $100 each. They could as well have been made worth $1 each. Whatever their par value, they were intended only as mere denominators to indicate the interests of the respective grantors in the Miller & Lux partnership assets included in the scheme of distribution, and the proportions of the proceeds to which they would be entitled. The payment to each stockholder of his pro rata share of the property, as fast as it was controverted into money, as the agreement provided, was, therefore, not a division of the capital stock of the corporation among its stockholders, but a mere distribution of the trust property in accordance with the terms of the trust.

It is urged that the stock was to be issued as fully paid stock, and that if in truth nothing was received for it except the property taken in trust, the beneficial interest in which still remained in the grantors, the scheme would be unlawful (Const. art. 12, § 11; Civ. Code, § 359), and that, therefore, there could not have been an intention to create a trust. The law forbidding the issuance of stock except for value is for the benefit of creditors, and to secure equality among stockholders. The plan here adopted does no injustice to any stockholder, all of them having agreed to it with full knowledge of all the facts and being on an equal footing. The rights of creditors are not involved in this action. The corporation and its stockholders may be estopped, as against creditors, to deny the liabilities to be implied from the form of its organization, as if the stock was actually paid up to its par value, but we think the intention to convey a mere trust estate to the corporation is so clear, that it must be given that effect, even if it is inconsistent in some particulars with the provisions of the law governing corporations. That a corporation may be formed for such a purpose is clear. Civ. Code, § 286. The principle that it may lawfully be a trustee of property, holding no beneficial interest therein, as to its stockholders, though it may be otherwise as to creditors, is recognized in Shorb v. Beaudry, 56 Cal. 450; Chater v. S. F., etc., Co., 19 Cal. 247; Hunt v. Davis, 135 Cal. 34, 66 Pac. 957; Cornell v. Corbin, 64 Cal. 200, 30 Pac. 629; Clute v. Loveland, 68 Cal. 258, 9 Pac. 133; and Behlow v. Fischer, 102 Cal. 215, 36 Pac. 509.

In this case the trust was declared and created by the "instrument under which the trustee claims the estate affected," as provided in subdivision 2 of section 852 of the Civil Code. That instrument consists of the deeds conveying the property to it and the previous agreement in pursuance whereof they were made, which must all be read together as one instrument. It was not necessary that the corporation should sign a declaration of the trust, as provided in subdivision 1 of that section.

2. It was contended in the petition for rehearing that there was no power to amend the articles of incorporation so as to provide for the annual division of at least $360,000 among the parties interested, or so as to require the sale of sufficient property for that purpose. The point is not well taken. The original agreement provided that as to the subdivisions numbered 7 to 11, inclusive, of the agreement, and the corresponding subdivisions of the articles of incorporation, amendments could be made by the vote or written consent of stockholders representing at least four-fifths of the capital stock. This was binding on the appellant, and such amendments could be made by four-fifths of the stockholders without her consent and against her will. The amendment made was germane to the subjects covered by the subdivisions above mentioned. Subdivision 10 of the original articles provided "that the net profits of the corporation shall be divided in money, at least annually, among the stockholders, as dividends." Subdivisions 2 and 9 declared, in effect, that the "profits" and "dividends" to be divided annually were to consist of the excess of the proceeds of the property over the debts and expenses. Subdivision 10 was amended so as to declare that the sum of $360,000 was to be so divided annually, and that if the "earnings" of the corporation, which we understand to mean the net proceeds of the property converted into money, should prove insufficient to make up that sum it should be raised by sales of property. The corporation had power to make sales to that amount, at the discretion of its directors, without the amendment. The only effect of the amendment was to make it obligatory instead of discretionary. We think this was clearly an amendment to the section, as contemplated by the power of amendment given in the original agreement, and is binding on the appellant.

We do not consider the other objections urged as sufficiently important to require notice.

The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.; LORIGAN, J.; ANGELLOTTI, J.

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6 Cal. App. 684

CONTINENTAL BUILDING & LOAN ASS'N OF CALIFORNIA v. LIGHT et al. (Civ. 390.)

(Court of Appeal, Second District, California. Oct. 23, 1907. Rehearing Denied Nov. 22, 1907.)

1. MORTGAGES—TRUST DEED—RECITALS—EVIDENCE.

Where a deed provided that in the event of a sale the recitals of the trustee's deed of any facts affecting the regularity or validity of the sale should be conclusive against the grantors in the trust deed, a deed of the trustee was admissible as evidence of compliance with the prerequisites of a valid sale.

2. SAME—PROCEEDS OF SALE—AUCTIONEER'S AND COUNSEL'S FEES.

Where a trust deed provided for the payment of an auctioneer's fee and counsel's fee, in case of sale, and the sums retained for such fee out of the proceeds of the sale were actually paid by the trustee in the execution of the trust, they were properly retained.

Appeal from Superior Court, San Bernardino County; F. E. Densmore, Judge.

Action by the Continental Building & Loan Association of California against J. E. Light and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. E. Light and Mack & Light, for appellants. Frank G. Finlayson, for respondent.

ALLEN, P. J. Action to recover balance due on note after proceeds of sale under a trust deed had been exhausted. Judgment for plaintiff, from which defendants appeal upon a bill of exceptions.

The trust deed executed by defendants to the Central Trust Company as security for the payment of a promissory note of even date, made by defendants to plaintiff, contained the stipulation that, in the event of a sale under said trust and the execution of a deed by the trustee, the recitals therein of any facts affecting the regularity or validity of such sale should be conclusive of all facts recited against the grantors in such deeds; that the trust deed was security for the repayment of all moneys laid out and expended by virtue thereof, and for an attorney's fee, to become due and payable upon default of any of the conditions of the trust deed; and that, in the event of a sale, the trustee, out of the proceeds, should pay, first, the expenses of executing the trust, including counsel fees.

Upon the trial, the court admitted in evidence the deed of the trustee to the purchaser as evidence of the prerequisites to a valid sale. We find no error in this. The deed of trust made by appellants expressly stipulated as to the force and effect of the recitals in the trust deed in the event of a sale, and gave the trustee authority to bind them by the execution of a deed and by its recitals. Mersfelder v. Spring, 139 Cal. 593, 73 Pac. 452.

The right to retain out of the proceeds of the sale an amount sufficient to pay an auctioneer's fee and counsel fees is questioned. Again, we find that the deed of trust expressly authorizes such retention. While the deed by its terms provided that upon default an attorney's fee shall become due, yet, reading the subsequent clause, which relates to the event authorizing its retention, it is plain that such fees were not in the nature of a penalty, but a reimbursement on account of actual expenses incurred. The court found, and the evidence sustains such finding, that the sums mentioned were actually paid by the trustee in the execution of the trust, and the same were proper matters to consider in determining the net amount applicable to the remaining indebtedness secured by the deed of trust. The deed authorized payment of expenses incurred by the trustee, and those items of which appellants complain were appropriate outlays in the execution of such trust.

We find no error in the record, and the judgment is affirmed.

We concur: SHAW, J.; TAGGART, J.

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6 Cal. App. 686

POND v. DOUGHERTY et al. (Civ. 376.)

(Court of Appeal, First District, California. Oct. 25, 1907. Rehearing Denied by Supreme Court Dec. 23, 1907.)

1. SUBROGATION—RIGHTS OF CO-SURETY.

Civ. Code, § 1432, declares that a party to a joint or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution. Section 2849 provides that a surety is entitled to every security for a performance of the principal obligation held by the creditor or by a co-surety, and section 2848 declares that a surety, on satisfying the obligation of the principal, can enforce any remedy which the creditor then had against the principal, and require his co-sureties to contribute thereto. *Held* that, where a surety had been compelled to pay the debt of his principal, he was subrogated to all the rights of the creditor as against his co-sureties, in the same manner as against the principal debtor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Subrogation, §§ 17, 18.]

2. EXECUTORS — CLAIMS AGAINST STATE — CLAIMS OF THE UNITED STATES—FAILURE TO FILE.

The United States being exempt from all statutes of limitation, its claim against the estate of a deceased surety, on the bond of a collector of internal revenue, was not barred by its failure to present such claim against the estate, under Code Civ. Proc. §§ 1493, 1500, 1630, requiring presentation of all claims against a decedent's estate in a prescribed manner.

3. SUBROGATION—RIGHTS OF CO-SURETIES.

Under Rev. St. U. S. §§ 3466, 3467 [U. S. Comp. St. 1901, p. 2314], giving priority to claims of the United States against deceased persons, and providing that every executor who pays other debts before he satisfies debts due to the United States shall become personally answerable for the debts due the United States so unpaid, where the liability of the estate of a deceased surety on the bond of a collector of internal revenue was established in a suit in the federal courts, whereupon the decedent's co-sureties paid the entire claim without rendition of judgment against the estate, they were thereby subrogated to the rights of the United States against the estate, and their assignee was entitled to recover contribution therefrom.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by Edward B. Pond against Annie Fenton Dougherty, as trustee, and others. From an order sustaining a demurrer to plaintiff's amended complaint, he appeals. Reversed.

Charles W. Slack, for appellant. D. W. Burchard and Jno. J. O'Toole, for respondents.

KERRIGAN, J. Appeal from an order sustaining a demurrer to an amended complaint.

This is an action to enforce contribution by the distributees of the estate of William P. Dougherty, deceased, of the decedent's share of a liability incurred by him, plaintiff and others, as sureties on an official bond given by Oscar M. Welburn, as principal, to the United States for the faithful discharge of Welburn's duties as deputy collector of internal revenue.

The facts alleged in the complaint are briefly as follows: December 26, 1893, Welburn was appointed collector of internal revenue for the First district of California. January 12, 1894, he gave a bond in the sum of $100,000 to the United States, with plaintiff and seven others, including William P. Dougherty, as sureties for the faithful performance of his duties as such collector. February 11, 1894, he entered upon the discharge of the duties of collector of internal revenue, and held the office until June 30, 1897. March 18, 1894, Dougherty died, and his will was admitted to probate April 6, 1894. Welburn having defaulted in his duties as internal revenue collector, an action was commenced February 11, 1898, in the United States Circuit Court by the United States against Welburn and his bondsmen, and against the executors of the Dougherty estate. While that action was pending, February 18, 1898, the superior court of Santa

Clara county, in a decree in probate, after distributing the property of the Dougherty estate to the beneficiaries under the will, recites that since the settlement of the final account of the executors, and since the filing of their petition for distribution, the United States had presented a claim against the estate upon the Welburn bond; that an action had been commenced against the sureties, and that the sum of $10,000 would be sufficient to discharge the proper share of any judgment which might be obtained against the executors in said action. The decree also recites: "It is therefore ordered, adjudged, and decreed that the distribution herein provided for shall be subject to the said lien and charge of $10,000 (ten thousand dollars) in the hands of said executors and said trustees, and to be held by them to meet and pay any said judgment that may hereafter be so recovered." James M. Thorpe and James Dougherty, who were the executors of the Dougherty estate, acted as trustees therefor by virtue of the decree of distribution to them until May 4, 1899, when Thorpe died. After his death James Dougherty acted as sole trustee of the trusts until January 27, 1900, when he died, whereupon Annie Fenton Dougherty, one of the respondents herein, was appointed trustee. January 5, 1900, judgment was entered in the action of the United States v. Welburn and his bondsmen against all the defendants, except the surviving executor of the Dougherty estate, for $45,979.27 and $78.75 costs, and in favor of said executor that plaintiff take nothing by its action against him. The case was taken to the United States Circuit Court of Appeals on a writ of error, and that court October 7, 1901, entered its judgment setting aside the judgment which the circuit court had rendered in favor of the Dougherty estate. and affirming the judgment which had been rendered against the other defendants. Thereupon, and without any further proceedings being had in the circuit court, the sureties, with the exception of the Dougherty estate, paid the judgment, which amounted with interest to $47,506.82. Prior to the commencement of this action five of the sureties who had paid the judgment of the United States assigned their claims for contribution against the Dougherty estate to the plaintiff Edward B. Pond. The complaint was demurred to on the ground that it does not state facts sufficient to constitute a cause of action, and also upon several special grounds. The ground relied upon is the general ground of want of facts. The demurrer was sustained without leave to amend.

There can be no question that, when one of several co-sureties pays more than his share of the claim against all, he may compel contribution from all the parties jointly liable with him, and that he is entitled to be subrogated not only to all the rights and securities which the creditor has against the principal debtor, but to all the rights and securities which the creditor has against cosureties. Section 1432, Civ. Code, provides: "A party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him." Section 2849, Civ. Code, provides: "A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a cosurety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not." Section 2848 of the same Code reads: "A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his cosureties to contribute thereto, without regard to the order of time in which they became such." It will be observed that the last-quoted section speaks of the right of subrogation as against the principal, and is silent on the question of subrogation as against a co-surety; but there can be no doubt that a surety who is compelled to pay the debt of his principal is entitled to be subrogated to all the rights and remedies of the creditor as against his co-sureties, in precisely the same manner as against the principal debtor. 27 Am. & Eng. Ency. of Law (2d Ed.) p. 223. Appellant claims that, under these principles, he has a lien on the fund of $10,000 set aside by the order of the superior court of Santa Clara county, and that he is entitled to recover on this lien under section 2849, Civ. Code, supra. This $10,000, we have seen, was to be held to meet and pay any judgment that might be recovered by the United States against Dougherty's executors. No such judgment was ever obtained. It is true that the judgment entered in the Circuit Court in favor of Dougherty's executors was set aside by the Circuit Court of Appeals in Pond v. U. S., 111 Fed. 989, 49 C. C. A. 582; and it would seem that, acting upon the mandate of the latter court, a judgment might have been rendered in the lower court in favor of the United States and against the executors of the Dougherty estate, but this was not done.

Appellant, however, chiefly relies on the fact that, having paid the judgment recovered by the United States against himself and his assignors, he is subrogated to all the rights and advantages which the United States may have had against the Dougherty estate. This is true, unless the failure of Dougherty's co-sureties to present their claims against his estate is a bar under sections 1493, 1500, 1630, Code Civ. Proc. But those sections do not apply to this case, because the original creditor here (to whose rights the appellant claims subrogation) was the United States, and it is well settled that the United States is exempt from all statutes of limitation. U. S. v. Nashville, etc., Ry., 118 U. S. 126, 6 Sup. Ct. 1006, 30 L. Ed. 81; Pond v. U. S., 111 Fed. 989, 49 C. C. A. 582; section 3466, 3467, U. S. Rev. St. [U. S. Comp. St. 1901, p. 2314]. And it necessarily follows that the United States had a right to pursue the property of the deceased debtor into the hands of the distributees of his estate, to which right we think appellant was subrogated. The United States had a perfect claim against the estate of William P. Dougherty, and the appellant and his assignors, having satisfied that claim, were subrogated to the position of the United States, with every right and remedy that the United States might have had, including exemption from the operation of statutes of limitations and statutes of nonclaim. American Bonding Co. v. Nat. Mechanics' Bank, 97 Md. 598, 55 Atl. 395, 99 Am. St. Rep. 466. In this case the court says: "The appellant, being subrogated to the right of the state in respect to its claim against the appellee, is entitled to the benefit of every right, lien, and security which existed in favor of the state in reference to the claim. Among these may properly be classed the state's exemption from the running of the limitations against it. In Orem v. Wrightson, 51 Md. 34, 34 Am. Rep. 286, it was held that a surety who had paid the debt of the principal to the state was entitled to enjoy by subrogation the right of priority over other creditors in the distribution of the assets of the principal debtor, which would have existed in favor of the state as a creditor had the claim been asserted by it. The reasoning which led our predecessors to the conclusion there arrived at requires us to hold that the present appellant is entitled to stand in the state's position in reference to its claim against the appellee, and enjoy its exemption from the operation of the statute of limitations." See, also, 1 Brandt on Suretyship, § 353 (3d Ed.); Richeson v. Crawford, 94 Ill. 165; Schuessler v. Dudley, 80 Ala. 547, 2 South. 526, 60 Am. Rep. 124.

The judgment and order are reversed.

We concur: COOPER, P. J.; HALL, J.

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6 Cal. App. 657

KENNISTON v. KENNISTON. (Civ. 379.)

(Court of Appeal, Third District, California. Oct. 19, 1907.)

1. Divorce—Conflicting Evidence.

In an action for divorce, evidence, though conflicting, *held* sufficient to sustain a finding that the separation of the parties was by mutual consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 446–449.]

2. Same—Corroboration.

Civ. Code, § 130, provides that no divorce can be granted on the uncorroborated statement, admission, or testimony of the parties; and Code Civ. Proc. § 1839, defines "corroborative evidence" as additional evidence of a different character on the same point. *Held*, that plaintiff's testimony as to the contents of certain letters written by him to defendant to induce her to come and live with him was not corroborated by introducing the letters themselves.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 407.]

3. Same—Offer of Home—Character.

Civ. Code, § 103, provides that the husband may choose any reasonable place or mode of living, and, if the wife does not conform thereto, it is desertion. *Held*, that where plaintiff, after deserting his wife in Massachusetts in 1891, and removing to California, claimed that her refusal to come to California and live with him, pursuant to his offers made in 1901 and 1903, constituted desertion, entitling him to a divorce, he could not obtain such relief, in the absence of proof that the place and mode of living he had chosen and offered to his wife were reasonable.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Royal F. Kenniston against Margaret Kenniston. From a judgment for divorce, and from an order denying defendant's motion for a new trial, she appeals. Reversed.

A. M. Drew, for appellant. Snow & Freeman, for respondent.

BURNETT, J. The appeal is from a judgment of divorce and an order denying the motion for a new trial.

The only point made by appellant that we deem worthy of serious consideration is that there is a want of sufficient corroboration of plaintiff's testimony to justify the judgment of the court. It is not contested that the plaintiff in 1891 left the defendant in the state of New York, where they had been residing for years. Without informing her of whither he expected to go, he went to Haverhill, Mass., remaining there only a short time. He then came to Fresno, Cal., and he has resided there ever since. Defendant was in ignorance of plaintiff's whereabouts for 8 or 10 years. She finally applied to the pension department of the government for a portion of the pension which was being paid to plaintiff. Her application was based upon the contention that plaintiff had deserted her. She established her claim to the satisfaction of said department, and, according to its rules and regulations, one-half of said pension was awarded to her. Plaintiff's opposition to her said application conveyed to her the first intimation of where he was residing. Shortly thereafter, on December 31, 1901, he sent her a letter asking if she would come and live with him in Fresno, and if so he would send the money for transportation. She received the letter, but made no reply to it. Again, on February 3, 1903, he wrote her a similar letter, which she did not answer. On March 3, 1903, plaintiff began an action for divorce against defendant on the ground of desertion. Defendant set up a recriminatory plea of desertion and willful neglect. The judgment, rendered September 18, 1903, was "that the prayer of plaintiff's complaint be denied, and that the defendant herein have judgment for costs." October 28, 1903, he again wrote her to come to Fresno, inclosing money to pay her traveling expenses. He wrote various letters after that of similar import. He received only one letter from her. It does not apear in the transcript, but from his allusion to its contents it seems that she complained of great affliction from rheumatism. On December 23, 1904, he began another action against his wife for divorce on the ground of desertion, in which he was more successful than in his former suit.

One of the findings of the court is the following: "That plaintiff and defendant separated in the state of New York about the 11th day of August, 1891, by mutual consent, and ever since said separation continued to live separate and apart by mutual consent until the 2d day of November, 1903, upon which said date plaintiff revoked said consent to said separation and in good faith sought a reconciliation and restoration with and to defendant, but that defendant on said last-mentioned date refused said offer on the part of plaintiff to said reconciliation and restoration, ever since has and does now so refuse." The finding that said separation of August 11, 1891, was by mutual consent, is based entirely upon the testimony of plaintiff. He is not corroborated by any other witness nor by any circumstantial evidence. The defendant's testimony is that plaintiff abandoned her without cause. She says: "He arose in the morning and ate breakfast, hitched up the horse, and asked my sister to drive him to town, about four miles. After getting into the wagon, he said to me: 'Now look out for yourself, Maggie, for you will have nobody to look out for you.' Two or three days before going away he threatened to desert me and go to Haverhill, and said he might afterwards go to California." She further declared positively that he went away without her consent. Upon the important issue, then, as to whether the separation was by mutual consent or constituted an abandonment of defendant by plaintiff, the evidence was sharply conflicting, and while the preponderance seems to favor appellant's position, yet the finding is sufficiently supported according to the rule of conflicting evidence that prevails in ordinary cases. But section 130 of the Civil Code provides that "no divorce can be granted upon * * * the uncorroborated statement, admission or testimony of the parties." The vital question here relates to the effect to be given to this provision of the statute. "Corroborative evidence is additional evidence of a different character to the same point." Section 1839, Code Civ. Proc.

It is difficult, of course, by a general rule to prescribe the extent of the corroborative evidence required to satisfy the statute. But if it is clear that there is no such evidence, the duty of the court to deny the divorce is plain if regard is to be paid to the legislative will. The public is greatly interested in the maintenance of the marital relation, and it should not be dissolved at the whim or caprice of the parties, nor without the complete sanction of the law. Kuhl v. Kuhl, 124 Cal. 58, 56 Pac. 629. As an illustration of the application of the rule, we find the Supreme Court holding in Hayes v. Hayes, 144 Cal. 627, 78 Pac. 19, that the testimony of the husband was not sufficiently corroborated by the testimony of another witness as to the confession of the wife; the court, through Commissioner Chipman, stating: "But the confession of the wife, as well as the testimony of plaintiff, required corroboration, and there was none." Again, in Berry v. Berry, 145 Cal. 787, 79 Pac. 532, it is said: "The law, however, declares in very explicit terms that no divorce can be granted upon the uncorroborated statement of either of the parties to the action. And doubts should be resolved against divorce, instead of for it." In Gunther v. Gunther (N. J. Ch.) 57 Atl. 1015, it is held, as stated in the syllabus, that: "A divorce on the ground of desertion cannot be had; the only corroboration of complainant's testimony of a demand that defendant come and live with him where he had moved, and her refusal, being the testimony of a witness that at a time less than two years before the filing of the bill he heard complainant ask her why she would not come and live there, and that she answered no." In Corder v. Corder, 59 Atl. 309, the Court of Chancery of New Jersey says: "The original separation of the husband and wife in this case and the circumstances of it are proved only by the oath of the petitioner. The corroboration of petitioner as to the fact that subsequent to the separation the wife lived alone is not a sufficient corroboration of the desertion charged. It proved a continuance of a separation, but not that the original separation was a desertion." To substantially the same effect are Sabin v. Sabin (N. J. Ch.) 59 Atl. 627, and Hunt v. Hunt (N. J. Ch.) 59 Atl. 642. On the contrary, as tending to show the liberality of the Supreme Court's interpretation of the statute, respondent refers to Baker v. Baker, 13 Cal. 87; Smith v. Smith, 119 Cal. 191, 48 Pac. 730, 51 Pac. 183; Andrews v. Andrews, 120 Cal. 186, 52 Pac. 298, and McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808. In the Baker Case it is said: "The object of the rule is to prevent collusion between the parties. Without some limitation of this kind, it would be in the power of the parties to obtain a divorce in all cases. The public is interested in the marriage relation and the maintenance of its integrity, as it is the foundation of the social system, and the law wisely requires proof of the facts alleged as the ground for its dissolution."

It may be conceded that the primary object of the rule is correctly stated, but in some of the cases due weight seems not to have been accorded the consideration that the Legislature has pointed out the way by which this object is to be accomplished. It is certainly an erroneous assumption that to justify the court in awarding plaintiff a divorce it is only necessary for it to be satisfied that there is no collusion between the parties, and that the allegations of the complaint are true. Of these facts the court must be satisfied, but that conviction must rest in part at least upon corroborative evidence as provided by the statute. There seems to be no commanding reason why there should be any abatement of the rigorous requirement of the rule or any attempt by judicial action to enlarge the door of escape from the conjugal yoke and its corresponding obligations. It would subserve no useful purpose, and this is not the occasion to descant upon the menace to our civilization afforded by the frequency and facility with which divorces are secured under our practice, but we deem it not improper to say that there should be no relaxation of a rule designed to render somewhat less facile the improper extinguishment of a relation that means so much to the state. In the Smith and Andrews Cases, supra, there was corroborative evidence. In the latter, as stated in the syllabus, it is held: "When a divorce is sought on the ground of extreme cruelty consisting of successive acts of ill treatment, it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff, but it is sufficient corroboration if a considerable number of important and material facts are testified to by other witnesses, or if there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the statements of the plaintiff." It is clear that, if "a considerable number of important and material facts" showing cruel treatment are proven, nothing more should be required to establish such a charge. In the McMullin Case, also, there was substantial corroborative evidence. This is apparent from the statement of the court that "the attitude and declarations of the defendant to various parties at the time of and subsequent to the offer of April 10, 1895, are in themselves a sufficient corroboration." There was at least material testimony of other witnesses in addition to that of plaintiff.

It is contended, however, that said finding is immaterial for the reason that whether plaintiff originally was at fault or not, and whether the separation was with or without consent, after the lapse of so many years if he sought reconciliation in good faith, and it was refused by defendant, he could successfully maintain an action for divorce on the ground of desertion. The husband did not seek to return to the wife's domicile, but this is unimportant, as he pursued the course suggested by section 103 of the Civil Code, which provides that "the husband may choose any reasonable place or mode of living and if the wife does not conform thereto it is desertion." Is it true that, if plaintiff deserted his wife, he can thereafter place her in default and be entitled to a divorce on the ground of her desertion? Nelson, in his work on Divorce and Separation (paragraph 75) says: "The offer to return is ineffectual if made after the statutory period has elapsed. However willful the leaving may have been, or however destitute of reasonable cause, it is not a ground of divorce unless the separation has continued for the statutory period. The door of repentance and return must be kept open during that period. But after the statutory time has elapsed the injured party has a cause for divorce. If such a party refuses to renew cohabitation, it is not desertion. For to renew cohabitation is to condone the offense, and the law does not enforce condonation. This refusal of an offer to return will not bar the divorce to which the party is already entitled." And in Vosburg v. Vosburg, 136 Cal. 204, 68 Pac. 698, in speaking of the recriminatory plea of desertion set up by the husband in defense of the wife's complaint for divorce on the same ground, the court, speaking through Mr. Justice Henshaw, says: "But even if the offer had been made in good faith, and if the home provided had been a suitable one, still, as has been said, it came too late to operate against her perfected cause of action." Nelson, though, seems not to have been considering the contingency where the injured party's cause of action is barred by the statute of limitations, and the remark quoted from the Vosburg Case is undoubtedly sound as applied to the facts therein revealed. But here, assuming that the husband deserted the wife, she could not maintain her action for divorce on account of her long delay—at least, unless satisfactorily explained. This is covered by section 124 of the Civil Code, which provides that the divorce must be denied if not brought for certain causes within a specified time, and in all other cases where there is an unreasonable lapse of time before the commencement of the action, and in section 125 it is provided that "unreasonable lapse of time is such a delay in commencing the action as establishes the presumption that there has been connivance, collusion or condonation of the offense or full acquiescence in the same with intent to continue the marriage relation, notwithstanding the commission of such offense." The delay of the wife for more than 10 years to seek a divorce, and then only in response to plaintiff's complaint, establishes the presumption of her "acquiescence with intent to continue the marriage relation."

In the McMullin Case, supra, it is stated, through Mr. Justice Angellotti, that the injured party's right of action must not be barred by the statute in order to constitute a defense to such a cause for divorce as the plaintiff presents in the case at bar. It is observed that our law does not contemplate a continuance of the marital relation with the parties living separate and apart against the will of one of them. The conclusion is based upon the assumption that our law is humane and never closes the door of hope to one penitentially and in good faith offering reparation and seeking reconciliation and restoration. It must be admitted, though, that there is force in appellant's contention that the language of section 102 of the Civil Code plainly implies that desertion may be cured by the party at fault only within a time "before the expiration of the statutory period required to make the desertion a cause for divorce." But conceding the soundness of respondent's contention in this regard, still the difficulty is that there is not sufficient evidence within the rule to establish the desertion of appellant as contemplated by said section 103 of the Civil Code. The evidence in support of his claim that his wife was in default and properly chargeable with desertion was as follows: He testified that he had chosen Fresno for his home; that he had resided there about 12 years; that his wife had never been in Fresno; that he had written several letters, and sent her $130 to come there with; and that he had received only one reply to said letters. The letters were introduced in evidence, and it was admitted that the defendant had received them. It is plain that plaintiff could not corroborate himself. Such a notion is entirely foreign to a proper conception of corroborative evidence. One witness may be corroborated by another witness or by a presumption or by circumstantial evidence. But it is a misuse of the term to say that one portion of his testimony is corroborated by another. So his testimony as to the contents of the letters is not corroborated by introducing the letters themselves. The letters, of course, are the best evidence of their contents, but they are simply the written declarations of the plaintiff, and it would be rather startling to hold that a party may corroborate statements made under oath by testifying as to declarations that he has made not under oath. Respondent says this evidence is "better than it would have been had plaintiff spoken to defendant the very language which he wrote and handed her the $130 which he sent, in the presence of witnesses, for no witness or number of witnesses could have been as explicit and told the conversation exactly as it was." But respondent overlooks the fact that it is not altogether a question of "better evidence," but whether there is corroboration as required by the statute. But conceding that there is sufficient evidence as to the offer of a home, and defendant's refusal to accept it, there is no evidence whatever as to the character of the home to which plaintiff invited defendant. He must show that he had chosen a reasonable place or mode of living before he can insist that his wife is in default. No presumption can be indulged in that behalf in favor of plaintiff. He must show the utmost good faith in order to invoke successfully the power of the court. One of the important facts tending to show good faith is that he has urged his wife to come across the continent to a home reasonably suitable to their station in life. It would be, in our opinion, an arbitrary exercise of power to hold that this material element in plaintiff's case need not be proven, or that it may rest upon presumption. It is especially important in view of the testimony of the wife as to the reasons why she had no confidence in the sincerity of her husband's offer. It may be difficult for the husband to prove his case as the statute requires, on account of the fact that his wife is residing thousands of miles away, where he left her many years ago; but that is no reason why the court should ignore a salutary rule of evidence of which the interests of society demand a strict enforcement.

The judgment and order denying the motion for a new trial are reversed.

We concur: CHIPMAN, P. J.; HART, J.

6 Cal. App. 665

CHATFIELD et al. v. CONTINENTAL BUILDING & LOAN ASS'N. (Civ. 337.)

(Court of Appeal, Third District, California. Oct. 19, 1907.)

1. Trial — Trial by Court — Findings of Fact.

Where the answer consists of denials only, a general finding that all the allegations of the complaint are true is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 932.]

2. Same.

A general finding that all the allegations of the complaint are true, in an action wherein the answer consists of denials only, loses none of its certainty because there are, in addition to the general finding, certain specific findings of facts covered by the general finding.

3. Same.

A complaint alleged that plaintiffs exhibited to defendant an assignment to them of a contract authorizing plaintiffs' assignor to sell land of defendant, and that defendant ratified the assignment, and authorized plaintiff to proceed under the contract. The court made specific findings, among others that plaintiffs exhibited the assignment to defendant, but did not specifically find that defendant ratified the assignment as alleged. The court did make, however, a general finding that all the allegations of the complaint were true. *Held*, that the point that the findings were not coextensive with the complaint, in that there was no specific finding as to defendant's ratification of the assignment, was not well taken, but that the general finding covered that part of the complaint.

4. Appeal — Review — Presumptions — Sufficiency of Evidence.

Where the evidence is not brought up on appeal, it must be presumed that it supported the finding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2911.]

5. Brokers — Action for Compensation — Sufficiency of Complaint.

A complaint alleging that a mortgage foreclosure of land was compromised by mortgagor conveying his title to mortgagee in consideration of mortgagee delivering a contract giving the mortgagor the exclusive sale of the mortgaged property, and that, should he succeed in selling it at more than the amount due the mortgagee, the excess should be retained as his commission; that the mortgagor assigned to plaintiffs his interest in the contract; that plaintiffs sold the property, and tendered to the mortgagee the amount due it; and that plaintiffs were at all times willing to perform, and had performed all the conditions of the contract—is not subject to the objection that it fails to allege that plaintiffs found a purchaser on the terms offered by mortgagee, but clearly shows that a sale was made so as to secure to the mortgagee all it could claim under the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 101.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Thomas F. Chatfield and another, partners, against the Continental Building & Loan Association. Judgment for plaintiffs, and defendant appeals. Affirmed.

Gavin McNab (R. M. F. Soto, of counsel), for appellant. Francis J. Heney and C. A. S. Frost, for respondents.

CHIPMAN, P. J. Action for damages arising out of a contract authorizing plaintiffs' assignees to sell certain real property. The trial was by the court without a jury, and plaintiffs had judgment from which defendant appeals. There is a bill of exceptions, prepared by plaintiffs, to show that all of paragraph 6 and part of paragraph 11 of the complaint was stricken out on motion of defendant. But plaintiffs do not appeal, and the part stricken out does not impair the complaint, and need be no further noticed.

The appeal is, in fact, upon the judgment roll alone. The verified complaint alleges, in substance, as follows: That plaintiffs, at the times mentioned in the complaint, were partners engaged in the business of selling real estate. That on and prior to January 24, 1903, one Pelletier, also known as Pelkey, was the owner of certain real property in Marin county, which was then under mortgage by Pelkey to defendant. That on January 10, 1903, he had given to plaintiffs an exclusive authority, in writing, to sell said property on commission, under which contract plaintiffs had advertised the property for sale and had sought purchasers therefor, and on January 16, 1903, he made another similar contract with plaintiffs, in writing, giving plaintiffs similar authority for the period of 10 days, to continue thereafter until canceled in writing by Pelkey, under which contract plaintiffs advertised said property for sale, spending money in that behalf, and had endeavored to find a purchaser for the same. That while plaintiffs were so engaged with the knowledge of said defendant, a suit was pending to foreclose said mortgage in the superior court of said county, which was compromised and settled by said Pelkey conveying his title in the land to defendant in consideration of defendant delivering to plaintiffs the contract, of which the following is a copy: "San Francisco, Jan. 24, 1903. Thomas L. Pelletier, Esq., San Francisco, Cal.—Dear Sir: We hereby agree to give you the exclusive sale of property located in Novato [describing the property in question] until April 1, 1903. Should you succeed in selling this property or any portion of it, at an approximate value of over $5,260.10, the amount due this Association, same may be retained by you as a commission for said sale. Yours Truly, Continental Building and Loan Association, by Wm. Corbin." That thereafter, on the same day, Pelkey notified plaintiffs of his having conveyed the property to defendant, and for a valuable consideration then and there transferred and assigned to plaintiffs all his right and interest in said last aforesaid contract, indorsing thereon at the bottom thereof, in writing, the following: "San Francisco, Cal., Jan. 24, 1903. For value received I hereby transfer and deliver to Chatfield & Vinzent all my right, title and interest in the above agreement and give them the same privilege that I might receive in same; provided I receive one hundred dollars ($100.00) from Chatfield & Vinzent in case sale is made. Thomas L. Pelletier, known as Thomas Pelkey." That on the same day plaintiffs exhibited said assignment of said contract to defendant, and that defendant then and there ratified and confirmed said assignment, and consented thereto, and authorized plaintiffs to proceed under said contract to sell said property. That thereafter plaintiffs diligently endeavored to find a purchaser for said land, and expended money in advertising and otherwise in their said efforts. That on March 27, 1903, plaintiffs, in pursuance of said contract and assignment, sold said property to one Laymance for the sum of $7,000, and on March 28, 1903, plaintiffs demanded the conveyance of the property from defendant to said Laymance, and tendered to defendant the sum of $5,260.10 at its place of business in San Francisco, between the hours of 10 a. m. and 11 a. m. of said day. That on March 30, 1903, plaintiffs notified Pelkey in writing of their willingness to perform the terms of said contract and made diligent search for him to make tender to him of $100, but were unable to find him, and that plaintiffs were and at all times have been ready and willing to perform all the terms of said contract and of said assignment, and have duly performed, on their part, all the conditions of the same. That on said March 28, 1903, defendant refused to convey said real property, and stated that it was unable to comply with the terms of said contract of January 24, 1903, and ever since has so refused. Plaintiffs pray judgment for $1,739.90, the difference between $7,000 and $5,260.10. A general demurrer was overruled, and defendant answered, denying all the material allegations of the complaint, except that it is a corporation, and that it had refused and neglected to execute a conveyance to Laymance, and it also failed to deny the alleged tender of $5,260.10 to defendant, though it denied the alleged sale to Laymance. The court made specific findings of fact in accordance with the allegations of the complaint, and the court found, among others, that plaintiffs exhibited said assignment of contract of January 24th to defendant, but did not specifically find that defendant ratified and confirmed said assignment and consented thereto, as was alleged in the complaint. But the court made a general finding "that all of the allegations of the complaint herein are true." As conclusion of law the court found that plaintiffs were entitled to recover.

The answer consists entirely of denials, and sets up no affirmative defense. Mr. Spelling says that the "decisions appear to have fully established the sufficiency of finding in the general form, where no affirmative defenses are alleged in the answer." 2 Spelling's New Trial, § 593. In Williams v. Hill, 54 Cal. 390, the trial court made some specific findings, and also a general finding "that all the facts set forth in the complaint are true." It was objected by defendant that there was no finding upon the alleged mistake set up in the answer. But the court held that the general finding fully answered this objection because "the facts set forth in the complaint are entirely inconsistent with the mistake alleged in the answer." "If," said the court, "the allegations of the complaint are true, there could be no mistake." See, also, Davis v. Drew, 58 Cal. 152. In Johnson v. Klein, 70 Cal. 186, 11 Pac. 606, held: "A finding that all the allegations of the complaint are true necessarily covers all of the issues made by the pleadings, and is sufficient where the answer contained nothing but denials." In Alameda County v. Crocker, 125 Cal. 101, 57 Pac. 766, the finding was that all the facts alleged in the complaint "are true, except as to those hereinafter specified, and as to these the court finds as follows." Then follow certain specific findings. The court said: "We think the natural reading of the finding is, in effect, that all the facts alleged in the complaint are true, except as to those facts therein alleged and in the findings otherwise specified, as to which the facts are not necessarily untrue, but are as found specifically by the court." Cases such as Johnson v. Squires, 53 Cal. 37, Harlan v. Ely, 55 Cal. 340, Bank of Woodland v. Treadwell, 55 Cal. 379, and others were cases where the finding left something undetermined, so that the court could not ascertain precisely what facts had been found.

The purpose of findings is to dispose of the issues of fact, and to exhibit the grounds upon which the judgment rests. It is necessary, therefore, that they should be sufficiently definite and certain so as not to require an investigation on review to determine what issues are decided. When the answer consists of denials, only a general finding that all the allegations of the complaint are true would be both definite and certain, and would be sufficient. And where the court, in such a case, makes a general finding, we do not think it is wholly lost because the court also undertakes to make, in addition to the general finding, certain specific findings upon facts covered by the general finding. The latter loses none of its certainty and clearness by specific findings. To hold otherwise we must lay down as a rule that, where the trial court attempts to make specific findings, it must specifically find upon every material allegation of the complaint, and that a general finding as to the truth of all the allegations of the complaint must be given no force whatever. We would also have to hold, in effect, that the omission to find specifically upon some one or more material facts must be taken as a finding negativing such facts notwithstanding the general finding that they are true. We know of no rule of practice in this state so broad as that. It is true that a general finding that certain averments of the complaint are true will be controlled by a special finding inconsistent with such general finding. (McCormick v. National Surety Co., 134 Cal. 510, 66 Pac. 741); but here there is no conflict between the general finding and any special finding. We think, therefore, that the court has found the fact to be that "plaintiffs exhibited said assignment of said contract (defendant's contract with Pelkey), and said defendant then and there ratified and confirmed said assignment of said contract and consented thereto, and authorized and empowered said plaintiffs to proceed under said contract to sell said real property." The evidence is not brought up, and we must presume that it was sufficient to support the general finding. We have dealt thus with this question arising out of the findings because appellant makes the point that the findings are not coextensive with the complaint for the reason that there is no specific finding upon the fact as to defendant's ratification of and consent to the assignment by Pelkey of his contract with defendant. We have shown that the general finding covers that part of the complaint.

Appellant's effort to escape liability is purely technical, and wholly ignores the merits of the controversy. The judgment is so obviously just that appellant's points must be not only persuasive, but so clearly convincing as to compel a reversal.

It is contended that defendant's contract with Pelkey created the relation of principal and agent, and was therefore nonassignable; that plaintiffs, at most, were subagents not authorized to sell, but merely to find a purchaser; that Pelkey did not, because he could not, assign the contract, but only the commissions which he might earn thereunder, and, as subagents, plaintiffs must look to

Pelkey for compensation. It is further urged as to the complaint that it fails to allege that plaintiffs found a purchaser upon the terms offered by defendant. Appellant does not point out in what respect there is any such failure. It may not so appear in direct terms, but the averments clearly show that a sale was made so as to secure to defendant all it could claim under the contract and so far as it was concerned the sale fully met all the terms of the agreement. We do not find it necessary to enter upon the somewhat wide field for discussion to which appellant's other points invite. It seems to us that, in view of the finding of the court that defendant ratified and consented to the transfer to plaintiffs of all the rights Pelkey had under his contract and authorized plaintiffs to sell the property, we are relieved from considering whether it created the relation of principal and agent, or was assignable as being coupled with an interest or was in its nature an option. The evidence is not before us, and for all we know the ratification and consent of defendant and authority to sell may have been in writing and as broad as the allegations of the complaint. Whether the contract was technically assignable as creating an agency or not, defendant made it so by its consent and by recognizing plaintiffs as possessed of all rights and powers given Pelkey.

What, then, were Pelkey's rights? He was being foreclosed; the suit was compromised, and Pelkey conveyed the fee to defendant, surrendering his right of redemption, in consideration of the delivery to him of the authority to sell the property at a price that would give defendant all it claimed to be due from Pelkey and allowing him to retain whatever excess he could get from a purchaser. He was to have about two months in which to skirmish for a purchaser who would pay the mortgage debt, and as much more as he could get, and whether this excess was much or little it belonged to him. When defendant by its conduct placed it out of its power to convey the land to Pelkey's customer, or refused to so convey upon demand and tender of the money it was to receive, defendant became at once liable to Pelkey for this excess. Such were Pelkey's rights had he made the sale, and such are the rights of his assignees.

Respondents cite Robinson v. Easton & Eldridge Co., 93 Cal. 80, 28 Pac. 796, 27 Am. St. Rep. 167, a somewhat analogous case, and numerous other cases, to show that the Pelkey contract was assignable; but, as already intimated, we do not think it necessary to consider the question. Every consideration of justice and equity calls for an affirmance of the judgment to which we find in the record no sufficient answer.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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6 Cal. App. 691

BRUNGER v. PIONEER ROLL PAPER CO.

(Civ. 452.)

(Court of Appeal, Second District, California. Oct. 26, 1907. Rehearing Denied Nov. 25, 1907; Denied by Supreme Court Dec. 23, 1907.)

1. MASTER AND SERVANT—NEGLIGENCE—INJURIES TO SERVANT—DEFECTIVE MACHINERY—EVIDENCE.

Where, in an action for injuries to an employé by the fall of the knife of defendant's paper cutting machine, there was evidence that the machine had been for some time out of repair, evidence that several years before the accident the machine had been seriously disabled by a fire, and thereafter repaired; that a few days before the accident, as well as a few days afterward, the knife of the machine had fallen, and that soon after the accident a machinist examined the machine, found it in bad condition, and at the instance of defendant's foreman repaired it—was competent, as tending to show the condition of the machine at the time of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 916, 917, 919.]

2. APPEAL—HARMLESS ERROR.

In an action by an employé for injuries from a defective machine, the admission of evidence that soon after the accident defendant had the machine repaired, if erroneous, was not prejudicial to defendant, where, after the admission of the evidence, defendant procured an order that the jury inspect the machine; this being in effect a representation by defendant that the machine was in the same condition as at the time of the accident, which plaintiff was entitled to rebut by showing a change of condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

3. MASTER AND SERVANT—INJURIES TO SERVANT—EVIDENCE—INSTRUCTIONS.

While, in an action by an employé for injuries through defective machinery, the condition of the machinery within a reasonable time preceding and following the accident may be shown as tending to show the condition at the time of the injury, such evidence is admissible only in so far as it tends to show such condition at the time, and defendant is always entitled to an instruction qualifying the evidence in that regard.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 916, 917.]

4. SAME.

Where, in an action by an employé for injuries through alleged defective machinery, it is shown by satisfactory evidence that the machinery was not reasonably safe in its operation, and through some defect was rendered dangerous, which fact was known to defendant, it is not essential that plaintiff should show technically wherein the defect existed, and what occasioned in a precise manner the unsafe condition of the machinery.

5. SAME—FELLOW SERVANTS.

Where defendant employer intrusted a paper cutting machine and its care and repair into the hands of a foreman, who, knowing of the defective condition of the machine, directed plaintiff, who was ignorant of such condition, to operate it, the foreman was the representative and agent of defendant, and not a fellow workman of plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 427-430.]

6. TRIAL — INSTRUCTIONS — SUPPORT IN EVIDENCE.

Where, in an action by an employé for injuries through defective machinery, there was nothing to indicate that a lack of adjustment of the machinery by plaintiff was involved, instructions asked on the theory of plaintiff's duty to adjust the machine were properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596–612.]

7. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action by an employé for injuries through defective machinery, evidence *held* to warrant a finding of negligence on defendant's part and of lack of contributory negligence on plaintiff's part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954–977, 987–996.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Percy H. F. Brunger against the Pioneer Roll Paper Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. W. Freeman and A. D. Laughlin, for appellant. A. Lincoln Walker and Ansel Smith, for respondent.

ALLEN, P. J. Action for personal injuries. Judgment for plaintiff. Order denying a new trial. Appeal from judgment and order.

Plaintiff, an employé of the defendant, was engaged in operating a paper cutting machine furnished by defendant as an appliance for operation in the performance of plaintiff's duties. The machine worked automatically, the knife being operated by a friction clutch. It is intended that this knife, which with its head weighs about 200 pounds, should come down once only when the clutch holding it is released. When at the top, in order to start the knife, a spring catch is released and a handle lifted. The knife then falls and returns to the top by its own mechanism, and, when it reaches the top, a trip throws out a clutch and also puts on a brake, which holds it there. The defendant had intrusted the machine and its care and repair into the hands of the foreman. This foreman directed plaintiff on May 17, 1906, to operate such machine. It appears from the evidence that the machine had been for some time out of adjustment and repair, to the extent that upon occasions the clutch would not hold, and the knife would descend a second time without the clutch being released by the operator. This condition was known by the foreman, but unknown to the plaintiff, who was injured by the knife repeating; that is, descending a second time without action on the part of the operator. Upon the trial the court admitted evidence tending to show that several years before the accident the machine had been through a fire and seriously disabled, but thereafter repaired; and further, evidence to show that a few days before the accident, as well as a few days thereafter, the machine had been known to repeat; and, further, to show that an expert machinist made an examination of the machine a few days after the accident, and testified that the arm attached to the cutter bar, which throws out the friction, was worn so badly that it did not throw the brake or release the clutch properly, and that, at the foreman's instance, he repaired and adjusted it.

The specifications of error upon which the motion for a new trial was based are 79 in number; but all relate, in so far as they apply to the action of the court in admitting evidence, to the admissibility of evidence tending to show that the machine had passed through a fire several years before the accident, and of the condition of the machine a few days prior to, as well as a few days subsequent to, the accident, and especially in reference to the action of the court in admitting testimony of the repairs made at the instance of the foreman after the accident. We are satisfied that there was no prejudicial error in the admission of any of this testimony. While it is true that it was incumbent upon the plaintiff to show by satisfactory evidence that a defect in the machine was the proximate cause of the accident, and that it existed at the time of the accident, and that the defendant either knew or had the means of knowing of such defect before the accident, nevertheless, this evidence in relation to the conduct of the machine before and after the accident was competent as tending to show its condition at the time of the accident. It is not often possible to show affirmatively the defect at the precise moment of the accident. Most frequently it can only be determined by showing that within a reasonable time prior thereto the machine was not a safe appliance, and, when thus shown, a presumption arises that it so remained unless the same was remedied; and when, in addition, it appears that within a few days after the accident the same conditions existed, such evidence is most satisfactory in determining the actual condition during the interval within which the accident occurred. "An evidentiary fact is relevant to the principal fact when the former tends to show that the latter probably did or did not occur; and mere remoteness usually goes to the weight, and not to the admissibility, of evidence." Craven v. Central Pac. R. R. Co., 72 Cal. 350, 13 Pac. 878. While it is established law that mere repairs made after the accident cannot be shown to establish a negligent condition at the time of the accident (Helling v. Schindler, 145 Cal. 312, 78 Pac. 710), the incidental showing of such repairs shortly thereafter made to remedy actual defects then shown to exist in the machine's mechanism or operation, which, under the evidence, presumably existed at the time of the accident, presents an entirely different question (Dyas v. Southern Pac. Co., 140 Cal. 307, 73 Pac. 972). In those jurisdictions where the fact of repairs is not admitted in evidence, the prevailing reason therefor seems to be that the admission of testimony of mere repairs is in the nature of an admission upon the part of the employé who causes the repairs, and therefore not admissible as against the principal. But in this case the condition, independently of the repairs, is first shown, and the necessity for repairs is made apparent. It should follow that such subsequent repairs ordered by an employé could in no wise prejudice the defendant. The necessity for the repairs was not determined by the foreman who called the expert, nor were they occasioned by his act, but, on the contrary, were the result of a minute examination by the mechanic of the machine, which demonstrated their necessity.

Another reason exists in this case why the proof of repairs was without prejudice when we consider that after the introduction of such testimony the defendant procured an order that the jury view the machine and inspect it. This, in effect, was a representation by defendant that the machine was in the same condition in which it was at the time of the accident. Upon such motion, it would have been competent to have shown a change in its condition occasioned by the repairs. That this changed condition was shown previous to the act of the defendant in connection with the view is of no consequence. Even assuming that the court erred in admitting proof of the incidental repairs at the time of its admission, it was cured by this subsequent act of the defendant. While the condition within a reasonable time preceding and succeeding the accident may be shown as tending to show the condition at the time of the injury, yet it is admissible only in so far as it tends to show such condition at the time, and a defendant is always entitled, upon request, to an instruction qualifying such evidence in that regard, and it would be error for the trial court to refuse such an instruction. We have examined the instructions refused by thè trial court in this case, and we find none that may be construed as a qualifying instruction. The nearest approach to it is instruction No. 8, refused, which, to an extent, correctly states the law, "that the negligence of the employer which renders him responsible for the accident depends upon what he did and knew before the accident," and that "the knowledge on his part from which negligence is to be inferred must be established by evidence independent of any subsequent act in changing the appliance, and any defect in such evidence cannot be supplemented by such act"; that if, at the time of the accident, the defendant did not know of any defect in the paper-cutting machine, defendant was entitled to a verdict, "even if the evidence discloses the fact that after the injury the defendant did have repairs made." The substance of this charge was given by the court in two instances, and in the form as requested was properly refused, because in such instruction was incorporated the statement that defendant's responsibility must be established by facts and circumstances preceding the accident, which is, in effect, to say that evidence of facts showing the condition immediately succeeding the accident, or within a reasonable time thereafter, could not be shown, and, if shown, would not establish, or tend to establish, the defective condition at the time of the accident.

It is insisted by appellant that the court erred in refusing various instructions in which was embodied the proposition that it was incumbent upon plaintiff to show a defect in the machine, and, in addition, of what that defect consisted. The matter for determination is whether or not the employer used reasonable care in furnishing his employés reasonably suitable and safe machinery and appliances with which to do the work required of them, and used reasonable care to keep such machinery and appliances in repair. If it be shown by satisfactory evidence that the machinery so furnished employés was not reasonably safe in its operation, and through some defect it was rendered dangerous, which fact was known to the employer, it is not essential that the injured party should show technically wherein the defect existed and what occasioned in a precise manner the unsafe condition of the machinery.

It is further insisted that the omissions of the foreman were those of a fellow workman, and that no liability of defendant occurred on account thereof. Under the circumstances of this case, as presented by the record, this foreman was the representative and agent of the employer. Skelton v. Pacific Lumber Co., 140 Cal. 507, 74 Pac. 13, 98 Am. St. Rep. 25. We find nothing in the record indicating that any lack of adjustment of the machine, which ordinarily would be performed by the employé in its operation, is here involved. The worn and unsafe condition is shown to have been occasioned by long wear and bad usage, and which repairs and adjustments devolved upon the employer, and not upon the employé. The instructions asked upon the theory of the plaintiff's duty to adjust the machine were therefore properly refused. There is evidence in the record warranting the jury in determining that negligence was shown on the part of the defendant, and no contributory negligence of plaintiff was made to appear. The instructions given by the court appear to cover all of the points presented by those requested by defendant and refused.

The judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

6 Cal. App. 641

DONALDSON v. ORCHARD CRUDE OIL CO. et al. (Civ. 362.)

(Court of Appeal, First District, California. Oct. 16, 1907.)

1. Appeal—Dismissal—Moot Questions.

A personal judgment was obtained against defendant in a mechanic's lien proceeding. The amount of the judgment was made a lien upon defendant's leasehold interest in land, and also on certain implements and machinery used thereon, but which had been sold to another, and a provision was made for the sale of the leasehold and implements and docketing of a deficiency judgment. *Held*, that the character of the personal judgment was not modified by the provision for enforcing a lien on the property and the entry of a deficiency judgment, and plaintiff, by waiving his right to the deficiency judgment, was not entitled to a dismissal of the appeal on the ground that it presented only moot questions, in that defendant had no interest in the property ordered to be sold.

2. Same.

Aside from defendant's liability on the personal judgment, his leasehold interest in the land rendered it directly interested in securing a reversal of that part of it decreeing a lien on its leasehold interest.

3. Corporation — Officers — Authority of Secretary to Contract.

Proof that a person is secretary of a corporation is not sufficient alone to establish his authority to make contracts for the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12. Corporations, § 1613.]

4. Mine and Minerals—Mechanics' Liens—Right to Lien—Services on Oil Claim.

Code Civ. Proc. § 1183, provides that any person who performs labor in a mining claim, or in or upon real property worked as a mine, either in the development thereof or in working therein by the subtractive process, has a lien upon the same. Plaintiff was employed by defendant on an idle oil claim part of the time as watchman, and at other times in pumping oil from the claim for use in the boiler. *Held*, that for his services in pumping oil he was entitled to a lien, but for his services as watchman he could only look to defendant's personal liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 234.]

5. Mechanics' Liens—Proceedings—Attorney's Fees.

No allowance should be made for an attorney's fee in mechanic's lien proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 651–653.]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by W. W. Donaldson against the Orchard Crude Oil Company, the Santa Clara Valley Oil Company, and others. Judgment for plaintiff, and defendant Santa Clara Valley Oil Company appeals. Reversed and remanded.

Geo. E. Whitaker and F. J. Hambly, for appellant. Niles E. Wretman, for respondent.

HALL, J. This action was brought by plaintiff to obtain a judgment against the Orchard Crude Oil Company, a corporation, and the Santa Clara Valley Oil Company, a corporation, for the principal sum of $433.40, $2 costs of filing a claim of lien, and $100 as plaintiff's attorney fee for foreclosing the lien, and that the same be adjudged a lien against certain land worked as a mineral oil claim and certain described implements and machinery alleged to be appurtenant to and used in the working of said claim. The court gave judgment: (1) That plaintiff have and recover from the defendant Orchard Crude Oil Company the sum of $146.90; and (2) that the plaintiff have and recover from the Santa Clara Valley Oil Company the sum of $240 debt, and $2, cost of filing his lien, and $75 for his attorney fee in the action, and that said sums of money are a charge and lien upon the leasehold interest of said Santa Clara Valley Oil Company in and to the premises worked as such oil claim, containing about seven acres of land, together with the improvements and appurtenances thereunto belonging or in any wise appertaining consisting of (here follows a list of the implements and machinery above referred to). The judgment contains the usual direction for the sale of such property and for the docketing of a judgment for any deficiency against said Santa Clara Valley Oil Company. This appeal is by the Santa Clara Valley Oil Company only, and is from the judgment against it only, and was taken within 60 days from the rendition thereof.

Since the oral argument before this court, the respondent, in his printed reply to the oral argument, waives any and all right to any deficiency judgment against appellant, and consents that all portions of said judgment relating to a deficiency may be stricken therefrom. He now asks that the appeal be dismissed as presenting only moot questions, for the reason, as he claims, that it appears that appellant has no interest in any of the property ordered to be sold. There are two answers, however, to respondent's contention: (1) The judgment is a personal judgment against appellant for the entire sum. The action is against appellant upon a direct and personal liability. The court found that there was due and owing to plaintiff from appellant $240 for services rendered to appellant, and gave judgment against appellant, accordingly, for such sum, and for $75 for attorney's fee. The action is one brought under the mechanic's lien law, under which a claimant may recover a personal judgment against the person primarily liable for the debt. Such a judgment plaintiff obtained against appellant, which we do not think is modified by the succeeding direction for the enforcement of a lien on certain property and the entry of a deficiency judgment. (2) Not only is the amount adjudged to be recovered by plaintiff from appellant adjudged to be a lien on the machinery and implements, which the record shows to have been sold by appellant to the R. H. Herron Company, but it is adjudged to be a lien on the leasehold interest of appellant in the real property, which is ordered sold. The court found appellant to be the owner of a leasehold interest in the premises. This is separate and distinct from the personal property alleged and admitted to have been sold by appellant to the R. H. Herron Company. Appellant is therefore directly interested in securing a reversal of that portion of the judgment decreeing a lien on its leasehold interest in the premises. The appeal does not present moot questions only.

Appellant insists that the evidence is insufficient to show that plaintiff was ever employed to render any service for appellant by any one having authority so to do. Plaintiff testified that he was employed to work for appellant by one Smith, the secretary thereof. Appellant insists that a secretary of a corporation as such has no authority to employ laborers about the mining operations of such corporation, and that in the record in this case there is no evidence of any authority in Smith except that he was the secretary of the corporation.

Undoubtedly, proof that a person is secretary of a corporation is not sufficient alone to establish his authority to make contracts for the corporation (2 Cook on Corporations, § 717); but, of course, such an officer may be authorized to act in other capacities, and may have power to enter into contracts for the corporation. It must be confessed that the record in this case discloses very meager evidence as to what authority Mr. Smith had in the premises. At the trial Mr. Smith denied that he had employed plaintiff for appellant at all, and very little attention seems to have been given to the question as to what authority he may have had. Doubtless, upon a retrial of the action, more certain and satisfactory evidence will be given pro and con upon this point; and as we think that the judgment must be reversed for other reasons, we do not deem it necessary to pass upon the sufficiency of the evidence in this respect.

Plaintiff sued to recover for services as roustabout, well cleaner, and watchman in and about the oil claim alleged to have been worked by appellant. He alleged the amount due him from appellant for such services to be the sum of $433.40, and the court found the amount to be $240. The evidence of plaintiff, assuming it to be true, shows that the greater portion of this amount was due for his services for acting as watchman of the premises and plant, at a stated salary per month, while it was lying idle. His claim of lien, which is a part of his complaint, also shows that his whole claim is for services as a watchman at $20 per month, and additional compensation for labor at $2 per day. Plaintiff first worked for the Orchard Crude Oil Company for $2 a day and $20 a month for his board, but later entered into a new arrangement with the superintendent of said company, by which he was to receive $20 a month for acting as watchman, and $2 a day for such work as he might do. This second arrangement was made May 1, 1903, and under it plaintiff worked for the Orchard Crude Oil Company until July 23, 1903. By this agreement he testified that he was to receive $20 per month for services as watchman and $2 per day when he worked. The plant passed to the control of appellant about July 23, 1903, and plaintiff testified that he was told by Mr. Smith to continue there just the same as he had been doing. In other words, his testimony clearly shows that during the time he claims to have been in the employ of appellant he was to receive $20 per month for acting as watchman of the premises, and $2 per day for his labor when he worked. He filed his notice of lien July 11, 1904, which was framed upon a theory in accord with the evidence just stated. From his testimony the number of days that he worked for appellant did not exceed 67, for 21 of which he admits that he was paid by a Mr. Gallagher. This leaves but 46 days to be paid for at $2 per day, which would amount to $92. He also admitted having been paid on his account against appellant $30 by Mr. Smith. The court found that he had performed work for appellant as roustabout, well cleaner, and watchman, and that there was a balance unpaid him therefor to the amount of $240, but did not determine what part was due him for services as watchman, and what for the other services. This brings us to the vital point of the present discussion.

Plaintiff's claim for a lien is founded upon that portion of section 1183, Code Civ. Proc., which provides that: "Any person who performs labor in any mining claim or claims, or in or upon any real property worked as a mine, either in the development thereof or in working thereon by the subtractive process, has a lien upon the same." A lien is not given for any and every work that may be done upon or about a mining claim, but only for work done in the development thereof or in working thereon by the subtractive process. Unless the services of a watchman of an idle mine come within this category, plaintiff was not entitled to a lien for what was due him as such watchman. It was said, in Williams v. Hawley, 144 Cal. 98, 77 Pac. 764: "It is clear that the statute implies that the labor to be performed upon any mining claim, and for which a lien is given, is labor performed in the course of the actual work of mining or development of the mining claim, and that it does not include the services of a watchman engaged in caring for the mine while it is lying idle." See, also, as supporting the same principle, Phillips on Mechanics' Liens, § 36; Jones on Liens, § 1356.

In the case at bar the claim was lying idle during all the time it was in the possession of appellant, save that plaintiff upon occassions pumped oil therefrom for use in the boiler. For such services as he performed in pumping oil he was within the protection of section 1183, if employed so to do by appellant; but for his services as watchman he can only look to the personal liability of appellant.

As there is no way by which we can determine from the record how much of the judgment is for services as watchman, the judgment must be reversed, and a new trial had. No allowance should have been made for an attorney's fee. Union Lumber Co. v. Simon (Cal.) 89 Pac. 1081.

The judgment is reversed, and the cause remanded for a new trial.

We concur: COOPER, P. J.; KERRIGAN, J.

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6 Cal. App. 671

WISTROM v. REDLICK BROS., Inc.

(Civ. 373.)

(Court of Appeal, Third District, California. Oct. 19, 1907.)

1. Municipal Corporations—Use of Streets—Negligent Driving.

Where the driver of a delivery wagon drives up to the sidewalk across a bicycle path, and then discovering that he has made a mistake in the place turns back across the path towards the center of the street, without looking to see if anybody is approaching, and strikes a bicyclist coming in the opposite direction on the path, the driver is negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1515.]

2. Municipal Corporations—Use of Streets — Turning to the Right — Negligent Driving—Action—Instructions.

Pol. Code, § 2931, provides that, where vehicles meet, the driver of each must turn seasonably to the right of the center of the highway so as to pass without interference. *Held*, that an instruction embodying that law is properly given where the driver of a delivery wagon who has driven up to one side of the street collides with a bicycle in attempting to cross back to the center.

3. Same.

An instruction that a state statute requires drivers of vehicles approaching from opposite directions to turn seasonably to the right of the center of the road so as to pass without interference was not misleading as tending to cause a misapplication of the law to one delivering goods with a wagon upon the right or left side of the street, where the jury were also instructed that a person may lawfully pass on the left side of the highway or across it to turn up to a house, etc., but it is his duty in crossing the road to use reasonable care to avoid injuring other travelers.

4. Same—Application of Rule to Bicycles.

The law applies to bicycles as well as to other vehicles.

5. Trial—Instructions.

Where an instruction is hypothetical and pertinent, it is no ground of objection that a different theory may also find support in the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 478.]

6. Negligence—Actions—Burden of Proof—Contributory Negligence.

In an action for injuries from defendant's negligence, it is sufficient for plaintiff to show, in the first instance, that the injury resulted from defendant's negligence, and plaintiff's contributory negligence is a matter of defense to be proved affirmatively by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 221, 229.]

7. Same—Instructions—Contributory Negligence—Burden of Proof.

In an action for injuries from defendant's negligence, an instruction that contributory negligence is an affirmative defense to be established by defendant, and must be shown by defendant, by a preponderance of the evidence, etc., is not erroneous as stating that the defense of plaintiff's contributory negligence could not be sustained, unless it appeared from defendant's own testimony, especially when taken in connection with another instruction that, if the jury believe from the evidence that the injuries complained of by plaintiff were caused by plaintiff's contributory negligence, then plaintiff cannot recover.

8. Trial — Refusal of Requests — Instructions Covered by Those Given.

The refusal of instructions substantially covered by those given is not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

9. Municipal Corporations—Use of Streets — Negligent Driving — Action—Instructions.

In an action for injuries from a collision between defendant's delivery wagon and plaintiff while riding a bicycle, caused by the sudden digression of the wagon, an instruction absolving defendant if the driver of the wagon had no knowledge of plaintiff's approach is properly refused, since his ignorance would afford no shield if it were the result of the want of ordinary care.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Fred Wistrom against Redlick Bros., Incorporated. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

W. D. Crichton, F. H. Short, and F. E. Cook, for appellant. Bernhardt & Sutherland, for respondent.

BURNETT, J. The following statement of the facts, following closely that made by appellant, is substantially correct, and is sufficient for the purposes of this appeal:

On the 23d day of May, 1903, plaintiff was riding on his bicycle along the westerly side of K street in the city of Fresno, traveling in a southerly direction. At the same time a delivery wagon was being driven along the same street in a northerly direction, the wagon and team belonging to the appellant and being driven by one of its employés. The plaintiff was riding with ordinary speed. Appellant's employé thought he was near the place where he was to deliver some merchandise, and turned to the left, but when he had reached practically the edge of the sidewalk he observed that he was in the wrong block, and turned from the left towards the right side of the street. The plaintiff observed him turning to the left, and, in order to avoid an accident, he also turned to the left at about the same moment that the horse was turned toward the center of the street, on the right of the driver. A collision occurred, and plaintiff was quite seriously hurt.

1. The evidence is sufficient to support the verdict of the jury. Appellant says: "It appears to be assumed by respondent that it constituted negligence on the part of defendant's employé to turn in by mistake to the place where he did not desire to go, and thence to turn back toward the center of the

street." That assumption would not be very creditable to the intelligence of any one urging it. However, we do not understand respondent to take any such position. His contention is that the driver in turning his horse, as stated, failed to exercise ordinary care and prudence. His negligence consisted principally in not looking to see if any one were approaching. The driver himself declares: "I wheeled over as soon as I saw it was wrong; I didn't see this man [plaintiff] at all." It is so manifest as not to require argument nor authority that it was the duty of the driver to proceed slowly and carefully, and to be on the alert lest he come into collision with others. The plaintiff was where he had a right to be; he was on a well-defined bicycle path on the extreme right of the highway or public street near the sidewalk. The driver had swung across this path, and the law charged him with the duty of careful observation of the situation in view of the probability that travelers would be coming in an opposite direction. Under such circumstances, inattention and apparent indifference to the approach of others and to the danger of collision are not to be excused, according to the law of negligence as generally expounded and accepted. Wikberg v. Olsen Co., 138 Cal. 480, 71 Pac. 511; Palmer v. Barker, 11 Me. 338; Fales v. Dearborn, 1 Pick. (Mass.) 345; Robinson v. W. P. R. R. Co., 48 Cal. 421. It was not a wanton injury, but the driver was thoughtless, and he did not exercise ordinary care, the care that ordinarily prudent persons would exercise under similar conditions, and therefore his employer is held responsible for the damage done in consequence of his want of care.

2. Appellant complains of this instruction given by the court: "A statute of the state provides that, where vehicles meet, the drivers of each must turn seasonably to the right of the center of the highway so as to pass without interference." The instruction constitutes a part of section 2931 of the Political Code. It is contended that it has no application to the facts of this case, but that its purpose is to present a rule "whereby vehicles meeting upon a street or highway could pass each other in uniform manner." But the "uniform manner" is designed to prevent interference, and to avoid such accidents as occurred in the case at bar. Since it is a general regulation and sound in principle, it seems proper that it should be given in a case like this, where two vehicles meet and they are not turned "so as to pass without interference." It was probably more favorable to defendant than to plaintiff, for the reason that the evidence shows that, immediately before the accident, the former had turned to the right and the latter to the left. That the rule is applicable to bicycles as well as to other vehicles is held in Diehl v. Roberts, 134 Cal. 164, 66 Pac. 202. There was no danger of the jury misapplying the rule to the condition of delivery of goods upon the right or left side of the street, as seems to be apprehended by appellant, because the court covered that contingency by another instruction, that "a person may lawfully pass on the left side of the highway or across it for the purpose of turning up to a house or store, but it is his duty in passing from one side of the road to the other to use reasonable care to avoid injuring other travelers upon the highway."

3. The seventh and eighth instructions are somewhat mildly assailed by appellant. The only objection to the former is that it ignores the facts. No fault is found with it as an abstract proposition. It is clear that the objection is not tenable as the instruction is in harmony with the facts as testified to by plaintiff. That a different theory may also find support in the evidence is no valid ground of objection as the instruction is hypothetical and pertinent.

As to the eighth instruction, appellant makes the suggestion that it is misleading. But his argument is based upon the evidence and inferences most favorable to defendant's theory of the case. It is really the same objection as that made to the preceding instruction, and is equally untenable.

The brunt of appellant's attack, however, is directed against instruction No. 10, which is as follows: "In an action for injuries alleged to have been caused through the negligence of the defendant, it is sufficient for the plaintiff to show, in the first instance, that the injury resulted from the negligence of the defendant, and need not show a want of contributory negligence in himself. Contributory negligence is an affirmative defense to be established by the defendant; and such contributory negligence must be shown by the defendant, by a preponderance of the evidence, to have been the proximate cause of the plaintiff's injury." The general doctrine of the instruction has been indorsed more than once by the Supreme Court. In Smith v. Occidental, etc., Steamship Co., 99 Cal. 468, 34 Pac. 85, the court said, through Mr. Justice Harrison: "In this state, in accordance with the weight of authority as well as with the principles upon which the rule rests, it is established that it is sufficient for a plaintiff to show, in the first instance, that the injuries resulted from the negligence of the defendants." Citing Nehrbas v. Central Pacific R. R. Co., 62 Cal. 320; MacDougall v. Central R. R. Co., 63 Cal. 431; Magee v. North Pacific C. R. R. Co., 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69. And in Schneider v. Market St. Ry. Co., 134 Cal. 487, 66 Pac. 736, the correlative burden of the defendant is presented, through Commissioner Smith, as follows: "It remains to consider the question of alleged contributory negligence on the part of the plaintiff's decedent. In considering this, it is important to bear in mind that such negligence is a matter of defense to be proved affirmatively by the defendant, and hence that the burden of proof is on him."

The two principles, then, are clearly established, first, that plaintiff has the burden of proving defendant's negligence, and defendant of proving plaintiff's contributory negligence. But the point of appellant's objection is that under the instruction, "unless it appeared by defendant's own testimony that the plaintiff was guilty of contributory negligence, that the defense cannot be sustained upon that ground, wholly disregarding the question as to whether or not the testimony of the plaintiff showed contributory negligence." We feel satisfied that appellant's criticism is entirely unwarranted. The instruction must be considered in its entirety, keeping in view the obvious purpose for which it was given. The court was manifestly undertaking to instruct the jury as to what burden of proof must be borne by the plaintiff and what by the defendant. All that the instruction means when fairly interpreted is that plaintiff is required to prove the negligence of defendant, but he is not required to go further, and prove the want of negligence on his own part, but that contributory negligence is an affirmative defense and must be shown by the defendant. It does not limit the proof by defendant to any one's testimony. In fact, the expression used negatives any such interpretation as that suggested by appellant because it is to "be shown by a preponderance of the evidence," which clearly implies a consideration of all the evidence. Again, it certainly requires a microscopic eye to distinguish any substantial difference between "established by the defendant" and "shown by the defendant." It is clearly held by the authorities, as we have seen, that contributory negligence must be established by the defendant. And while "established" may suit the philological taste of appellant better than "shown," we feel assured that, to the ordinary comprehension, the latter imposes no greater burden than the former. Again, if the burden is upon defendant to show or establish contributory negligence, how is it to be done except by "a preponderance of the evidence"? To justify appellant's interpretation, we must read into the instruction the phrase "by his own testimony," or "by evidence offered by him," or some equivalent expression. But if standing alone the instruction were liable to be so misunderstood, as feared by appellant, the danger is obviated when we consider, as we must, the whole charge of the court. If, in the respect suggested, there be anything lacking, we find it supplied in the following instruction given at defendant's request: "You are hereby instructed that if you believe from the evidence that the accident and injuries complained of by the plaintiff herein were caused by the contributory negligence and want of care of the plaintiff, then the plaintiff cannot recover, and your verdict will be in favor of the defendant." If any juror with these instructions before him did not understand that he was to consider all the evidence in determining whether there was any contributory negligence, he certainly would not be susceptible of misdirection by reason of the nice refinement suggested by appellant.

4. The only other point that we deem worthy of notice is that the court erred in refusing to give certain instructions requested by defendant. But, as far as correct in principle, they were substantially covered by those given. It is true the jury was not instructed specifically "that the servant and employé of the defendant was entitled to use, at the time of the accident, any portion of K street necessary for him in the pursuit of his employment, and in the delivery of packages and parcels for the defendant, his employer." It is, however, clearly implied in the instructions given. Besides, it is hard to conceive of any jury that would need such an instruction.

The second instruction was properly refused because it excuses the defendant if the driver had no knowledge of the approach of plaintiff. As we have seen, his ignorance would afford no shield if it were the result of the want of ordinary care. The instruction ignores a vital element in the case.

We have examined all the assignments of error. None of them, in our opinion, has any substantial merit.

The judgment and order denying the motion for a new trial are affirmed.

We concur: HART, J.; CHIPMAN, P. J.

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6 Cal. App. 697

TOWNE v. TOWNE et al. (Civ. 385.)

(Court of Appeal, First District, California. Oct. 30, 1907. Rehearing Denied Nov. 27, 1907; Denied by Supreme Court Dec. 23, 1907.)

1. Deeds — Delivery—Manual Possession—Evidence.

Though a deed may be placed in the manual possession of the grantee without accomplishing a legal or operative delivery, when a duly signed and acknowledged deed has been placed in the grantee's hands by the grantor or by his direction, a prima facie case of delivery is established.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 117–121, 625–627.]

2. Same—Weight and Sufficiency.

Possession by the grantee of a duly executed deed creating a presumption of delivery, the burden is upon him denying delivery to prove his claim by strong evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 574–583, 625–627.]

3. Same.

Evidence on an issue whether a deed was delivered by the grantor with intent that it should operate as a conveyance *held* insufficient to overcome the presumption of delivery, arising from the fact that the deed was placed in the grantee's manual possession by the grantor's direction, after being duly signed and acknowledged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 625–627.]

4. HOMESTEAD—CONVEYANCE—HUSBAND AND WIFE—NECESSITY FOR JOINDER.

Where a husband's father orally agreed to convey a lot upon which the husband built a house, and while the husband and wife were residing on the premises the wife recorded a declaration of homestead, a subsequent deed of the lot to them under such oral agreement fed the homestead, and the declaration of homestead by the wife became effectual, and defeated a subsequent conveyance by the husband, under Civ. Code, § 1242, preventing the conveyance of a homestead of a married person unless the deed is made by both husband and wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 203–209.]

5. DIVORCE—ADJUDICATION AS TO PROPERTY—EFFECT AS TO STRANGERS.

No adjudication in a divorce suit can affect the title to land of either party as against strangers to the suit, nor the title of any such stranger as against the parties.

6. SAME—DECREE—EFFECT.

A divorce decree adjudging that the husband "is entitled to the benefit and disposition of any and all property now belonging to him or in his hands," and that the wife has no right therein, includes community property and a homestead selected from the community property as well as separate property, though the court found that the husband owned no community property.

7. SAME—DISPOSITION OF PROPERTY.

Under the express terms of Civ. Code, § 146, a divorce being granted for the wife's adultery, the court could award to the husband all the community property, including the homestead, if any, selected therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 713–715.]

8. SAME—DESCRIPTION OF PROPERTY.

Community property, including the homestead, if any, selected therefrom may be awarded in a divorce suit in general terms and without particular description.

9. JUDGMENT—PRESUMPTIONS—DISPOSITION OF ALL MATTERS IN CONTROVERSY.

It is presumed that a judgment disposed of all matters in controversy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1822.]

10. DIVORCE—DISPOSITION OF PROPERTY.

If a wife felt aggrieved by the finding or judgment in a divorce suit in which the community property was awarded to her husband, she should have attacked them in an appropriate manner, and having allowed them to become final she may not assert title to the property in another suit.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Virginia L. Towne against Willis J. Towne and J. W. Towne; Harry B. Towne, administrator, being substituted for J. W. Towne on the latter's death. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Reversed.

Benj. K. Knight and Hugh R. Osborn, for appellants. T. J. Crowley and Frank McGowan (Chas. M. Cassin, of counsel), for respondent.

HALL, J. This action was brought to have it decreed that a certain piece of land in the city of Santa Cruz was the homestead of plaintiff, and that she be entitled to the possession thereof, and that a certain conveyance thereof executed by Willis J. Towne to J. W. Towne be decreed to be null and void.

The action was originally brought against Willis J. Towne and J. W. Towne, but J. W. Towne having died after the action was brought, Harry B. Towne, as the administrator of his estate, was substituted as defendant in his place and stead. Willis J. Towne is the divorced husband of plaintiff, and was made defendant because he refused to join with plaintiff in bringing the action. Willis J. Towne and plaintiff intermarried in 1888, and in 1890 Willis J. Towne entered into an oral contract with his father, said J. W. Towne, by which said J. W. Towne agreed to sell to Willis J. Towne the lot of land in dispute for the sum of $500. Willis J. Towne, in order to build a dwelling upon the lot, borrowed from a bank the sum of $800, for which his father, J. W. Towne, went security. A house was built upon the lot by Willis J. Towne, and plaintiff and said Willis J. Towne took up their residence therein, and continued to reside therein with their child until some time in 1899. On the 23d day of August, 1895, while plaintiff and defendant were husband and wife, and while they were residing on the premises in dispute, plaintiff executed, acknowledged, and recorded in the county recorder's office a declaration of homestead, in all respects sufficient in form for a declaration of homestead by a married woman. On the 15th day of April, 1896, J. W. Towne and his wife acknowledged before said Harry B. Towne, who was a notary public, a deed, dated January 11, 1896, in terms conveying the premises in dispute to said Willis J. Towne for the expressed consideration of $5. This deed was confessedly placed in the hands of Willis J. Towne on or about the day of the acknowledgment thereof by said Harry B. Towne, by the direction of said J. W. Towne and his wife. On the 27th day of August, 1898, plaintiff caused said deed to be recorded in the office of the county recorder. On the 10th day of November, 1898, said Willis J. Towne executed and acknowledged a deed to the said premises, purporting in terms to convey said premises to said J. W. Towne, which was recorded on the same day. On the 19th day of February, 1901, Willis J. Towne obtained a decree of divorce from plaintiff.

As before stated, the action was brought to have it decreed that the premises described in the complaint were the homestead of plaintiff, and that she was entitled to the possession thereof as against J. W. Towne and his estate, and that it be decreed that the deed from Willis J. Towne to J. W. Towne was null and void. Harry B. Towne, as administrator of the estate of J. W. Towne, answered, and also filed a cross-complaint to quiet the title of the estate to said premises as against plaintiff and Willis J. Towne. The court found the facts in favor of plaintiff, and entered judgment annulling the deed from Willis J. Towne to J. W. Towne, and decreeing said premises to be the community property of plaintiff and defendant Willis J. Towne, and to constitute the homestead of plaintiff and said defendant, and that the estate of J. W. Towne has no right or estate in said property. Defendants moved for a new trial, and this appeal is from the order of the court denying the motion for a new trial and from the judgment.

The only grounds urged for a reversal of the order or the judgment concern the sufficiency of the evidence to support certain findings of the court, and the whole matter resolves itself down to two questions: First. Does the evidence show that the deed to the premises of date January 11, 1896 from J. W. Towne and wife to Willis J. Towne was ever delivered with intent to become operative as a conveyance?—the contention of appellants being that, though the deed was actually delivered, that is, placed in Willis J. Towne's possession, by direction of the grantors therein, it was so delivered upon the understanding that it should not be effective until the premises were fully paid for and that the same were never in fact fully paid. Second. Was plaintiff divested of all interest in the premises in dispute by the judgment of divorce between Willis J. Towne and herself?

We will first dispose of the question concerning the delivery of the deed. It is undoubtedly true, as contended for by appellants, that a deed may be placed in the manual possession of the grantee without accomplishing a legal or operative delivery. Denis v. Valeti, 96 Cal. 227, 31 Pac. 1; Kenney v. Parks, 137 Cal. 531, 70 Pac. 556; Hibbard v. Smith, 67 Cal. 551, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726. But it is equally true that when it is shown that a deed, duly signed and acknowledged by the grantor, has been placed in the hands of the grantee by the grantor, or by his direction, a prima facie case of delivery has been established. Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778. The possession of the deed duly executed in the hands of the grantee is prima facie but not conclusive evidence of its delivery. It therefore follows that he who disputes this presumption has the burden of proof, and must show that there has been no delivery. And not only must this presumption be overcome, but it is held that there is such a strong implication that it has been delivered when it is found in the hands of the grantee that only strong evidence can rebut the presumption. Devlin on Deeds, § 294; Ward v. Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151.

In the case at bar the deed in question was, after being signed and acknowledged, handed to the grantee by direction of the grantor, where it remained until it was recorded two years and four months thereafter. Indeed, there is no evidence that it was ever recalled, or any attempt made by the grantor before the bringing of this action to claim possession thereof. The only evidence relied upon by appellants to overcome the presumption of a delivery is the evidence of defendant Harry B. Towne, who is a son of J. W. Towne and one of the heirs at law, and Willis J. Towne, also a son and heir at law of J. W. Towne. Upon this point Harry B. Towne, after testifying that his father and mother acknowledged the deed before him, said: "They told me, they said to hand it to my brother Willis, and if he paid all the money to let him go and record the deed, and if he did not pay all the money the deed was to be handed back to my father, and in case of the death of my father the deed was to be recorded by my brother Willis; if he did not make the payments it was to be of no effect." The witness further said that the money to be paid was the money owing on the house and lot, but did not say how much was owing at the time of this conversation. He further said: "If he did not pay the whole amount and abandoned it, whatever he did pay in was to go as rent. * * * I did hand this deed to Willis J. Towne, and inform him of those conditions; it was handed to him under those conditions stated by me." This witness did not attempt to say how much was unpaid on the house and lot, and of course could not and did not attempt in any way to say but that what was unpaid at the time of his handing the deed to the grantee was subsequently, and before the recording of the deed, fully paid. The recording of the deed occurred two years and four months after the handing of the deed to the grantee. This evidence falls far short of proving no delivery of the deed, in that it does not show but that the conditions were complied with. The only other evidence introduced by defendant upon this question is the evidence of Willis J. Towne, who in substance stated that he bought the lot from his father on an oral agreement to pay therefor $500. He said: "I entered into a verbal contract with him as to the purchase of this lot. * * * I was to pay $500 for the lot; the terms of the contract were that when I paid for it I was to own it, but he spoke, of course, that at his death it was to be mine, * * * if I did not pay for it what money I had paid was to go as rent, and he was to take it back." His father also went on his note at the bank for $800 to build on the lot. That he started in to pay on the contract, and paid $500 in the course of about nine years; that he never paid the note to the bank, but that his father paid the note to the bank, and that as he could not fulfill his contract the money that he had paid went for rent. On the contrary, plaintiff testified that her husband, Willis J. Towne, and J. W. Towne and his wife, stated to her that the note to the bank had been fully paid by Willis J. Towne; that J. W. Towne told her this in 1896. She also gave testimony tending to show payment of the purchase price of the lot. She boarded men for her father-in-law to an amount of about $150, which was to go on the lot, and she allowed her husband to sell some horses of her separate property for about $500, to be paid on the lot.

Furthermore, defendant put in evidence the judgment roll in the action for divorce between Willis J. Towne and plaintiff. In the verified answer of Willis J. Towne to the cross-complaint of the defendant therein (plaintiff herein) said Willis J. Towne, in reply to her allegation that he owned as community property the premises now in dispute, denied that he then owned said homestead lot, and alleged that he did at one time own the house and lot, "but sold the same two years ago for $1,500, of which sum, after paying the debts due on said house and lot, the plaintiff retained the sum not to exceed $600." This statement, sworn to by Willis J. Towne in his action for divorce, is entirely inconsistent with his testimony in this action relating to his ownership of the premises in dispute. No attempt was made to explain the contradiction, and under these circumstances the court was justified in giving no credence to his testimony. Certain it is that we cannot, from the whole record in the case, say that the court was obligated to hold that the prima facie case of delivery made by the fact that the deed was placed in the actual manual possession of the grantee, by direction of the grantor after being duly signed and acknowledged, was overcome by the satisfactory proof required by the law. Ward v. Dougherty, supra. The deed of January 11, 1896, having been delivered, the title thus acquired by Willis J. Towne fed the homestead, and the declaration of homestead previously filed by plaintiff became effectual, and the subsequent conveyance thereof by Willis J. Towne was void and of no effect. Alexander v. Jackson, 92 Cal. 514, 28 Pac. 593, 27 Am. St. Rep. 158; Perry v. Ross, 104 Cal. 15, 37 Pac. 757, 43 Am. St. Rep. 66; Civ. Code, § 1242.

We now take up the question as to the effect of the decree in the action for divorce upon the rights of the parties to this action. The contention of appellants is that by the decree of divorce the premises in dispute were awarded to the defendant Willis J. Towne, and that therefore plaintiff had no interest therein. The court in its findings in this action found, in reference to this question, "that said court, by its said decision and judgment in said divorce suit, did not in any manner dispose of the property described in plaintiff's amended complaint." Of course, no adjudication that the court, in the action for divorce, might make could affect the title of either party to the divorce suit as against strangers to that suit, nor the title of any such stranger as against either or both of the parties to the divorce suit. Nevertheless, if the court, in the divorce suit, awarded the property in dispute in this action to the plaintiff in that action (Willis J. Towne), plaintiff in this action has no interest in such property, and should have been defeated in this action.

The judgment roll in the divorce action shows that in his complaint for divorce Willis J. Towne charged the defendant therein (plaintiff herein) with adultery, and alleged that he owned certain community property, consisting of household furniture and $300 in money, and expressly alleged that he was not possessed of any other community property. The defendant in said action by her cross-complaint alleged that the plaintiff in said action was the owner and possessed of the property in dispute herein and other property, all of which she alleged to be community property, but did not set up that any of it was a homestead. Plaintiff in that action, in his answer to the cross-complaint, denied that he owned the premises in dispute in this action. He admitted that he owned certain other property which she charged that he owned, and which he had not mentioned in his complaint, but alleged that all the property that he then owned was his separate property. The court in its findings in the divorce suit found that the plaintiff therein owned as his separate property one piano and 160 acres of land in Glenn county, and inferentially, as least, some money, the balance of the proceeds of some other property which he had sold during the pendency of the action, and that the plaintiff in said action did not at the beginning of said action, or at the time of the rendition of the decision, own any community property whatever, and in effect that he did not own the property in dispute in this action.

The court in its decree adjudged: "That plaintiff is entitled to the benefit and disposition of any and all property or money now belonging to him, or in his hands, and defendant has no right thereto or therein, or claim in or upon the same, or any part thereof, nor has the defendant any right or claim to maintenance or support by or from plaintiff. That plaintiff is the absolute owner of the following real property" (here follows a description of 160 acres of land in Glenn county), "also one piano." While the language of the first paragraph of the decree above quoted is not as apt as might have been chosen for the purpose of awarding to the husband all the community property, we think such is the effect of the language used. The court adjudged that "the plaintiff" (Willis J. Towne) "is entitled to the benefit and disposition of any and all property or money now belonging to him or in his hands, and the defendant" (Virginia E. Towne) "has no right thereto or therein, or claim in or upon the same, or any part thereof." The words "all property or money now belonging to him or in his hands" include community property, and a homestead selected from community property as well as separate property. The divorce having been granted because of the adultery of the wife, the court had power to award to the husband all the community property, including the homestead, if any, selected therefrom. Civ. Code, § 146. And this may be done in general terms without particularly describing the property. Stockton v. Knock, 73 Cal. 427, 15 Pac. 51. In the case just cited it was held that the language, "It is further ordered and adjudged that the whole of the community property be set apart to the defendant," was sufficient as an award to the defendant of the homestead selected from community property.

In the decree now under discussion the court in effect awarded all the community property to the husband, and expressly adjudged that the guilty wife had no right thereto or claim in or upon the same. It is true that the court in its findings had found that the husband owned no community property; yet in its decree it used language broad enough to settle all property rights of the parties, and evidently so intended. Such construction of the decree accords with the presumption that all matters in controversy were disposed of by the judgment. Bingham v. Kearney, 136 Cal. 175, 68 Pac. 597. If the wife felt aggrieved, either by the finding or by the judgment, she should have attacked them in the appropriate manner; but having allowed the same to become final, she cannot now be heard to say that she has any interest in such property. By the decree of divorce she was divested of all interest in the community property, all of which was awarded to her husband, for which reason the finding of the court—"That said court, by its said decision and judgment in said divorce suit, did not in any manner dispose of the property described in plaintiff's amended complaint"—is not supported by the evidence.

For this reason the order and judgment are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

HUTCHISON v. EVANS et al. (Civ. 329.) (Court of Appeal, First District, California. July 10, 1907.) Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge. Action by D. Hutchison against J. W. Evans and others. Defendant Evans appeals from a judgment for plaintiff and from an order denying his motion for a new trial. Affirmed.

H. A. Powell, Geo. R. Williams and W. A. Dow, for appellant. Sullivan & Sullivan and Theo. J. Roche, for respondent.

KERRIGAN, J. Appeal by defendant J. W. Evans from a judgment in favor of plaintiff, and from an order denying his motion for a new trial. This appeal involves precisely the same questions as the case entitled "S. W. Jones, Plaintiff and Respondent, v. J. W. Evans, Appellant, No. 328" (this day decided by this court) 91 Pac. 532, and for the reasons stated in the opinion in that case the judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

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WINDT v. COVERT. (S. F. 3,114.)

(Supreme Court of California. Nov. 29, 1907.)

1. Mortgages — Conveyance Constituting Mortgage—Rights of Mortgagee on Satisfying Prior Lien.

Where the maker of a note purchased land incumbered by a mortgage, and caused the vendor to convey the same to the payee to secure the note, the payee held a legal title, subject to the resulting trust in favor of the maker, and was in equity, within Civ. Code, § 2924, a mortgagee, holding a special lien within sections 2875, 2876, and 2923, providing that, where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount, etc.

2. Same — Junior Mortgagee — Payment of Senior Mortgage — Enforcement — Limitations.

Under Civ. Code, § 2876, providing that, where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount as a part of the claim for which his own lien exists, a grantee in a conveyance operating as a mortgage, compelled to satisfy a prior lien for his own protection, may add the amount thereof to the amount for which the conveyance is security and enforce both in one action, within Code Civ. Proc. § 726, and, so long as the right to foreclose his conveyance exists, the right to recover the amount paid to satisfy the prior lien is not barred by limitations.

3. Same.

Where a junior mortgagee pays the debt secured by a senior mortgage after the commencement of an action to foreclose it, he is compelled to pay the senior mortgage for his own protection, within Civ. Code, § 2876, and he may enforce payment of the amount so paid as a part of the claim for which his own lien exists.

4. Same—"Satisfy."

The word "satisfy," in Civ. Code, § 2876, providing that where the holder of a special lien is compelled to "satisfy" a prior lien, he may enforce payment of the amount thereof as a part of the claim for which his own lien exists, when considered in connection with section 2941, providing for a satisfaction of record, and declaring that it must be entered when any mortgage has been "satisfied," means payment or discharge, and a junior mortgagee who pays a senior mortgage satisfies it, though there is no formal release of record.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6328–6334.]

5. Same—Foreclosure—Personal Liability—Deficiency Judgment.

A junior mortgagee to whom mortgaged land, purchased by his debtor, has been conveyed by the vendor as security for the debt, who pays the senior mortgage, is not entitled by virtue of Civ. Code, § 2876, to a deficiency judgment against his debtor for the amount so paid, a personal liability depending on a promise to pay.

6. Same—Proceeds of Sale—Application.

The maker of a note purchased mortgaged land, and caused a conveyance thereof to be made to the payee to secure the note. The payee paid the existing mortgage and foreclosed his conveyance, treating it as a mortgage. *Held*, that the proceeds of the sale should be applied first to the discharge of the payee's claim for the payment of the existing mortgage, though Civ. Code, § 2876, entitles the payee to enforce payment of the amount so paid as a part of his claim.

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Morris Windt against Mary I. Covert. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Judgment modified and affirmed, and order denying a new trial affirmed.

Welles Whitmore and R. V. Whiting, for appellant. Mary I. Covert and Wallace A. Wise, for respondent.

SLOSS, J. On April 27, 1893, the defendant executed and delivered to plaintiff her promissory note in the sum of $2,200, payable six months after date. At the same time, and as security for the payment of said note, said defendant Mary I. Covert purchased from one Brown a parcel of land in the county of Alameda, and caused Brown to execute a conveyance thereof to the plaintiff. This action was commenced on the 25th day of October, 1897, and by his complaint the plaintiff, treating the conveyance of the land to himself as a mortgage, sought a decree of foreclosure. At the time of the execution and delivery of the deed by Brown to the plaintiff, there existed a mortgage on said premises made by Brown to one Hardy to secure a promissory note in the sum of $3,000, with interest at the rate of 8 per cent. per annum. The complaint alleges that on or about the 15th day of December, 1893, Hardy brought an action to foreclose his said mortgage, and that on or about the 25th day of May, 1894, the plaintiff herein paid, satisfied, and discharged said note and mortgage by paying and delivering to Lucius L. Solomons, to whom Hardy had assigned his note and mortgage, the sum of $3,483.46; that being the amount then due and owing thereon. It is alleged, further, that said sum of $3,483.46 was necessarily and properly expended by the plaintiff to protect and preserve his own lien. The complaint sets forth that the plaintiff had been in possession of the property and had collected rents, which he credited upon the interest due, and that he had allowed to the defendant a further credit of $915 on the principal of the promissory note executed by her. An answer was filed raising various issues, and after a trial the plaintiff had judgment of foreclosure adjudging that there was due him from the defendant Covert the sum of $375.25 on account of the note executed by said defendant, and the further sum of $4,378.25 on account of moneys paid by the plaintiff to Solomons to pay and satisfy the debt secured by the Hardy mortgage, directing a sale and providing for a deficiency judgment against the defendant Mary I. Covert in the event that the proceeds of such sale should prove insufficient to pay said sums and costs. The defendant appeals from the judgment and from an order denying her motion for a new trial.

It appears that at the time this action was commenced, October 25, 1897, an independent action to foreclose the mortgage given by Brown to Hardy, or a suit by plaintiff to be subrogated to Hardy's claim, would, if then begun, have been barred by the statute of limitations. In the answer of the defendant she relied upon the statute of limitations, so far as plaintiff's right to recover the amount paid on the Hardy note and mortgage was concerned, and it is now urged that the court erred in including the amount paid on said note and mortgage in the judgment herein. This contention is answered by the provisions of section 2876 of the Civil Code, which reads: "Where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him, as a part of the claim for which his own lien exists." That the conveyance of the property in question to the plaintiff, under the circumstances above set forth, constituted him the holder of a special lien within the meaning of the Civil Code (see section 2875), is not questioned. The plaintiff became the holder of the legal title, subject to a resulting trust in favor of the defendant, the real purchaser. But the fact that the title was conveyed as security gave the transaction, in equity, the additional character of a mortgage. Civ. Code, § 2924. "In such a case the grantee holds a double relation to the real purchaser; he is his trustee of the legal title to the land and his mortgagee for the money advanced for its purchase." Campbell v. Freeman, 99 Cal. 546, 548, 34 Pac. 113, 114; Woodard v. Hennegan, 128 Cal. 293, 60 Pac. 769; Banta v. Wise, 135 Cal. 277, 67 Pac. 129. And as such mortgagee he is the holder of a special lien, "unless otherwise expressly agreed." Civ. Code, § 2923. The effect of section 2876 is to give to the holder of a special lien, who is compelled to satisfy any prior lien for his own protection, the right to add the amount so paid to the amount for which his special lien was security and to enforce both together. "There can be but one action for the recovery of any debt * * * secured by mortgage." Code Civ. Proc. § 726. Such action, which is an action of foreclosure, affords the only method by which the plaintiff could enforce payment of the "claim for which his own lien exists." The only way in which he could enforce payment of the amount paid by him in satisfaction of a prior lien as a part of the claim which he already held was by including that amount in the action brought by him for foreclosure of his mortgage. So long as the right to foreclose his junior lien existed, the right to recover as a part of it the amounts paid by him to satisfy prior liens could not, consistently with the provisions of section 2876, be barred by the statute of limitations. Any other construction of this section might require the holder of a lien, who has been compelled to satisfy prior liens, to commence separate actions to recover the amounts paid on account of such prior liens before his own obligation became due. To compel him to commence such separate actions would be contrary to the plain provision of the statute, which allows him to enforce payment of the amounts so paid by him as a part of his own claim.

The payment of the Hardy mortgage by plaintiff was made after an action had been commenced by Hardy against Brown and the plaintiff herein to foreclose said mortgage, but before said action had gone to judgment. It is argued that a payment at this time was not within the rule of section 2876, above quoted, in that plaintiff was not "compelled" to pay said mortgage. The argument appears to be that a lienholder has no right under this section to satisfy a prior lien until a suit on such prior lien has been carried to judgment and sale has been had and the time for redemption is about to expire. This is an unreasonable construction of the section and one which would not benefit the debtor, since the delay insisted upon would result merely in adding costs and expenses to the amount which must ultimately be paid by such debtor. In Foster v. Furlong, 8 N. D. 282, 78 N. W. 987, the Supreme Court of North Dakota, in construing a statute identical with section

2876 of our Civil Code, says: "The compulsion with which one acts in paying a prior lien and which entitles him to add the amount so paid to his lien is merely an existing necessity to do so to protect his own interests under his lien after the party primarily liable to make the payments has defaulted in so doing." We think this is the proper construction of the language; and that where the holder of a lien upon property pays a prior mortgage thereon, after suit to foreclose such prior mortgage has been commenced or is threatened, he is, within the meaning of the section under discussion, compelled to pay such mortgage for his own protection. Upon the payment of the amount of the Hardy mortgage by plaintiff to Solomons (the assignee of Hardy), the suit to foreclose that mortgage was not dismissed, and said suit was still pending at the time of the trial of this case. Furthermore, there was no evidence that any formal release of the mortgage had been entered of record, and the court excluded evidence offered by the defendant to prove that such mortgage had not been satisfied of record. The point made in this regard is that the mere payment of a prior lien is not a compliance with the provisions of section 2876 which gives rights to one who has been compelled to satisfy a prior lien. It is argued that a formal satisfaction must be entered of record. We think there is no reason for giving this technical construction to the word "satisfy." Civ. Code, § 2941, which provides for a satisfaction of record, declares that it must be entered "when any mortgage has been satisfied." The word "satisfied," as here used, unquestionably means no more than paid or discharged, and the same meaning, which is the usual and ordinary one, should be given to it in section 2876.

The appellant attacks the findings of the court to the effect that the plaintiff went into possession by and with the consent of the defendant and that the net rents received by the plaintiff were $1,330.64. Without reviewing the evidence, we shall merely state that it was sufficient to support the findings.

Finally, the appellant claims that the judgment is erroneous in directing that, in case the property does not sell for sufficient to pay the plaintiff, a deficiency judgment be entered as against the defendant. So far as the judgment authorizes a personal judgment which shall include the amount paid by the plaintiff to satisfy the Hardy mortgage, we think this contention is sound, and must be sustained. The appellant executed a promissory note by which she agreed to pay the plaintiff $2,200. Of this amount the court finds that $375.25 is still due. This is the only amount which the appellant ever undertook to pay. While, by virtue of section 2876 of the Civil Code and of the general principles of equity, the property given as security by her for this claim is properly chargeable with the payment of any amounts which the lienholder was obliged to expend to protect his security, no reason is suggested, and none suggests itself to us, why the appellant should, in the event of a deficiency of security, be held to be personally liable to pay the amount due upon a note which she never executed and payment of which she never assumed. Section 2876 makes the amount paid to satisfy a prior lien a part of a secured claim of the party paying, but this is only for the purpose of enforcing payment out of the security. The lien is made to cover both amounts. But a personal liability does not result from the mere existence of a lien. Such liability depends on a promise to pay, and here there has been no such promise, express or implied. The defendant was not personally liable on the Hardy mortgage while it was held by Hardy or his assignee, and a personal liability to plaintiff could not arise from the mere fact that plaintiff for his own protection, and not at the request of the defendant, paid off the mortgage. While the defendant is not personally liable for the amount paid on account of the Hardy mortgage, it is proper that the proceeds of sale should be applied to the discharge of this claim before applying them to the payment of the amount due on the note signed by the defendant. The Hardy mortgage was, before plaintiff satisfied it, a prior lien, and, as such, entitled to priority in payment. The fact that plaintiff, on paying this prior lien, became entitled to enforce payment of the amount so paid as a part of his already existing claim (Civ. Code, § 2876), furnishes no reason why in equity the respective priorities of the liens, as theretofore existing, should be disturbed.

It was suggested at the oral argument that a sale of the property under the judgment had been had and that no deficiency had resulted, and that, therefore, the question of personal liability is of merely academic interest. But these facts do not appear of record, and, furthermore, the appellant, if she has succeeded in showing that the judgment appealed from was erroneous in any particular, is entitled to recover her costs of appeal. The error herein referred to will not, however, require a retrial of the case, nor will it, in case a sale has been had, require a vacation of that sale. Conformity to the views hereinabove expressed can be effected by adding to the decree a provision that the amount of any deficiency judgment shall not exceed the balance found due on the note executed by the defendant.

It is ordered that the judgment be modified by limiting the amount of any deficiency judgment to be entered against the defendant to $375.25, with interest at the legal rate from the date of judgment, and that, as so modified, the judgment be affirmed.

The order denying a new trial is affirmed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

152 Cal. 464

LAUREL HILL CEMETERY v. CITY & COUNTY OF SAN FRANCISCO et al.

(S. F. 3,855.)

(Supreme Court of California. Dec. 4, 1907.)

1. Municipal Corporations—Police Power—Health.

Under Const. art. 11, § 11, empowering any county or city to enforce within its limits local, police, sanitary, and other regulations, not in conflict with the general laws, and under the charter of the city and county of San Francisco the supervisors thereof have power to pass ordinances placing such restriction on the use of property or the conduct of business as may be necessary for the public health, provided such ordinances bear a reasonable relation to the object sought to be attained, and are not arbitrary or unreasonable, and are not a cloak for an arbitrary interference with or suppression of a lawful business.

2. Constitutional Law—Determination of Questions—Judicial Review.

The determination by a legislative body of what is a proper exercise of its police power, or the expediency or necessity of a restrictive measure, though primarily for the Legislature, is subject to judicial review.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1308, 1309.]

3. Health—Validity of Regulations—Cemeteries.

Where a cemetery is located in a thickly settled community, further interments therein may be prohibited because the burial of dead bodies therein tends to endanger the public health; but where a cemetery is remote from human habitations, or is close to but few dwellings, the absolute prohibition of interments therein is an unreasonable restriction of a lawful business, not required for the preservation of the public health, and will not be sustained by the courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Health, § 25; vol. 9, Cemeteries, §§ 1–3.]

4. Same.

Where a city includes considerable tracts of uninhabited areas, interments anywhere within the limits of the city may not be prohibited merely because the territory involved is within the boundaries of the city.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Health, §§ 24, 25; vol. 9, Cemeteries, §§ 1–3.]

5. Same.

An ordinance of the city and county of San Francisco prohibiting the interment of dead bodies within the limits thereof, adopted after the passage of Pen. Code, § 297, prohibiting the burial of human remains within the corporate limits of San Francisco, excepting in existing cemeteries, or those subsequently established by the supervisors thereof, merely prohibits interment in existing cemeteries, in fact, situated within densely populated portions of the municipality, and is valid as a reasonable exercise of the police power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Health, §§ 24–26; vol. 9, Cemeteries, §§ 1–3.]

6. Same.

Since the police power granted by the Constitution is not restricted to the suppression of nuisances, but includes the regulation of the conduct of business, to the end that the public health may not be endangered, an ordinance of the city and county of San Francisco prohibiting interments within the limits thereof is not unreasonable in its application to a cemetery, the soil of which is of such character that no disease breeding elements can be transmitted through the same; the question whether the danger from interments is to be averted by a prohibition of further burials being a question of legislative policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Health, §§ 24–26; vol. 9, Cemeteries, §§ 1–3.]

7. Same.

Even if a city expressly granted to a cemetery association the right to make interments in a cemetery in perpetuity, the city might exercise its police power and prohibit interments therein, since the police power cannot be contracted away, and since all rights and property are subject to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Health, §§ 24–26; vol. 9, Cemeteries, §§ 1–3.]

8. Same.

A cemetery at the time of its establishment was outside the limits of San Francisco, in unsettled territory. The municipality granted land for the cemetery, and acquiesced in the expenditure of money in improvements thereof. The city thereafter, by reason of its growth, included the cemetery within its limits, and the surrounding territory became thickly settled. *Held*, that the city was not estopped from exercising its police power by prohibiting further interments in the cemetery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Health, §§ 24–26, 35; vol. 9, Cemeteries, §§ 1–3.]

9. Same.

After a cemetery, originally located one mile from any habitation, had become the center of thickly populated portions of San Francisco, the city adopted an ordinance, prohibiting further interments therein, which was not to be in force until nearly 18 months after its passage. *Held*, that the ordinance was a valid exercise of the police power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Health, §§ 24–26, 35; vol. 9, Cemeteries, §§ 1–3.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the Laurel Hill Cemetery against the city and county of San Francisco and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Lloyd & Wood and Haven & Haven, for appellant. William G. Burke and Percy V. Long, City Attys., John T. Williams, Asst. City Atty., John S. Partridge, William M. Sims, and Garret W. McEnerney, for respondents.

SLOSS, J. This action was brought to restrain the city and county of San Francisco and its officers from enforcing an ordinance prohibiting the interment of dead bodies within said city and county, and to obtain a decree declaring the ordinance void. The defendants answered and moved for judgment on the pleadings. Their motion was granted, and the plaintiff appeals from the judgment entered upon the order so made.

This court has already in Odd Fellows' Cemetery Association v. City and County of San Francisco, 140 Cal. 226, 73 Pac. 987, decided that the adoption of the ordinance in question was a valid exercise of the legislative power of the city and county. It is urged, however, by the appellant that the case here presented differs in some respects from that considered by the court in its former decisions. Furthermore, great reliance is placed upon two decisions—one of the Supreme Court of the United States, and the other of the United States Circuit Court for the Ninth Circuit of the Northern District of California—both rendered since the filing of the opinion in the Odd Fellows' Case, and both, it is claimed, inconsistent with the views there expressed by this court. The complaint in the case at bar is very voluminous, but its essential allegations do not, we think, differ materially from those set forth by the complainants in the earlier case. Briefly stated, it alleges the incorporation of plaintiff in 1867 as a cemetery association pursuant to the provisions of an act approved April 18, 1859, and entitled, "An act authorizing the incorporation of rural cemetery associations." St. 1859, p. 281, c. 267. It is averred that in 1853 one Nathaniel Gray, and others associated with him, were the owners of a tract of land then lying beyond the corporate limits of the city of San Francisco, containing about 160 acres, which said Gray and his associates determined to appropriate and devote to the purposes of a rural cemetery. They prepared the land for such purposes, clearing it of brush and laying out roads, and doing other work. On the 30th of May, 1854, said lands were publicly dedicated to the purposes aforesaid by the name of the Lone Mountain Cemetery; the dedication being made the occasion of a "solemn and impressive ceremony" in which the mayor of the city participated. The Lone Mountain Cemetery continued to be occupied by said association as a cemetery. In May, 1868, Gray and his associates conveyed to the plaintiff so much of the tract as had been appropriated for the purposes of a cemetery. The plaintiff entered into possession of the land, and has since continuously carried on and conducted there the business of a cemetery, under the name of Laurel Hill Cemetery. On June 23, 1871, the mayor of the city and county made a grant to plaintiff of said tract of land, in consideration of the sum of $24,139.79, paid by plaintiff to the treasurer of said city and county. Since the establishment of the cemetery and its dedication in the year 1854, plaintiff and its predecessors have sold and conveyed 40,000 lots or plots, a large proportion of which have been used for the purposes of burial, but many of them are capable of receiving a number of interments in addition to those already made therein. Over $2,000,000 have been expended by the owners of said lots and plots in preparing them for the burial of bodies and in the construction of monuments and tombs and the embellishment of their lots by landscape culture. The plaintiff association has also expended large sums of money in constructing roads, avenues, and paths through said cemetery, in constructing a system of waterworks, and erecting a lodge and walls. Of the area included in said cemetery the plaintiff has about seven acres unsold and ready for sale.

At the time of the establishment of the said cemetery, it was wholly outside the corporate limits of the then city of San Francisco, and was distant more than two miles in a direct line from the business part thereof, and at least one mile from the residence part thereof. No residence had then been built to the west of said cemetery, and the whole country between it and the Pacific Ocean was practically unoccupied. Plaintiff avers "that at no time since the establishment of said cemetery has it or any part thereof been, nor has it or any part thereof, or will it or any part thereof, become injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use in the customary manner of any public park, square, street, or highway; that the soil of said cemetery is sand, and the natural condition and character thereof is such that no dangerous or disease-breeding elements can be transmitted through the same from the decaying remains of bodies buried therein; that since the establishment of said cemetery many residences have been built in its neighborhood, and the same have been and are now occupied with families, and yet it has not been proven that the district embracing said cemetery and said residences was unhealthy and subject to epidemics, but, on the contrary, said district has always been, and is now regarded, as particularly healthy and free from the diseases which prevail in other parts of said city and county." There have never been any wells excavated in the neighborhood of said cemetery "for the purpose of supplying water to any residences of families residing therein, or for any consumption of human beings." It is further alleged that there are within the corporate limits of the city and county of San Francisco several large tracts of land, some of which consist of barren sand hills and are entirely unoccupied, and some of which are used solely for farming purposes; that some of said tracts of land contain several hundred acres, and interments of dead bodies could be made on several of said tracts of land, and within the corporate limits of the city and county of San Francisco, which would be more than a mile distant from any human inhabitant or public thoroughfare.

The ordinance complained of was passed on the 26th day of March, 1900, and provides that after the 1st day of August, 1901, it shall be unlawful for any person, association, or corporation to bury, or inter, or cause to be interred or buried, the dead body of any person in any cemetery, graveyard, or other place within the city and county of San Francisco, exclusive of those portions thereof which belong to the United States, or are within its exclusive jurisdiction. The violation of the ordinance is made a misdemeanor. This ordinance is assailed by plaintiff upon the grounds that it deprives plaintiff of its property without due process of law, and impairs the obligation of a contract; and that it is unreasonable, in that it prohibits acts which are in no way dangerous to life, or detrimental to the public health. It is also claimed that the city and county is estopped by its acts and conduct to assert or exercise the right of making it unlawful to continue to bury the dead bodies of persons in the cemetery of the plaintiff. The ordinance contains a recital that "the burial of the dead within the city and county of San Francisco is dangerous to life and detrimental to public health." It purports to be passed in pursuance of what is generally known as the "police power" of the state, and of that branch of the police power which has to do with the preservation and protection of the public health. Under the charter of the city and county, read in connection with the state Constitution (article 11, § 11), the supervisors have power to pass ordinances placing such restrictions upon the use of any property or the conduct of any business as may be necessary for the public health. Odd Fellows' Cemetery Association v. City and County, supra. Such ordinances must, of course, bear a rational relation to the object sought to be attained. They may not be arbitrary or unreasonable. The exercise of the police power cannot be made a mere cloak for the arbitrary interference with or suppression of a lawful business. Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. In re Smith, 143 Cal. 368, 77 Pac. 180. "The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385. But, while the action of a legislative body in assuming to exercise the police power is always subject to review by the courts, the question of the expediency or necessity of a proposed restriction is primarily for the Legislature, and the courts will not interfere with the exercise of the legislative discretion unless it clearly appears that such discretion has been arbitrarily or unreasonably exercised. Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; County of Plumas v. Wheeler, 149 Cal. 758, 87 Pac. 909.

There is ample authority defining the limits of the power of legislative bodies in restricting the right of interment of dead bodies. That the interment of such bodies in the midst of thickly populated districts is likely to prove a danger to the health of the surrounding population, and as such may properly be prohibited, seems to be settled by a number of well-considered cases, cited in the opinion in the Odd Fellows' Cemetery Case. People v. Pratt, 129 N. Y. 68, 29 N. E. 7; Presbyterian Church v. Mayor, 5 Cow. (N. Y.) 538; Coates v. Mayor, 7 Cow. (N. Y.) 585; Kincaid's Appeal, 66 Pa. 411, 5 Am. Rep. 377; Sohier v. Trinity Church, 109 Mass. 1; City Council v. Wentworth St. Baptist Church, 4 Strob. (S. C.) 309; Humphrey v. Front St. Methodist Church, 109 N. C. 132, 13 S. E. 793. On the other hand, it is equally well settled that the interment of the bodies of the dead is proper, indeed necessary, and that the Legislature may not prohibit such interments in places where no possible danger to human life or health could result. Thus, it has been declared by this court that an ordinance prohibiting the establishment of a cemetery within the limits of the county of Los Angeles without the permission of the board of supervisors was unreasonable and void. Los Angeles v. Hollywood Cemetery Ass'n, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75. This went on the ground, as was pointed out in the Odd Fellows' Cemetery Case, that the county of Los Angeles "has within its limits many square miles of territory which are not only not thickly populated, but in which there are scarcely any inhabitants at all." In the Odd Fellows' Cemetery Case some of the justices intimated that the line of demarcation is that separating cities from counties; i. e., that interments may be prohibited in cities, but may not be prohibited in counties. This is perhaps too broad and general a statement of the rule. The right to prohibit interments in a given territory rests upon the conditions existing in that territory. Where a cemetery in which it is proposed to make interments is located in a thickly settled community, further interments there may be prohibited because the burial of dead bodies in close proximity to the habitations of the living has a tendency to endanger the health of large numbers of persons. Where, however, the place in which it is proposed to bury the dead is remote from human habitations, or is close to but few dwellings, the absolute prohibition of interments is an unreasonable restriction of a lawful business, not fairly justified or required for the preservation of the public health, and will not be sustained by the courts. Ordinarily, cities are thickly populated, whereas the portions of counties lying outside of cities are not. In view of this, it may be properly said as a general rule that interments in cities may be prohibited. It must be borne in mind, however, that the limits of many cities include large uninhabited areas; that oftentimes cities include extensive tracts of land which are not actually occupied by dwellings, and are not likely to be for many years to come. Where a city includes considerable tracts of this character, it will not be said that interments anywhere within the corporate limits may be prohibited merely because the territory involved is all included within the boundaries of a city. Thus, in Wygant v. McLauchlan, 39 Or. 429, 64 Pac. 867, 54 L. R. A. 636, 87 Am. St. Rep. 673, an ordinance, prohibiting burials within the city of Portland was held invalid; it appearing that there were within the city limits considerable tracts of land which were sparsely inhabited. This case is criticised to some extent by this court in Odd Fellows' Cemetery Association v. City and County; but whether or not it was rightly decided on the facts appearing we do not question the correctness of the principle that such circumstances may be shown as would make it unreasonable, even in a city, to absolutely prohibit burial anywhere within the city limits. In Lakeview v. Rose Hill Cemetery Company, 70 Ill. 191, 22 Am. Rep. 71, an ordinance prohibiting further interments in the town of Lakeview was, by a divided court, held unreasonable and invalid. It there appeared that the town of Lakeview contained 8,400 acres of land, and but 1,500 inhabitants, and that, as is stated in the opinion of the court, the lands of the company owning the cemetery "are well selected and are situated at a proper distance from the populous part of the city, in a sparsely settled community, there being but few dwellings in the immediate vicinity." This case, therefore, is no authority for the proposition that a municipality may not properly prohibit further interments in populous parts of its territory, or anywhere within the municipality, if all of it be, or may soon be, thickly settled. In the case at bar it is true that the complaint alleges that there are within the corporate limits of the city and county several large tracts of land, some of which contain several hundred acres, and that interment of dead bodies could be made on several of said tracts of land at points which would be more than a mile distant from any human inhabitant or public thoroughfare. If the ordinance did in effect prohibit the interment of dead bodies upon any such tracts of land, it may be that it would be to that extent unreasonable, or at least that this allegation would tender an issue which would require the trial court to take proof to determine whether or not under all the circumstances the ordinance was unreasonable. But at the time this ordinance was adopted, and for many years theretofore, the Penal Code of this state contained a provision (section 297) making it a misdemeanor to bury or inter, or cause to be buried, any human remains in any place within the corporate limits of any city or town in this state, or within the corporate limits of the city and county of San Francisco, "except in a cemetery or place of burial now existing under the laws of this state and in which interments have been made, or that is now or may hereafter be established or organized by the board of supervisors of the county or city and county in which such city or town or city and county is situate." By reason of the existence of this statute, it was already, at the time of the passage of the ordinance in question, a misdemeanor to inter any dead body in any place within the city and county of San Francisco outside of the existing cemeteries, or those to be authorized by the supervisors. There is no suggestion that the establishment of new cemeteries was contemplated. The ordinance, therefore, in effect merely prohibited the interment of bodies in existing cemeteries. It is not alleged that any such cemeteries did, in fact, exist upon any of the vacant tracts of land referred to in the complaint. Indeed, the only cemetery described by the plaintiff is its own, and that, as is shown by the allegations of the complaint itself, is situated in the midst of a thickly settled district. As is alleged, "many residences have been built in its neighborhood, and the same have been and are now occupied with families." As no presumptions are to be indulged in support of the pleading, it may be assumed that all the cemeteries existing in San Francisco at the date of the passage of the ordinance were similarly situated. The effect of the prohibition, therefore, was merely to prevent further interments in cemeteries situated within densely populated portions of the municipality. That such prohibition is a reasonable exercise of the police power vested in the board of supervisors clearly appears from the authorities above cited.

It is, however, claimed that the ordinance is unreasonable in its operation upon plaintiff's cemetery, considered by itself, and this contention is based upon the allegations of the complaint to the effect that the soil of the cemetery is of such character that no disease-breeding elements can be transmitted through the same, that the district in which it is has not been proven to be unhealthy or subject to epidemics, and that the cemetery does not possess the characteristics necessary to constitute it a nuisance within the definition of the Code. Civ. Code, § 3479. It is argued that no legislative body can by its mere assertion make that a nuisance which is not in fact a nuisance. This is undoubtedly true, but the ordinance in question does not proceed upon the basis that further interments are to be prohibited because the cemeteries in which such interments are sought to be made are in fact nuisances under the general law. The police power granted by the Constitution is not restricted to the suppression of nuisances. It includes the regulation of the conduct of business, or the use of property, to the end that the public health or morals may not be impaired or endangered. As was said by this court in the Odd Fellows' Cemetery Case, at page 231 of 140 Cal., page 988 of 73 Pac.: "Whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health if not suppressed or regulated, the legislative body may, in the exercise of its police powers, make and enforce ordinances to regulate or prohibit such act or thing, although it may never have been offensive or injurious in the past." "The exercise of this power is not limited to the regulation of such things as have already become nuisances or have been declared to be such by the judgment of a court." Id. The question is whether in the exercise of a reasonable discretion the board may conclude that the thing prohibited is dangerous to the public health. The views already expresed make it clear that this decision may properly be reached with regard to the interment of dead bodies in thickly settled communities. Whether the danger to be apprehended from such interment is to be best averted by a prohibition of further burials is a question of policy to be decided by the legislative body. The court is not to substitute its judgment for that of the board of supervisors. Any evidence that might be introduced tending to show that, as a matter of fact, a particular cemetery had not proven or might not prove detrimental to the public health, would not alter the fact, of which courts take judicial notice, that cemeteries situated as this one is are likely to cause such injury, and are therefore, as to further use, within the control of the legislative authority.

Much stress is laid by the appellant upon the facts that a grant of this land was made to it by the city and county of San Francisco for the purposes of a cemetery, and that the establishment and existence of the cemetery were known for many years to the city and county and acquiesced in by it. From these facts it is argued that the city is estopped to now prevent the further use of the premises for the purposes of interment of the dead. There is no force in this position. Even if the city and county had made an express contract granting to the plaintiff the right to make interments in this ground in perpetuity, such contract would have no force as against a future exercise by the legislative branch of the government of its police power. Brick Presbyterian Church v. Mayor, supra. This power cannot be bargained or contracted away, and all rights and property are held subject to it. Boston Beer Co. v. Mass., 97 U. S. 25, 24 L. Ed. 989; Butchers' Union v. Crescent City Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; New Orleans Gas Co. v. Louisiana Light, etc., Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516. The alleged estoppel relied on can have no greater force than would a contract such as the one supposed. But, in fact, there is nothing upon which to base the claim of estoppel. As appears from the complaint, this cemetery, at the time of its establishment, was outside the limits of the city of San Francisco, in a then unsettled district, more than a mile distant from the nearest residence section. If, as is claimed, the city acquiesced in the establishment of this cemetery and in the expenditure of large sums of money in its improvement, such acquiescence was based upon the conditions as they then existed. Since that time the city (or its successor, the city and county) has grown until it has surrounded the cemetery in question. This change of conditions altered what was before a harmless and beneficial enterprise into one fraught with danger to the community. There is no ground for the claim that, because the city in 1854 considered the location in question a proper one for a cemetery, it was bound to continue to so regard it half a century later, when the situation of the cemetery with relation to the city had entirely changed.

Apart from this claim of estoppel, the case does not differ materially from that made by the plaintiffs in the Odd Fellows' Cemetery Case. The decision in that case, apart from what we have here said, sufficiently answers the contention of appellant that its incorporation under the act of 1859, and its purchase of the land in question, constituted a contract, which is violated by the ordinance in question. Indeed, on all the questions raised in the earlier case, we should have rested our rulings upon a mere reference to the former decision, but for the fact that the plaintiff, as has been said, relies upon two decisions of federal courts as being in conflict with our views. In Hume v. Laurel Hill Cemetery (C. C.) 142 Fed. 552, the United States Circuit Court for the Northern District of California did hold upon a complaint not essentially different from that here presented, that the ordinance in question was void. While we have the highest respect for the opinion of the learned judge who rendered this decision, we cannot, for the reasons above stated, concur in it. It is claimed, further, that the decision of the Supreme Court of the United States in Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169, compels the conclusion that the ordinance in question is void, as depriving the plaintiff of property without due process of law. In any case, we should feel strongly inclined to follow the decision of this high tribunal, and, in a case involving a claim of right under the Constitution of the United States, we should, if that decision had been rendered in a parallel case, be bound to follow it. But we think the Dobbins Case is very different from the one before us. There the city council of Los Angeles had in August, 1901, adopted an ordinance making it unlawful to erect and maintain gas works outside of a certain district. In September the plaintiff purchased lands and made a contract for the erection of gas works upon territory which was not within the prohibited zone. After the work had been commenced, the city council on November 25, 1901, passed a second ordinance so changing the boundaries of the territory within which the erection of gas works was permitted as to include the plaintiff's land within the prohibited territory. It was alleged that the second ordinance was adopted at the instigation of a corporation which was engaged in manufacturing gas and for the purpose of preserving a monopoly by said corporation, and that the territory which was added to the prohibited territory by the second ordinance was devoted almost exclusively to manufacturing enterprises. It was held that the ordinance was void upon the ground that the facts as to the situation and conditions were such as to establish the exercise of the police power in such manner as to comprise a discrimination against the plaintiff, the court saying; "We think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power, which amounts to the taking of property without due process of law, and an impairment of property rights protected by the fourteenth amendment of the federal Constitution." It appeared there that within four months after the city council had fixed the limits within which the business of manufacturing gas could be conducted, and after the plaintiff had, in reliance upon this action, purchased land within the permitted limits and gone to expense in preparing to manufacture gas, the council had, without any apparent change of conditions requiring such action, altered the limits so as to make unlawful that which but shortly before they had, in effect, declared to be lawful. This the court characterized as a "sudden and unexplained change of limits," indicating an intent to discriminate against the plaintiff, and, following its settled rule, it held that the police power could not be made a pretext for such discrimination. But these considerations do not apply to the case at bar. Here there was no change that was either sudden or unexplained. By the ordinance itself a period of almost 18 months was given to those affected by it to prepare for the change. The ordinance, passed in March, 1900, was not to be effective until August, 1901. Furthermore, ample cause for the change was shown. The land affected by it was, when originally dedicated as a cemetery, one mile from any habitation. At the time the ordinance was adopted it had become the center of a thickly populated residence district. These circumstances, which appear from the complaint itself, afford at once the justification for the exercise of the police power, and the refutation of the claim that the exercise of that power was a mere pretense for the spoliation of private rights. On the facts alleged it cannot be claimed that there was no reasonable justification for the action of the board, and there is no claim that the ordinance was passed for the purpose of discriminating against the plaintiff by imposing upon it any onerous burdens which were not imposed upon others similarly situated. We think the appellant has shown no reason why the ordinance in question was not a valid exercise of the legislative power of the city and county.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

152 Cal. 443

BECHTEL v. WIER. (L. A. 1,841.)

(Supreme Court of California. Dec. 2, 1907. Rehearing Denied Dec. 30, 1907.)

1. Mortgages — Foreclosure — Voidable Sales—Collateral Attack.

A voidable sale under a mortgage foreclosure decree cannot be overthrown in a collateral proceeding brought after the expiration of five years from the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1470, 1541.]

2. Same—Mode of Sale.

A sale under execution or foreclosure decree is void only if conducted in a manner prohibited by statute, or in a manner which would not have been in the power of the court in the first instance to authorize.

3. Judicial Sales—Validity—Irregularity —Vacating.

Whether a motion to vacate a sale in execution of a judgment on account of irregularity of the officer making the sale should be granted rests in the discretion of the court; and it is immaterial whether the irregularity consists in disregarding the provisions of the statute or in failing to observe the directions in the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Judicial Sales, § 72.]

4. Same—Confirmation—Effect.

To invoke the rule that a departure from the directions in a decree directing a sale renders the sale void, the departure must be of a material character; and, where an officer in making a sale departs from the directions of the decree, the court may, by confirming the sale, ratify it, provided the terms so ratified are within the power of the court to impose in the first instance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Judicial Sales, § 66.]

5. Equity—Jurisdiction—Decrees.

The powers of equity dealing with subject-matters within its jurisdiction are not confined by the rules of law, but a wide play is left to the chancellor in formulating decrees so as to be capable of dealing with the conditions presented.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 986–992.]

6. Mortgages — Foreclosure — Sales — Validity.

A mortgage of one parcel given by a debtor to secure a debt, and a mortgage of another parcel given by a third person as additional security for the payment of the same debt, were foreclosed by a decree directing a sale of the debtor's parcel first and the sale of the third person's parcel in case of a deficiency. The officer, on being unable to sell the parcels separately, sold them en masse. *Held*, that the sale was at most only voidable on account of the irregularity, and was good until set aside by a direct proceeding, and could not be collaterally attacked.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1537–1539, 1559.]

7. EXECUTION—SALES—VALIDITY.

A sale en masse under an execution of distinct parcels directed to be sold separately establishes only an irregularity, and is not void, but voidable on a proper application of the judgment debtor.

8. MORTGAGES—FORECLOSURE—SALES.

Where separate parcels are offered for sale separately at a foreclosure sale, and no bid is made, the property may be sold in one parcel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1515.]

9. SAME.

Where a mortgage of one parcel given by a debtor to secure a debt, and a mortgage of another tract given by a third person as additional security for the payment of the same debt, were foreclosed by a decree directing the sale of the debtor's parcel first, and the third person's parcel in case of a deficiency, a sale of both parcels as one tract, after a failure to sell the parcels separately, was valid as against the objection that the sale imposed on the third person the whole burden of the debt, and as against the objection that a sale of the debtor's property must be made before recourse could be had to the third person's property.

10. SUBROGATION—PAYMENT BY SURETY—EFFECT.

Under Civ. Code, § 2848, and Code Civ. Proc. § 709, authorizing a surety satisfying the obligation of the principal to enforce the remedies of the creditor against the principal, etc., a mortgagor in a mortgage given to secure a debt due from a third person is, on a sale of the premises under foreclosure, entitled to be subrogated to the rights of the creditor.

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by L. D. Bechtel against L. Wier. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Herbert Cutler Brown, George H. Moore and E. W. Freeman, for appellant. L. D. Bechtel and Dunnigan & Dunnigan, for respondent.

HENSHAW, J. Plaintiff Bechtel and one Lena B. Mattern each gave a mortgage to secure the debt of the latter. The mortgages were on separate pieces of property. Bechtel's mortgage was given as additional security for the Mattern debt. The mortgage declared that it was given "as security for the payment of one promissory note according to its terms," and declared, further, that, if she shall fail to pay or cause to be paid any part of the debt secured when due, the whole debt secured shall, at the option of the mortgagee or assigns, become due and collectible. A foreclosure was had of these mortgages. The decree and order of sale directed that the parcel of land mortgaged by Lena Mattern be first sold at public auction; that, if the moneys arising from the sale of this property was not sufficient to satisfy the judgment, then, for any deficiency remaining, the parcel mortgaged by Bechtel be sold. The sheriff sold the property, and issued to the purchaser his certificate of sale in due form. His return shows that he first offered the parcel mortgaged by Mattern for sale, and received therefor no bid. He then offered the Bechtel property for sale, and received therefor no bid. Thereupon he offered both parcels for sale in one lot, and effected a sale for an amount sufficient to satisfy the judgment. After the sale, which was on April 25, 1901, Bechtel leased his land so sold to the defendant in this action at the monthly rental of $20. Subsequently, upon defendant's refusal to pay rent, plaintiff brought his action in a justice's court for unlawful detainer. The answer pleaded by way of defense the sale of the land, and alleged that the defendant had paid the rent sued for to the purchaser, a fact uncontradicted. Defendant recovered judgment in the justice's court, plaintiff appealed to the superior court, and there recovered judgment, from which this appeal is taken. In the superior court the certificate of sale offered by defendant was excluded upon the ground that the sale itself was void because made contrary to the directions of the decree. Upon the other legal questions involved the attorneys for plaintiff and defendant are in accord. The single proposition to be determined in the case is whether or not the sale was in fact void. If voidable merely, then, owing to the great lapse of time—some five years—and to the fact that this is but a collateral attack and not a direct proceeding to vacate the sale, it could not be overthrown in this action for irregularity. Respondent's position may be thus stated: The terms of the decree ordering sale are controlling. By those terms the Mattern property was to be first sold, and the Bechtel property was to be sold only in the event of and to make good any deficiency which might exist after the sale of the Mattern property; that the right to sell the Bechtel property existed and arose only after the sale of the Mattern property, and the sale of the two parcels in gross was a violation of the terms of the decree and therefore void.

1. Coming to the consideration of this proposition, it is to be remembered that a sale under execution or under foreclosure decree is void only if conducted in a manner prohibited by statute, or in a manner which would not have been in the power of the court in the first instance to have authorized. And in this regard it matters not whether the departure was from the statutory mode or from the directions of the decree. Thus it is said by this court in Humboldt Society v. March, 136 Cal. 321, 68 Pac. 968: "Whether a motion to vacate a sale of property, made in execution of a judgment on account of some irregularity on the part of the officer making the sale, should be granted rests very largely in the discretion of the court before which the motion is made; and it is immaterial whether such irregularity consists in disregarding the provisions of the statute for making the sale, or in failing to observe and follow some express direction in the judgment. A party to an action cannot claim an

absolute right to have such sale vacated, unless he shall show that he has sustained some injury by reason of the irregularity." And, says Freeman on Void Judicial Sales, § 21: "It is sometimes said that a sale under a decree must pursue the direction therein contained, that a departure from these directions renders the sale void. But to invoke this rule the departure must be of a very material character. * * * In truth, the court is not absolutely bound by the terms of its order or decree respecting the mode of the sale. * * * If the court had the power to direct the terms of the sale in the first instance, it may change them afterwards, and, if an officer or any other agent of the law, or of the court in making a sale, departs from the directions of the decree, the court may nevertheless, by confirming the sale, ratify his action, provided always that the terms so ratified are such as the court had power to impose in the first instance." Farmers' L. Co. v. Oregon P. R. R. Co., 28 Or. 44, 40 Pac. 1089; Emery v. Vroman, 19 Wis. 689, 88 Am. Dec. 726.

The question which thus arises is: Could the court in its direction for sale have provided for the sale as here actually conducted en masse to meet the contingency which actually arose, namely, that no bid was obtained for either of the parcels when separately offered? We entertain no doubt that it could. The powers of a court of equity, dealing with the subject-matters within its jurisdiction, are not cribbed or confined by the rigid rules of law. From the very nature of equity a wide play is left to the conscience of the chancellor in formulating his decrees, that justice may be effectually carried out. It is of the very essence of equity that its powers should be so broad as to be capable of dealing with novel conditions. S. P. Co. v. Robinson, 132 Cal. 408, 64 Pac. 572. The mortgage contract of the surety in this instance was the agreement that his property should be subject to the payment of the whole debt due from Mattern. His principal right was that the Mattern property should first be exhausted toward the payment of that debt before recourse was had against his property. But his obligation was none the less the payment of the whole debt. If, for any reason, the security of the principal debtor had failed utterly, no doubt can be entertained but that all of Bechtel's property could have been subjected to sale for the payment of all of the Mattern debt. No doubt, therefore, can be entertained but that it would have been within the power of the court, if it had anticipated a failure to derive any money from the sale of the Mattern property, if, in other words, it had become valueless as security, or if, as here, after fully preserving the rights of the surety by ordering first a sale of the principal debtor's property, the court had further decreed that, in case of failure to effectuate the sale, both pieces of property might be offered and sold in gross. And, in the absence of fraud or unfair advantage taken (and it is to be noted that there is no attack upon the sale for any such reason), it would be assumed, from the fact that the sheriff was unable to sell the parcels of land separately and could only sell them as a whole, that the lands were more valuable taken together than separately. Hibernia S. & L. Society v. Behnke, 121 Cal. 339, 53 Pac. 812. Thus we find that it has been consistently held in this state since Nagle v. Macy, 9 Cal. 426, that a sale irregularly made is not void, but voidable merely, and is good until regularly set aside. The title of a purchaser at such sale cannot be impeached in a collateral action for any such irregularity. Moreover, it is held that a sale en masse, instead of by separate parcels, even if not authorized, establishes only an irregularity and not a lack of power, and is not void. Thus in Vigoroux v. Murphy, 54 Cal. 346, it is said: "There is no doubt that a sale en masse under a writ of execution of several known and distinct parcels, at a price greatly below the actual value of the property, cannot be sustained against the objection of the judgment debtor. Such sales are not void, but are voidable, and will be set aside upon a proper application of the judgment debtor when made in a reasonable time after such sale, where there is no ground in reason for belief that it was less beneficial to the judgment creditor or debtor than it would have been had the sale been made of the separate parcels"—citing San Francisco v. Pixley, 21 Cal. 57; Page v. Randall, 6 Cal. 32. And in Hudepohl v. Liberty Hill, etc., Co., 94 Cal. 588, 29 Pac. 1025, 28 Am. St. Rep. 149, an appeal from a proceeding instituted to set aside an execution of sale of several distinct lots of land because they were sold in gross, this court said: "It is not sufficient to allege merely that several separate tracts were sold in a lump by the sheriff. Riddell v. Harrell, 71 Cal. 262, 12 Pac. 67. Such cases are voidable, not void; and one who seeks to have a sale en masse set aside should show that none of the conditions which would authorize the sale of all the parcels together existed at the time of the sale." And Freeman on Executions, § 1711, says: "The decided preponderance of the authorities on this subject shows that a third person cannot object to a sale en masse; and that, when the person entitled to complain does not do so by some appropriate proceedings, the sale is impregnable to any collateral assault, and must be treated as valid."

2. We have so far considered the question of the sale to the extent of determining that, at the worst, it was not void, but voidable merely, and that respondent's remedy was by direct proceedings within a seasonable time to vacate the sale, proceedings which were never taken. But equally demonstrable is the proposition that, in the absence of

fraud and injury shown, the sale en masse of the two parcels of land, under the circumstances indicated by the sheriff's return, was not even irregular, but was a perfectly valid exercise of power. Marston v. White, 91 Cal. 40, 27 Pac. 588, quotes Freeman on Executions to the following effect: "The rule applicable to such cases is stated, and we think correctly, in Freeman on Executions, § 296, as follows: 'The rule that distinct parcels should be separately sold is not generally enforced to the extent of denying the right to sell when the sale can be made in no other way. Hence the officer, after offering the parcels separately and in various combinations, without receiving any bids, may then offer and sell them en masse.' * * * Here the lots were offered separately, as directed by the appellant, and the only ground urged for setting aside the sale was that they were sold together. This, as we have seen, was not a valid ground. * * *" So, also, in Connick v. Hill, 127 Cal. 164, 59 Pac. 832, it is said: "It is now the settled rule in this state that whenever separate known parcels of land are offered for sale separately in foreclosure proceedings, and no offer or bid made for either parcel, then the property may be offered and sold in one parcel. Marston v. White, 91 Cal. 40, 27 Pac. 588; Hibernia, etc., Society v. Behnke, 121 Cal. 341, 53 Pac. 812. The same rule is laid down by the Supreme Court of the United States. White v. Crow, 110 U. S. 190, 4 Sup. Ct. 71, 28 L. Ed. 113. The rule is to consider every sale made by an officer of court under the mandate thereof as final. Hopkins v. Wiard, 72 Cal. 262, 13 Pac. 687." See, also, Anglo-California Bank v. Cerf, 142 Cal. 304, 75 Pac. 902. Nor can it matter, as argued by respondent, that the effect of such sale is to impose the whole burden of the debt upon his land, and at the same time to force him in redeeming to redeem also the land of the principal debtor.

By his contract he imposed the burden of the whole debt upon his land, if, for any reason, the security of the principal debtor should fail. He is entitled to be subrogated to all the rights and remedies of the judgment creditor, and this is all he may justly ask. Civ. Code, § 2848; Code Civ. Proc. § 709. Respondent's contention that the direction was for a sale of the principal debtor's property before recourse could be had to the property of the surety, and that nothing can fill the measure of this requirement but an actual sale, presents altogether too narrow a view of the matter, and one not at all agreeable to equity. In this view, if an actual sale of the property of the principal debtor is a prerequisite to the subjection of the surety's property to the payment of the debt, it would amount to a confiscation of the creditor's security to the extent of his lien against the surety's property, in case an actual sale of the property of the principal debtor could not be effected. The reasonable and equitable view of the matter we take to be that adopted and expounded by the Supreme Court of Iowa. According to the statutes of that state concerning the homestead of the judgment debtor, it is provided that such homestead should not be sold except to supply the deficiency remaining after exhausting other property of the debtor also liable to execution. In Burmeister v. Dewey, 27 Iowa, 468, there had been a foreclosure upon real property, including the homestead of the judgment debtor. At the execution sale the property was offered in two parcels so as to exclude the homestead, and no bid was received therefor. Thereupon it was offered in gross, including the homestead, and sold. It was there argued, as here, that the law required a sale of the other property, and permitted a sale of the homestead only to supply a deficiency. The court said: "But was the other property named in the writ exhausted? I say it was when it was all offered in the smallest legal subdivisions, and not sold for want of bidders. If, after being thus offered, the other 200 acres had been offered in a body and not sold, and the 240 had been offered and sold, it would to my mind be the merest talk to say that the other property was not exhausted, and therefore the homestead could not be sold; that an offer of the other property, without selling it, is not exhausting it within the meaning of the law. The power to sell, the duty to sell, would, in my judgment, beyond doubt arise after the offer of the 200 in gross, whether sold or not. If this is not so, then the sheriff might be required to perform, in some instances, an impossibility before the homestead could be sold."

With this view we are in full accord, and upon both of the grounds above mentioned the judgment must be reversed and the cause remanded.

We concur: ANGELLOTTI, J.; LORIGAN, J.; McFARLAND, J.

I dissent: BEATTY, C. J.

SHAW, J. I concur in the judgment upon the grounds stated in part 1 of the foregoing opinion. As to the second ground, it appears that the appellant was a surety only, and the provision of the decree requiring a separate sale was for his benefit I am not prepared to say that he should not have the irregular sale set aside in a direct proceeding for that purpose.

GLENN et al. v. BECHTEL. (L. A. 1,853.)

(Supreme Court of California. Dec. 2, 1907. Rehearing Denied Dec. 30, 1907.)

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by L. W. Glenn and others against L. D. Bechtel. From a judgment for plaintiffs, defendant appeals. Affirmed.

Herbert Cutler Brown, George H. Moore, and E. W. Freeman, for appellant. L. D. Bechtel and Dunnigan & Dunnigan, for respondents.

PER CURIAM. This was an action to quiet title brought by the grantee of the purchaser at foreclosure sale of the property of the defendant Bechtel. The defense was that the sale was void. Judgment passed for plaintiff. The sale being the same sale as that considered in Bechtel v. Wier (L. A. 1,841, this day decided) 93 Pac. 75, and the validity of the sale there having ben upheld, the judgment in this case is affirmed.

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152 Cal. 523

RIANDA v. WATSONVILLE WATER & LIGHT CO. et al. (S. F. 4,318.)

(Supreme Court of California. Dec. 9, 1907.)

1. PLEADING—DEED—FAILURE TO DENY UNDER OATH—ADMISSION.

Under the express terms of Code Civ. Proc. § 448, the execution of deeds relied on as a defense and set forth in full was admitted by plaintiff's failure to file an affidavit denying their genuineness and due execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 869.]

2. WATERS—CONVEYANCE OF LAND—APPURTENANCES—RIPARIAN RIGHTS.

Where decedent "granted, bargained, sold, and conveyed" land to her daughters, all her legal and equitable interest therein, together with all that was appurtenant or incident to it or beneficial for its enjoyment passed; and her estate has no interest authorizing her administratrix to sue to set aside deeds to water rights and riparian rights appurtenant to the land made by decedent to defendants before the conveyances to her daughters and to quiet title to such rights, on the ground of fraud in procuring the deeds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 167–172.]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Ellen Rianda, administratrix, against the Watsonville Water & Light Company and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed and dismissal of action directed.

Wyckoff & Gardner and Charles A. Shurtleff, for appellants. Geo. P. Burke and Dickerman & Torchiana, for respondent.

LORIGAN, J. This appeal is prosecuted by the defendants from a judgment in favor of plaintiff and from an order denying their motion for a new trial. The action was brought to quiet title to certain riparian and other water rights in Santa Cruz county, and to set aside two certain deeds made by plaintiff in this action to the defendants Smith and Montague on the ground of fraud in their procurement.

Referring generally to the pleadings, it is alleged in the complaint that Carmen A. de McKinlay died on October 6, 1901, and that plaintiff was duly appointed and qualified as administratrix of her estate; that on September 27, 1884, said Carmen A. de McKinlay was the owner in fee simple of a tract of land in Santa Cruz county, being lot 1 of the Rancho Los Corralitos, containing 855 acres, which land embraced part of a certain lake known as "Pinto Lake," and part of a certain creek known as "Corralitos creek," in the waters of both of which she had riparian rights appurtenant to her said land; that on said September 27, 1884, and on June 27, 1885, said Carmen A. de McKinlay made and executed in favor of said Smith and Montague deeds in which she granted to them "all and singular the water and riparian rights and privileges of every kind and description which belong or in any manner pertain to" the land described in the complaint, together with a right to have, take, and use the flow of the waters of "Corralitos" creek, and to enter and lay down pipes or flumes on the lands of the grantor "for the convenient use and management and appropriation of said water, water rights, and riparian rights as aforesaid," with a covenant on the part of the grantees as to a given quantity of water from said Corralitos creek which the grantor was entitled to take for usual household, culinary, and domestic purposes, including the watering of stock on her premises, from any pipe or flume laid by said grantees, and which, on her demand, they would supply her from any point on the pipe or flume line she might designate.

It was further alleged that, when Mrs. McKinlay executed said deeds, she did not understand English, and had no independent advice relative to the transactions evidenced by them; that, when the grantees presented said deeds for execution, the portion thereof purporting to convey water, water rights, and riparian rights was not read or explained to her; that, on the contrary, said grantees informed her that the deeds effected simply the transfer by her of a right to enter her lands for the purpose of laying pipes and flumes to take water from the Corralitos creek; that she did not know that said deeds contained anything purporting to convey water, water rights, or riparian rights other than pertained to the waters of said Corralitos creek; that she did not know that she had conveyed her water rights and riparian rights in either of said deeds, and did not discover the contents of them, or the legal effect of said deeds until December, 1900, when she immediately took steps to institute suit to set said deeds aside, but before she was able to do so died.

In another count it is alleged that there was no consideration for the deeds; that the covenant therein by the grantees to furnish her water from the pipes or flumes had never been fulfilled; and that, when the covenant in that regard was made by them in said deed, it was made without any intention on the part of either of them of performing it.

The last count set up a claim of adverse possession to all said water and water rights by Mrs. McKinlay from the date of said deeds to the time of her death. It appears from the deeds, which are attached to the complaint, that the one executed by Mrs. McKinlay September 27, 1884, was recorded January 4, 1901, and the one executed June 27, 1885, was recorded on July 10, 1885. An inspection of the deeds shows that the only difference in their contents is that the last deed specifies the size of the service pipe through which Mrs. McKinlay might take water from the pipe or flume of the grantees, with the provision that she should furnish the pipe for that purpose.

It is further alleged that Smith and Montague in 1897 conveyed to the defendant, the Watsonville Water & Light Company, all the riparian rights and privileges acquired by them under said deeds, but with notice that, when Mrs. McKinlay executed them, she did not know there was anything in them purporting to carry any water or water rights whatever. The prayer was for a decree adjudging that the estate of said Carmen A. de McKinlay, deceased, is the owner of all the water, water rights, and riparian rights and privileges of every kind belonging or pertaining to the land described in the complaint.

A demurrer, general and special, to the complaint having been overruled, the defendants jointly answered, denying all the allegations of the complaint, except the execution of the deeds sought to be set aside and set up as a further and separate defense, that on August 6, 1901, the said Carmen A. de McKinlay, by deed of gift, granted and conveyed a portion of the property described in the complaint to her daughter Flora McKinlay Duckworth, and on the same date, by similar deed, conveyed to her daughter Ellen McKinlay Riandi another portion of said property, reserving, however, to herself in the whole of said land so separately conveyed a life estate. The said two conveyances to said daughters comprised and embraced all the property described in the complaint. It was then averred that said Carmen A. de McKinlay subsequent to said conveyances to her daughters, and on October 6, 1901, died, and that after that date neither she nor her estate, nor the administratrix thereof, had or possessed any right, title, or interest in and to the land described in the complaint, or in any of the hereditaments or appurtenances thereunto appertaining or belonging; that said estate has no interest in the subject-matter of the action, and is not the real party in interest. Both deeds from Mrs. McKinlay to her daughters were set forth at length as exhibits to the answer and made a part thereof.

We have stated the contents of the pleadings in this general way as sufficiently presenting the point upon which this appeal is to be determined.

While many grounds are urged by appellants for a reversal of the judgment and the order denying a new trial—that the court erred in overruling the demurrer to the complaint, insufficiency of the evidence to sustain the findings and errors alleged to have been committed in the admission of evidence and in other respects—the view we take upon another point presented by appellants makes it unnecessary to enter into a consideration of these matters at all. This point is addressed to the right of the plaintiff as administratrix of the estate of Carmen A. de McKinlay, deceased, to maintain this action. In that regard it is urged by appellants that, as it is admitted by the pleadings that Mrs. McKinlay had before her death conveyed by deeds of grant all the property described in the complaint to her two daughters, such conveyances carried with them as the legal effect thereof all interest, legal or equitable, she had in the property, including all water or riparian rights pertaining or appurtenant to said lands; and hence the estate of Mrs. McKinlay had no interest whatever in the lands described or in the water or riparian rights appurtenant or incident thereto. In considering this point, it will be observed that in the answer of defendants, to which we have called attention, the conveyances to her daughters by Mrs. McKinlay of the land described are set forth in full and made part of that pleading. There was no affidavit filed by plaintiff denying their genuineness and due execution, and hence under section 448 of the Code of Civil Procedure these matters were deemed admitted. This being so, the question then is squarely presented as to the effect of such conveyances upon the right of the representative of the estate of Mrs. McKinlay, or her estate, to maintain the action. We think that in view of such conveyances no such right exists. The terms of conveyance used in the deeds to the daughters are "grant, bargain, sell, and convey," which are of sufficient recognized legal effect to carry all legal or equitable interests she may have had in the land, together with all that was appurtenant or incident to it or beneficial for its enjoyment, and the effect of their use in the conveyances of the land in question was to divest the grantor, Mrs. McKinlay, of any interest whatever she possessed or might have in and to the water rights or riparian rights appurtenant thereto.

Counsel for respondent seem to take the position that, because Mrs. McKinlay had prior to her conveyances to her daughters conveyed these riparian rights to Smith and Montague, therefore they were severed from the lands to which they were appurtenant, and did not pass under the conveyances to her daughters of such lands. There is certainly no reservation as to such rights in the deeds to her daughters, nor anything pretending to accomplish it, and the deeds themselves stand unassailed. As to a severance of the riparian rights in the lands to which they were appurtenant, the very theory of this case is that nothing of the kind was ever accomplished. If the allegations of the complaint were true that the purported conveyances of the water and water rights by Mrs. McKinlay to Smith and Montague were obtained by fraud—the Watsonville Light & Water Company taking with notice thereof —then at least as between these parties Mrs. McKinlay had never parted with her title to them. There then never was a severance effected in either law or equity as against Mrs. McKinlay, and under the deeds to her daughters by virtue of the comprehensive language of conveyance used in them all her interest, of whatever character, passed with the conveyances of the lands to which they were appurtenant. Either these riparian rights were appurtenant to the land conveyed to the daughters at the time the conveyances to them were made or they were not. If they were not, it was because they had previously been severed by a valid conveyance of them to Smith and Montague, and hence, therefore, neither Mrs. McKinlay during her lifetime, or her estate at her death, had any interest in them. If, on the other hand, the conveyances to Smith and Montague were void, then in legal contemplation these rights as between Mrs. McKinlay and her daughters as grantees had never been severed from the lands, and passed under the conveyances of it from her to them, the granting clause of which we have seen was ample to convey them. In neither view could Mrs. McKinlay or her estate have any claim to such riparian rights subsequent to the last deeds—those to her daughters. Let us concede, for the purpose of illustration, that the deeds to Smith and Montague were void, and that prior to making the conveyances to her daughters Mrs. McKinlay had successfully maintained an action against the defendants here, and had succeeded in having the deeds to the defendants set aside for fraud. The effect of such successful effort would not be to revest in Mrs. McKinlay the riparian rights purporting to have been conveyed to Smith and Montague as severed and distinct from the lands to which they had been riparian when such conveyances were made. The legal effect would be to declare that such rights had not been severed as appurtenant to the lands if an invalid attempt had been made to sever them, and it could not for a moment be contended that the subsequent deeds to her daughters, such as she made of the lands described in the complaint, did not carry such water rights and riparian rights as appurtenant to them. The same result would follow if the conveyances to the defendants were nullified in the present action of the administratrix. If the attempted severance by the conveyance to Smith and Montague of such riparian rights from the lands to which they were appurtenant should now be declared void, the legal effect would be to restore or attach them as appurtenant to the lands conveyed to the daughters. And, even if as claimed, in one of the counts of the complaint, Mrs. McKinlay had acquired title by adverse possession to these riparian rights subsequent to the deeds to Smith and Montague, unquestionably whatever right she so acquired passed under her deed to her daughters. In fact, as far as any interest which she had in said water or riparian rights is concerned, the comprehensive terms of the conveyances to her daughters of the lands to which they were appurtenant carried them, and she and her estate would be estopped from asserting that they did not. The estate could not in any view have any interest in them.

Little authority is cited on either side as to the effect of the conveyances to the daughters of the riparian rights involved here. The appellants insist, and we think correctly, that the rule is so clear that they did pass under them; and hence that the estate of the grantor thereof had no interest in them, as to make such citations unnecessary. Counsel for respondent rely on the cases of Kimball v. Gearhart, 12 Cal. 28, and Collins v. O'Laverty, 136 Cal. 31, 68 Pac. 327, as sustaining their position. But the cases cited lend no support to their claim. The Kimball Case simply declares that, while a deed carried the property and future use of water, it did not retroact to carry a right of damages for the past illegal use of it. This case does not support in any particular the position of respondent. The Collins Case was an action by the administrator of the estate of Collins to set aside two conveyances of land made by his intestate a few days before his death. The result of such an action, if successful, would have been to vest the property in the estate of Collins. There is no analogy between the Collins Case and the one at bar. If, after making the alleged void deed, Collins had conveyed the property to third parties, the case would be analogous to the one under consideration. The fact that Mrs. McKinlay did, and Collins did not, make such a subsequent conveyance differentiates the two cases. In the Collins Case the property involved in the fraudulent deed, if such deed were set aside, would inure to the estate of Collins. In the present case, if the claim of plaintiff's intestate was sustained, and the deeds to Smith and Montague set aside, the estate of Mrs. McKinlay would not get the property involved—the riparian rights—because the title and right asserted thereto had passed from decedent in her lifetime by the conveyances to her daughters of the lands to which they were appurtenant. In the Collins Case this court said: "The sole test of the administrator's right of action is the right of the estate to the property." When we apply this test to the matter under review, it is evident that the plaintiff cannot recover because the administratrix has no right to the property involved in the action and the estate no interest in it. No further elaboration of the proposition is necessary.

Therefore, in the view we take, the judgment and order must be and is, reversed, and, as the plaintiff has no interest in the subject-matter of the action and is without right to maintain it, the lower court is directed to dismiss it.

We concur: SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.

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152 Cal. 500

HOUGHTON et al. v. LOMA PRIETA LUMBER CO. (S. F. 3,837, 3,920.)

(Supreme Court of California. Dec. 6, 1907.)

1. APPEAL—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence contrary to strong evidence, but not wholly unwarranted by the evidence, will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935–3937.]

2. MASTER AND SERVANT — WORK OF INDEPENDENT CONTRACTOR — NATURAL CONSEQUENCES OF WORK — EVIDENCE — INSTRUCTIONS.

Where, in an action for injuries from blasting while constructing a road, the evidence showed that the road was being constructed through an uninhabited and practically untraveled region, instructions authorizing the jury to apply the doctrine that, though the work was being done for defendant by an independent contractor, yet defendant was liable if the work done would necessarily produce wrongful consequences, without reference to negligent acts by the contractor, or was intrinsically dangerous and constituted ipso facto a nuisance, were improper.

3. NUISANCE—ELEMENTS—BLASTING.

Without reference to the particular locality in which it is carried on, blasting is not so intrinsically dangerous as to be ipso facto a nuisance, so that the blaster will be liable for injury caused by it irrespective of his negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 15, 23.]

4. MASTER AND SERVANT—INDEPENDENT CONTRACTOR—LIABILITY OF MASTER.

Where liability depends on negligence, an independent contractor is liable for the negligence, and not the employer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1241.]

5. SAME.

An employer contracting with an independent contractor to construct a wagon road through an uninhabited and substantially untraveled region is not liable for injury happening to some one injured by the blowing out of a stump in the road, though the blasting was done without notice; the chance of injury being remote, and the failure to give notice being the negligence of the independent contractor, and not of the employer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1259, 1260–1264.]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Harriet E. Houghton and others against the Loma Prieta Lumber Company. From a judgment for plaintiff and from an order denying a motion for a new trial, defendant appeals. Reversed.

Bishop, Wheeler & Hoefler and William Rix (Alfred J. Harwood, of counsel), for appellant. Sullivan & Sullivan, Theo. J. Roche, and Chas. M. Cassin, for respondents.

McFARLAND, J. These appeals both arise out of an action in the superior court entitled "Harriet E. Houghton et al. v. Loma Prieta Lumber Co." (a corporation). That action was brought by the widow and minor children of Herbert E. Houghton, deceased, to recover damages for his death, alleged to have been caused by the negligence of the defendant. The verdict and judgment were for plaintiff, and from the judgment and from an order denying a motion for a new trial the defendant appeals. The appeal from the order denying a new trial is presented in transcript S. F. No. 3,920, and the appeal from the judgment is presented in transcript, S. F. No. 3,837. The two appeals were heard together and will be determined in one opinion.

The injury which caused the death of the deceased occurred in this way: On February 2, 1901, a road was being constructed along a wooded and mountainous region, and about noon of that day a stump which stood in the course of the projected road was exploded. At the time of such explosion the deceased was walking along the course of the said road that was thus being constructed, and was in the close vicinity of said stump, and received such injuries from the consequences of the explosion as caused his death a few days after. It is contended by appellant that the persons who were actually engaged in the construction of the road had given ample notice of the coming explosion, and were not guilty of any negligence in the premises, and that the injuries of deceased were caused by his own contributory negligence; but, while there was strong evidence sustaining this contention, still there was some conflicting evidence on these points, and we cannot say that the finding of the jury against the contention of appellant as against these matters was wholly unwarranted.

The point in the case which requires the most attention, and about the only one that need be discussed in detail, arises out of the contention of the appellant that the road in question was being constructed by one A. W. Wyman as an independent contractor under a contract with appellant, by which Wyman was to have full control and direction of the construction of the road, and was to construct the same for a certain named sum of money; that the explosion was caused by Wyman; that, if there was any negligence in handling the explosion, it was the negligence of Wyman and his employés; and that, therefore, the appellant is not liable for the death of the deceased under the rule of respondeat superior. The evidence was quite clear and strong that the road was being constructed by Wyman as an independent contractor, but respondents contend that there was some evidence which should be considered as conflicting with appellant's evidence on this subject to such an extent as to have warranted the jury in finding that Wyman was not an independent contractor. It is not necessary, however, for us to pass upon this question; for, even if the jury had found that the road was being constructed by Wyman as an independent contractor, still they would have been authorized to find appellant liable, under certain instructions of the court which were erroneous. These instructions occur in several forms, but the point is sufficiently presented in instructions numbers 25 and 27. Instruction 25 as asked by appellant is as follows: "I instruct you as a matter of law that where work is contracted to be done by an independent contractor, the owner or employer retaining or exercising no management or control over the doing of the work, then the employer is not liable for injuries or death resulting from the negligence of the contractor." The court refused to give this instruction as asked; but of its own motion gave it with the following addition: "But this rule, however, is subject to some very important exceptions, among which are the following: If the performance of the work will necessarily bring wrongful consequences to pass unless guarded against, the law will hold the employer answerable for negligence in the performance of the work. If the work contracted for is of such a character that it is intrinsically dangerous or will probably result in injury to a third person, the one directing to have it done is liable for such injury, although the injury may be avoided if the contractor take proper precaution." Instruction No. 27 as asked by appellant is as follows: "I further instruct you that if you find from the evidence that said Herbert E. Houghton was killed by a blast exploded in the course of construction of the road referred to in the complaint, and that such blasting was done by a person or persons hired or employed by A. W. Wyman, and that the said A. W. Wyman was engaged in the construction of said road for the Loma Prieta Lumber Company, under an agreement or contract to construct said road for a specific sum of money, and that in and by such contract the right of selection or control of the persons employed by said A. W. Wyman was not reserved by the Loma Prieta Lumber Company, then said Loma Prieta Lumber Company would not be liable for the death of said Herbert E. Houghton, even though you should find that the persons who did the blasting which resulted in the death of the said Houghton did said blasting in a negligent manner." The court refused to give the instruction as asked, but gave it with the following amendment made by the court of its own motion: "Unless you believe from the evidence that the work contracted to be done would necessarily bring wrongful consequences to pass unless guarded against, or unless you believe that the work contracted to be done was of such a character that it was intrinsically dangerous and would probably result in injury to a third person."

By these instructions the jury were told that in this case they might apply the doctrine that, although the work was being done by an independent contractor, still the appellant was liable for any injury caused thereby if the work being done would necessarily produce the wrongful consequences, without reference to the negligent acts by the independent contractor, or was intrinsically dangerous and constituted ipso facto a nuisance; but the evidence and the facts in the case did not warrant such instruction. The road was being constructed on land owned by one George Olive through a wild, mountainous, uninhabited, and practically untraveled region. It was called the "Spignet Gulch Road." The nearest house was about one-half mile away from the point of explosion. Near a part of the course of the road there was an old trail about one-half or three-quarters of a mile long made many years ago by said Olive, for the hauling of wood upon a one-horse sled. It had not been used for that purpose for many years, and in places was so obstructed by brush and undergrowth that it could scarcely be traveled by pedestrians. There was a place somewhere in that general region of the country called "Olive Springs," which was in the summer months visited to some extent by campers; but it does not appear that even in those months any considerable number of those campers traveled this trail. At the time of the explosion in the month of February it was practically unused. James Olive, a witness for the plaintiff, testified as follows: "When this Spignet Gulch Road was being built, there were no campers there. There were no guests at the Springs at that time. There were no campers in January or February, 1901." George Olive, one of the witnesses for the plaintiff, testified substantially to the same thing. Speaking of this trail, he said: "It was almost impassable in February, 1901. * * * In building the wagon road up to the Spignet Gulch, they even had to brush out the sled road. In February, 1901, it was impassable for a man. Part of the time it was pretty well grown up with brush. The purpose for which that sled road was built was for getting out wood, etc., on a sled. It was what is called a 'gulching road.' It got all covered with brush because it was not used. A lot of brush grew over it. It was never a thoroughfare." Oscar Chase, another witness for plaintiff, said of this trail: "We had to crawl through the brush over part of it. There was considerable of it was brush. The trail was very little frequented so that it was all growed over." Apart from this old trail, in the condition above described, there was in the vicinity of the road that was being built no thoroughfare or traveled road near enough to be affected by an explosion, and no residences or people engaged in work or business of any kind. It is difficult to imagine a more isolated place, or one at which an ordinary blast would be less likely to cause any injury to person or property. Under these circumstances, it would be a rare thing for a blast there to do injury to any one even if carelessly exploded and without any warning; and yet the jury were told they might hold the defendant liable for injury caused by the blowing out of a stump at such a place, even though the work was being done by an independent contractor. We are satisfied that this view of the case was erroneous, that there was no warrant for the jury finding that the work was done by Wyman as an independent contractor, and still finding that the appellant was liable; and for this reason the judgment and order must be reversed.

Counsel on both sides have cited many authorities touching the question above determined, but we do not deem it necessary to minutely examine and discuss these authorities. The weight of authority seems to be that blasting, without reference to the particular locality in which it is carried on, is not so intrinsically dangerous as to be ipso facto a nuisance, so that the blaster would be liable for the injury caused by it whether or not he was guilty of any negligence in the manner in which the blasting was done; but that the question of his liability would depend upon whether or not he was guilty of any negligence. See French v. Vix, 21 N. Y. Supp. 1016, 2 Misc. Rep. 312, and the many cases there cited. In the said case of French v. Vix it is said: "The later decisions all tend to hold that blasting is not dangerous in itself, and we think that view is now firmly established by the courts of this state." Quotation is made from Herrington v. Village of Lansingburgh, 110 N. Y. 145, 17 N. E. 728, 6 Am. St. Rep. 348, in which case the court say: "If there was any culpable negligence which caused the injury to plaintiff, it was that of the contractors. They had entire control of the work and the manner of its performance. They could choose their own time for firing the blast, and select their own agents and instrumentalities. They could make the charges of powder large or small, and they could in some degree smother the blasts, so as to prevent falling rocks and much of the noise of explosion, or they could carelessly omit all precautions, and for the consequences of their negligence they alone would be responsible. If it were a prudent thing to notify persons in the vicinity of the blast before it was fired, then the contractors should have given notice, but the duty to give it did not devolve upon the village." It is not necessary, however, in the case at bar, to discuss the question whether blasting in the heart of a city or in a thickly populated place in close proximity to buildings and traveled streets and highways is so necessarily dangerous that one could not be relieved from injurious consequences by giving the work to an independent contractor. In considering questions similar to the one here under discussion, this court has recognized the distinction between acts done in secluded places and acts done in thickly populated places. In Kleebauer v. Western Fuse Co., 138 Cal. 497, 71 Pac. 617, 60 L. R. A. 377, 94 Am. St. Rep. 62, where the action was for damages caused by the explosion of powder stored by the defendant, the court said (we quote from the syllabus which correctly states the decision) as follows: "The storage of gunpowder in a powder magazine for use in the manufacture of fuses, in a place properly selected, is not a nuisance per se; and in an action for damages for explosion of the gunpowder so stored by defendant, where no negligence was shown, it was error to give an instruction to the jury making no distinction between the use and manufacture of powder, nor any exception to the rule where a secluded situation was selected, and others were afterwards attracted to the locality, and making the defendant liable, notwithstanding the exercise of the greatest care and notwithstanding the explosion and damage were caused by the unlawful act of a third person entirely beyond the control of defendant. In such a case the defendant is not responsible." And, of course, where liability depends upon negligence, the independent contractor is liable for the negligence, and not the party who lets the contract. To hold that a party cannot contract with an independent contractor to construct a wagon road through a uninhabited and substantially untraveled, wild, mountainous region, without being liable for injury that possibly might happen to some one by blowing out a stump on the course of the road, would be substantially to hold that in no case where there is an independent contractor can the letter of the contract escape the rule of respondeat superior. In the case at bar the chance of injury from the blasting of a stump, even when done without notice, was most remote, and the failure to give notice, if there was such failure, was the negligence of the independent contractor and not of the appellant. There is nothing in the contention of respondents that appellant was a trespasser on the land on which the road was to be built. It abundantly appears in the evidence that the road was constructed with the knowledge and consent of the owner of the land, and that he was paid by appellant for the privilege of constructing it.

Quite a number of other points are made by appellant, but we do not deem it necessary to notice them in detail. Most of them are unimportant, and others may not arise upon a new trial. In Harriet E. Houghton et al., Plaintiffs and Respondents, v. Loma Prieta Lumber Company, a Corporation, Defendant and Appellant, S. F. No. 3,837, the judgment appealed from is reversed; and in Harriet E. Houghton et al., Plaintiffs and

Respondents, v. Loma Prieta Lumber Co., a Corporation, Defendant and Appellant, S. F. No. 3,920, the order denying a new trial is reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

152 Cal. 531

RISSER v. SUPERIOR COURT OF COUNTY OF SACRAMENTO et al. (S. F. 4,925.)

(Supreme Court of California. Dec. 9, 1907.)

HOLIDAYS — SPECIAL HOLIDAYS — JUDICIAL PROCEEDINGS.

One charged with felony cannot complain because his case is set down for trial on a day declared by the Governor a special holiday, under Act Nov. 23, 1907, on the theory that the Legislature can only provide for a general holiday, and that the provision that the superior courts may act on special holidays is void; for, if the law providing for special holidays is void, the proclamation declaring a day a special holiday is without force.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Holidays, § 4.]

In Bank. Appeal from Superior Court, Sacramento, County; J. W. Hughes, Judge.

Application for writ of prohibition by Albert Risser against the superior court of county of Sacramento and another. Denied.

Grove L. Johnson, A. L. Shinn, C. E. McLaughlin, C. O. Busick, and C. B. Harris, for petitioner. L. T. Hatfield, for respondents.

PER CURIAM. The petitioner being under a charge of felony in the superior court of Sacramento county, his case was set down for trial on a day which has been declared a "special holiday" by the Governor, under the laws enacted at the special session of the Legislature lately convened, and approved November 23, 1907, amending sections 10 and 135 of the Code of Civil Procedure. He applies for a writ of prohibition to prevent the superior court from proceeding with the trial of his case on a special holiday. His theory is that the Legislature cannot provide for the creation of a holiday other than a general and full holiday; that the provisions of the aforesaid statutes designating special holidays and declaring that the superior courts may act on special holidays in certain classes of cases are void; and that the effect is that the days which are declared special holidays under that law are really general holidays, on which, as he contends, the court cannot be open.

If the law providing for special holidays is void, the effect would not be to make days so designated full general holidays. In that case the proclamation declaring them special holidays would be without authority of law and of no force. They would, in that event, be no holidays at all, and the superior court could proceed. In any case, therefore, the trial would be lawful.

The application is denied.

152 Cal. 507

PACIFIC VINEGAR & PICKLE WORKS v. SMITH. (S. F. 4,319.)

(Supreme Court of California. Dec. 6, 1907.)

1. CORPORATIONS — AUTHORITY OF OFFICERS—UNAUTHORIZED ACTS—RATIFICATION.

A corporation did not ratify its president's unauthorized act in receiving notes, so as to exculpate him from liability to it by presenting the notes in bankruptcy proceedings against the maker and receiving part payment of the amount due thereon, where it first learned of the unauthorized acts on the maker's failure; it being the corporation's duty to realize as much as it could upon the notes improperly taken so that his liability could be accurately estimated, and the general rule that a ratification of an agent's unauthorized act is an acceptance by the principal of the responsibilities of the act and the substitution of himself for the agent being applied to innocent third persons, and to relieve the agent where the principal could have disaffirmed or rescinded as against the innocent third party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1713–1719.]

2. NONSUIT — MOTION — SEVERAL CAUSES OF ACTION.

A motion for a nonsuit directed to all the causes of action sued on is not sustainable as to one cause of action only.

3. APPEAL — HARMLESS ERROR — REFUSAL OF NONSUIT.

Any error in refusing a nonsuit as to a cause of action is harmless where the court instructed the jury to find for defendant thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4209–4211.]

4. CORPORATIONS—BOOKS—IMPUTED KNOWLEDGE OF CONTENTS—UNAUTHORIZED ACTS OF PRESIDENT.

The rule that directors are presumed to know facts disclosed by the corporation's books is designed for the protection of third persons and stockholders, and cannot be applied against a corporation to defeat the liability of its president to it for unauthorized acts.

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by the Pacific Vinegar & Pickle Works against Elizabeth E. Smith, executrix. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

See 78 Pac. 550.

Carter P. Pomeroy, for appellant. Campbell, Metson & Campbell (Thomas H. Breeze, of counsel), for respondent.

HENSHAW, J. Sidney M. Smith in his lifetime was the president of the plaintiff corporation. This action was brought against his estate to recover as damages the balance remaining due on certain promissory notes executed by the California Packing Company to plaintiff corporation, which were accepted and received by Sidney M. Smith as president of the corporation without authority so to do and against the express instruction of plaintiff's board of directors. Trial was had before a jury, whose verdict passed for plaintiff. From the judgment which followed and from the order denying the motion for a new trial, defendant appeals.

Upon the appeal she first contends that the acts of Smith were ratified by plaintiff corporation. This ratification, it is contended, was established by the acts of plaintiff. The notes made by the California Packing Company were indorsed by A. B. Patrick and presented nominally to plaintiff corporation, but, in fact, to its president Smith, by whom there was placed upon the notes the indorsement of the plaintiff corporation, after which some of these notes were discounted in the banks, some by the president himself, while others remained the property of the plaintiff corporation. Subsequently the California Packing Company and its accommodation indorser, A. B. Patrick, both became insolvent. In the bankruptcy proceedings which followed the plaintiff corporation participated by presenting these notes and received from the bankrupts' estates part payment of the amount due thereon. It is urged that these acts amounted to a ratification, and relieved Mr. Smith and his estate from all liability to the Pacific Vinegar & Pickle Works. For the correct determination of this proposition, other facts than those thus stated are necessary for consideration. Some of those facts will be found set forth in Pacific Vinegar & Pickle Works v. Sidney M. Smith, 145 Cal. 352, 78 Pac. 550, 104 Am. St. Rep. 42. Others are as follows: The California Packing Company, under an agreement to purchase certain of its supplies from plaintiff corporation, promised to make its settlements on the first collection day of each month for all goods purchased for the calendar month preceding. Afterward Mr. Smith, as president of the corporation, requested of his board of directors that he be allowed to extend credit to the packing company, stating that the latter company could secure the indorsement of A. B. Patrick to its notes; it being understood that A. B. Patrick was financially responsible. The directors authorized Mr. Smith to extend credit to the company not exceeding $15,000. Under this agreement the sales continued to the packing company, and, in turn, its promissory notes bearing 7 per cent. interest per annum were taken. These notes were discounted by the plaintiff corporation from time to time as money was required. The notes were three-month notes. At first they were paid promptly at maturity, but within a short time the packing company became financially embarrassed. Mr. Cote, its manages, explained the situation to plaintiff's president, and an arrangement was entered into between them whereby, when a note of the packing company became due, Mr. Smith gave to Mr. Cote the check of the plaintiff corporation to pay the note, and in return took the defendant packing company's note —in effect a renewal note for the same amount. Not only did Mr. Smith thus use the money of the plaintiff corporation, but he charged the packing company a brokerage commission of 1 per cent. for so doing, and in some instances took a bonus in addition thereto. These transactions were concealed from the directors of the plaintiff corporation, to whom at their meetings Mr. Smith represented that the obligations of the packing company were being promptly met, and that the outstanding notes to the plaintiff, which notes it either held or had discounted, amounted to about the sum for which he was authorized to extend credit. When, however, the failure of the packing company came, plaintiff was first apprised that there were of the packing company notes held by it or indorsed in its name by its president Smith, and discounted, either to Smith himself or to the Bank of British Columbia, an aggregate of $60,000, about $23,000 of which was held by the bank and about $21,000 by Smith himself. The cases of Pacific Vinegar & Pickle Works v. Smith and Smith v. Pacific Vinegar & Pickle Works, 145 Cal. 352, 78 Pac. 550, 104 Am. St. Rep. 42, were cross-actions wherein Smith sought to recover upon the packing company's notes which had been indorsed by him in the name of the plaintiff corporation, and without its knowledge and which were by him held. The determination of that litigation was against Smith's contention, and the facts there brought forth were held not to constitute a ratification.

Nor in this case can it be successfully contended that the acts of the plaintiff amounted to a ratification which would exculpate its agent. The general rule undoubtedly is that the ratification of an unauthorized act of an agent is an acceptance by the principal of the responsibilities of the act and the substitution of himself for the agent. In general, the rule is applied for the protection of innocent third persons, those who have dealt with the agent upon the strength of his apparent or ostensible authority. As to such persons, such a rule is essential for the preservation of their rights; and it is therefore enforced to the fullest extent. It is declared to be the duty of the principal to act immediately after knowledge; and his passivity or silence will be construed into an acquiescence or ratification so as to protect the innocent third party. In general, also, the same rule is applied to relieve the agent where the principal could have disaffirmed or rescinded as against the innocent third party and has failed to do so, and this upon the very logical theory that having accepted the contract as to the third party with knowledge of its terms, and with ability to rescind he has thus affirmed the act as to his agent. But, upon a moment's reflection, it will become apparent that the reason for applying the rule in all its liberality to innocent third persons does not exist in the same broad and benignant sense to the unwarranted and perhaps unlawful act of the agent. Thus, in many instances, the transaction is one which the principal could not rescind, because of the ostensible power of his agent. The innocent third party is thus fully protected. But can it with reason or justice be said that, because the principal is thus compelled to accept the consideration from the innocent third party, the agent himself must of necessity be held harmless for his violation of duty and breach of trust? If an agent with ostensible authority to sell his principal's wheat, but under instructions to sell it for not less than $1 a bushel, shall sell and deliver it for 50 cents a bushel, there is no power in the principal to rescind the sale. Shall the principal by accepting the 50 cents be held to have exonerated his agent from liability for the other 50 cents per bushel? Such a doctrine certainly does not commend itself, and is not sustained. It is limited, so far as the agent is concerned, to those cases where there remains with the principal, after his first complete knowledge of the transaction, the power to rescind, and, failing so to do, he is properly charged with full acceptance of all the responsibilities of the contract, even to the exoneration of his agent, because, with the ability to rescind, if he had rescinded, the transaction would be at an end and nobody would be injured. But, in a case such as the one here presented, it cannot successfully be contended that the acts of the plaintiff in endeavoring to realize upon the notes of the insolvent corporation, taken and indorsed by Smith in violation of his instructions, could amount, as to him, to an exonerating ratification. As to the packing company, undoubtedly it was a ratification, but, as to the packing company, the plaintiff corporation could do nothing else. Mr. Smith had apparent and ostensible authority to make sales in the manner in which he did. The sales as to the packing company were valid sales. The plaintiff, as to the packing company, could not have rescinded, and in failing to attempt to rescind it cannot be held to have ratified its agent's acts. The sale being complete as between the vinegar works and the packing company, it was not only the right, but it was the duty, of the plaintiff to realize as much as it could upon the notes thus improperly taken by its president, not to the end that he should be relieved from responsibility for the differences, but to the very end that by using every endeavor to realize upon the notes the agent's liability by way of damage could be accurately estimated in terms of that difference. Triggs v. Jones, 46 Minn. 277, 48 N. W. 1113; St. Mary's Bank v. Calder, 3 Strobh. (S. C.) 403; White v. Sanders, 32 Me. 188; Goodale v. Middaugh, 8 Colo. App. 233, 46 Pac. 11; Williams v. Moore, 24 Tex. Civ. App. 402, 58 S. W. 953; Continental Ins. Co. v. Clark, 126 Iowa, 274, 100 N. W. 524.

It is urged that the court erred in refusing to grant a nonsuit as to the twelfth cause of action; plaintiff's liability upon each of these notes being charged in a separate cause of action, and the twelfth dealing with the sum of $165.20 alleged to have been paid out of the funds of the plaintiff to the defendant's testator without consideration. On the trial the plaintiff offered in evidence a check drawn by the plaintiff corporation to the order of its president, Sidney M. Smith, and indorsed by him. There was no evidence offered by the plaintiff showing the purpose for which the check was given to Mr. Smith and a failure of proof to show that it was given without consideration or without authority. But the motion was directed "to all the causes of action mentioned in the complaint," and was not tenable unless, as to all, there was a failure of evidence. Moreover, no injury could have resulted to appellant, since, by its instructions, the court charged the jury to find for the defendant as to this particular cause of action. The court was justified in refusing to give defendant's requested instructions Nos. 1 and 2. The instructions were based on the proposition that no limit was fixed by the directors as to the amount of credit which its president Smith could extend to the packing company. There was evidence showing that the board of directors placed a credit limit of "$15,000 or thereabouts," and that the real authority of the president, Mr. Smith, was limited to the extension of that amount of credit.

Instruction No. 3, requested by the defendant and refused by the court, was to the effect that, though the plaintiff might have originally limited the amount of credit to a particular amount, nevertheless, if after imposing such limit it intentionally, or by want of ordinary care, allowed Mr. Smith to believe that he was authorized to extend such credit to an amount beyond the limit so imposed, and to the extent that he did impose it, this fact, if established, was a defense to the action. In support of this proposed instruction, it is contended that the books of account of the plaintiff corporation had been introduced in evidence, and that, as these books of account would have shown to the directors the true state of facts, negligence or an intentional acquiescence is imputable to them in having allowed the credit to exceed the designated amount. In this appellant contends for the rule that the officers, and particularly the directors of a corporation, are chargeable with knowledge of the facts which its books of account and record disclose. This is unquestionably a rule, as is said by Mr. Justice Brewer in First National Bank of Ft. Scott v. Drake, 29 Kan. 311, 44 Am. Rep. 646, which is "founded in public policy, essential to the safety of third parties in their dealings with the bank, and to the protection of the stockholders interested in its welfare and safe management. So far as is necessary to accomplish these results, it should be carefully and strictly upheld; but it should not be carried beyond this, or to such an extent as to work injury to the bank." The rule itself and the limitation of its application cannot be more aptly stated than in the language just quoted. It is designed to protect, and limited to the protection of, third parties and of stockholders, whose trustees and agents the directors are. But, when it is sought to apply the rule against the corporation on behalf of a president found faithless to his trust, the effort is without support in reason or authority. It would permit an officer of a corporation to enforce his own wrong against the corporation itself. Thus, while this rule of imputable knowledge of the contents of the books of a corporation is presumed for the protection of third persons and stockholders, it is not only never recognized, but distinctly disaffirmed, where the matter complained of is one between the corporation itself and any of its officers or agents. To apply it would be to put a premium on dishonest bookkeeping, and, as pointed out by Mr. Justice Brewer, in the case of a bank, to permit the bookkeeper and cashier to combine and plunder the bank of all its assets, unknown to any one, though every transaction should be entered in the books, and, after doing this, to receive immunity because of the knowledge imputed to the other officers. See, also, Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513; Wakeman v. Dalley, 51 N. Y. 27, 10 Am. Rep. 551; Wallace v. Lincoln Savings Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Hallmark's Case, 8 Ch. Div. 329.

For these reasons the judgment and order appealed from are affirmed.

We concur: McFARLAND, J; LORIGAN, J.

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152 Cal. 437

KEYES v. GEARY ST., P. & O. R. CO. (S. F 3,986.)

(Supreme Court of California. Dec. 2, 1907.)

1. Appeal—Review—Conflicting Evidence.

The verdict, sustainable on the theory that the gripman of a car discovered a child in a perilous condition in time to avoid injuring him by the use of ordinary care, and likewise the refusal of a new trial on the evidence, will not be disturbed on appeal; there having been substantial conflict in the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935–3937.]

2. Witnesses — Impeachment — Contradictory Statements.

A witness who on his direct examination testifies to a material matter may, in the manner, and on the foundation laid, provided by Code Civ. Proc. § 2052, be shown, by the adverse party, to have made statements inconsistent with his testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1209.]

3. Same.

Declarations of a witness that would not otherwise be competent against the party for whom he testified are admissible to impeach him, when containing statements inconsistent with his testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50. Witnesses, § 1247.]

4. Appeal—Review—Admission of Evidence—Objections.

Where the gripman of the car which injured plaintiff, a child, testified for defendant that, when he saw the child, he instantly let go the cable, and stopped the car as quickly as he could, and on cross-examination he denied telling plaintiff's father, at a certain time and place, that, when he first saw the boy, he rang the gong, and thought he could frighten him, and the father was then asked if at such time and place the gripman did not make a certain statement to him, not precisely, but in substance, the same as that contained in the question to the gripman, and the answer finally given, as to what the gripman told him, showed a statement substantially the same as that as to which the foundation was laid, and no specific objection to the method of impeachment was made, but the only objection to the question calling forth the answer was that it was incompetent, and not part of the res gestæ; and there was no motion to strike out the answer, or any suggestion that the foundation laid did not fully cover the matter testified to—defendant cannot urge that a proper foundation was not laid for the impeaching testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1084.]

In Bank. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Robert H. Keyes, Jr., against the Geary Street, Park & Ocean Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Platt & Bayne, for appellant. H. H. Hutton, for respondent.

ANGELLOTTI, J. This is an action on behalf of an infant plaintiff for damages for personal injuries caused him by being struck by a moving car of defendant. Verdict and judgment were in his favor; and the defendant appeals from such judgment, and from an order denying its motion for a new trial.

1. The evidence given on the trial is sufficient to sustain the verdict upon the theory that defendant's gripman, after actual discovery of plaintiff's perilous situation, could have avoided the injury by the exercise of ordinary care. The well-settled rule that one is bound to use ordinary care to avoid injuring a person whom he actually discovers to be in a dangerous situation, although such dangerous situation is due solely to the negligence of such person, and is liable for the damage resulting from his failure to use such care, is not disputed. The claim is that the gripman did not actually discover the perilous situation of the child in time to avoid injuring him by the exercise of such care, and that, immediately upon discovering it, he did all that he could to stop the car and prevent the injury. An examination of the record has satisfied us that upon this question there is a substantial conflict of evidence, and under these circumstances the verdict of the jury and the ruling of the trial court on motion for a new trial are conclusive upon us. The case here presented is very different from that of Bennichsen v. Market St. Ry. Co., 149 Cal. 18, 84 Pac. 420, relied on by defendant, where there was no evidence at all to show that the motorman saw the child until after the accident had occurred, and the

contention was that he would have seen her had he exercised reasonable care.

2. It is claimed that the trial court erred to defendant's prejudice in admitting evidence as to a statement made the day after the accident by the gripman of the car to plaintiff's father. The gripman was called as a witness by the defendant, and, on his direct examination, testified: "The moment I saw the child, I released the rope. I had been watching for the crossing. When I saw the young boy coming, I released my cable, and set my brakes as quickly as possible. I stopped my dummy in about eight or nine feet. * * * Before I saw the child, I was looking straight for the crossing, and rang my gong in case any team should get in my way. * * * I did let go of the cable with my grip. When I saw the child, I instantly let go and stopped the car as quick as I could." On cross-examination, he testified: "I had hold of the gong when I first saw the child, and rang the gong for the crossing, and saw the boy at the same time. It is not a fact that I thought the gong would scare the boy away. I have had too much experience for that. Mr. Keyes [the plaintiff's father] came out to my house the day after the accident happened. I do not believe there was anybody there at the time when he first came in." The witness was then asked: "Did not you tell him that, when you first saw the boy, you rang the gong and thought you could frighten him?" This was objected to by defendant as incompetent, on the ground that the statement was not a part of the res gestæ, having been made after the accident occurred. The objection was overruled, and the witness answered that he did not make any such statement. Mr. Keyes was called in rebuttal, and testified that he had a conversation with the gripman at the gripman's residence the day or the second day after the accident. He was then asked: "I have asked you whether or not he told you at that time he saw this boy and rang the gong, thinking that the gong would stop the child's running?" This was objected to as incompetent "on the ground that it was not a part of the res gestæ." Plaintiff's counsel replied that he was attempting to show that the gripman had made contradictory statements. The objection was then overruled, and the witness answered: "Yes, sir; he did. He made an assertion." The witness was then asked: "What did he say?" This was objected to upon the same ground; and, the objection having been overruled, the witness answered: "The exact words. I do not know that I could recall them, but they were to the effect—" The defendant here further objected that the witness was stating simply his conclusion. The witness was then asked: "Can you give me the substance of what he told you?" The same objections were repeated and overruled, and the witness answered: "The substance was that he rang the gong, and that he was under the impression that the child would stop or did stop."

We see no error in any of the rulings of the court in this matter. Our law provides: "A witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony; but before this can be done the statements must be related to him with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and, if so, allowed to explain them. * * *" Code Civ. Proc. § 2052. It is unnecessary to cite authorities to the proposition that, in accord with this rule, a witness for an adverse party who testifies on his direct examination as to a matter material to the controversy may be shown, in the manner prescribed by the section quoted, to have made statements inconsistent with his testimony so given on direct examination. The only possible prejudicial effect as to defendant of the evidence in question was that it tended to show an admission on the part of the gripman that he did not upon discovering the child's perilous situation immediately endeavor to stop the car, but relied on the ringing of the gong to warn the child away. This is the effect claimed for the evidence by learned counsel for defendant, and it may be conceded that such was its effect. As we have seen, however, the gripman had testified on his direct examination: "When I saw the young boy coming, I released my cable and set my brakes as quickly as possible. * * * When I saw the child, I instantly let go, and stopped the car as quick as I could." This was most material evidence in support of the defendant's claim that, upon actual discovery of plaintiff's perilous situation, the gripman exercised the required care to avoid injuring him. Giving to the evidence in question the effect claimed for it by defendant, such evidence clearly showed a statement made at another time by the witness regarding the same matter, which was inconsistent with the evidence given by him for the defendant upon his direct examination. It was therefore, upon laying the proper foundation, admissible for the purpose of impeaching the witness, and discrediting the testimony given by him in that regard upon his direct examination. Counsel in discussing the question of the admissibility of this evidence have not referred to these particular portions of the direct examination of the witness, but they appear to us to so completely answer the objections made by defendant that we have not considered other reasons urged by plaintiff in support of the rulings.

It can constitute no valid objection to evidence showing inconsistent statements by a witness that it also shows a declaration by the witness that would not otherwise have been competent evidence against the party. Learned counsel for defendant is undoubtedly right in his contention that plaintiff was not entitled to show any negligence on the part of defendant by any admission or statement of the gripman made after the accident. But he did have a right to discredit the gripman's affirmative evidence given against him as to the exercise of all proper care by showing other statements made by him inconsistent with such evidence. The evidence was admissible solely for that purpose, and doubtless the trial court, if requested by defendant, would have instructed the jury that it could be considered only for that purpose. The instructions are not contained in the record, and, for aught we know, the jury was so instructed.

We have discussed the objection most strongly relied on by defendant; in fact, the only objection made in the original briefs. In the answer to the petition for a hearing in this court after decision in the district court of appeal, it is urged that proper foundation for the impeaching testimony was not laid. The foundation was certainly laid as to the statement contained in the question asked on the cross-examination of the gripman, viz.: "'Did not you tell him that when you first saw the boy you rang the gong, and thought you could frighten him?" The circumstances of time, place, and persons present had already been recited, and the witness answered in the negative. The alleged statement contained in the question asked the impeaching witness was not precisely the same in words as that contained in the question asked the gripman, but it was substantially the same in effect, and, although it was stated by counsel for plaintiff that the evidence was offered for the purpose of impeachment, no specific objection that the proper foundation had not been laid for the precise question asked was made. Practically no answer was given to this question. The answer finally given by the impeaching witness as to what the gripman told him on the occasion in question showed a statement differing somewhat in verbiage from the statement as to which the foundation was laid, but it was substantially the same in effect. No specific objection to the method of impeachment was made; the only objection to the particular question calling forth this answer being that it "was incompetent and not part of the res gestæ." No motion to strike the answer out was made, or any suggestion that the foundation laid did not fully cover the matter testified to. We are satisfied that for all practical purposes the statement testified to by the impeaching witness was substantially the same as the statement contained in the question asked the gripman, and that the gripman could not have been misled in the matter by the form of the question asked him. While we see nothing warranting a reversal on account of these matters, we do not desire to be understood as approving the practice here followed. The proper practice in impeaching a witness by showing other statements inconsistent with his testimony is shown by the opinion of this court in People v. Nonella, 99 Cal. 333, 33 Pac. 1097.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.

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152 Cal. 396

FORSYTH v. BUTLER. (S. F. 3,493.)

(Supreme Court of California. Nov. 30, 1907. Rehearing Denied Dec. 30, 1907.)

1. Appeal—Review—Findings on Conflicting Evidence.

A finding based upon conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983–3989.]

2. Partnership—Dissolution—Accounting.

Statement of proper method of determining items of expense chargeable to one of two partners in the business of packing, handling, and selling raisins, each partner being himself a grower, and turning over crop to the firm to be marketed, under an arrangement that their crops should be packed at a named price, but, when the crop of one should be greater than that of the other, the excess should be packed by the firm at cost at one of the seven packing plants of the firm.

3. Same—Overdrawing Account by Partner—Liability for Interest.

Where a partner through inadvertence overdraws his account which has not been stated, upon a settlement of the firm business, he should be charged with interest on the overdraft from the time he drew it down to the time of settlement, but not after that time, since he is not liable for interest after his money is due him.

4. Appeal — Record — Contents — Presumptions.

Even where the record does not show whether any, or, if any, which, of the grounds of the motion for a new trial mentioned in the notice of intention were argued before the court for a new trial as the statement on appeal is expressly required to do under Code Civ. Proc. § 661, and the statement on appeal settled two years after the motion made upon the minutes of the court was denied, does not state or imply that it contains all the evidence pertaining to all the grounds argued before the court, and there are circumstances indicating that evidence pertaining to all the grounds is not included, it will be presumed on appeal that all the grounds mentioned in the minute order were argued in the absence of an objection by respondent as to the sufficiency of the record.

5. Costs—Discretion of Court—Equity.

In equity costs are discretionary, both in the trial court and on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 21.]

In Bank. Appeal from Superior Court, Fresno County; J. R. Webb, Judge.

Action by William Forsyth against A. B. Butler. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed in part, reversed in part, and remanded, with directions.

Stanton L. Carter, for appellant. Frank H. Short, for respondent.

SHAW, J. The plaintiff and defendant were partners in the business of packing and selling raisins grown in the season of 1894. Each was also a grower of raisins on his own account, and each delivered to the firm the raisins grown by him, to be packed and sold by the firm for his individual account. After the dissolution of the partnership, Forsyth began this action for an accounting of the firm affairs. Butler thereupon began an independent suit against Forsyth, also for an accounting. The two actions were consolidated for trial and judgment, and but one decision was made for the two cases, covering all the issues in both of them. Butler appeals from the judgment and from an order denying his motion for a new trial.

The principal questions presented arise from differences concerning the settlement of the respective accounts of the members individually with the firm for the packing of the individual crop of each by the firm. According to the partnership agreement, Butler was to have charge of the keeping of the books of the firm, and of the storing, shipping, and selling of the packed product, while Forsyth was to attend to the receiving, grading, and packing thereof. The crop of each partner was delivered to the firm to be packed and sold for his account on the same terms as were fixed for other growers, with an exception to be hereafter referred to. The packing contract with the growers provided that, when the raisins were delivered at the packing house by the grower, the firm should "make a just and true grading according to quality, which grade shall be the basis of the proportionate amount of net receipts from the sale of raisins packed and sold by (the firm) during the season * * * to which said grower shall be entitled"; that all raisins received by the firm during the season from all growers were to be "graded alike as far as possible," but that, in packing and selling them, all the raisins of each grade were to be intermingled and packed and sold together, without distinction as to the persons delivering them. The different grades of raisins were of different values, ranging from 3 to 17 cents a pound, and, as a result, the value of each crop depended upon the proportion of high-grade raisins to be found therein. As they were intermingled in the packing, it was necessary, in order to have a basis of settlement with each grower, that an account should be kept of the total number of pounds delivered by each grower, and also a record either of the total number of pounds of each grade delivered by him, or of the proportion or percentage of each grade which his particular raisins would run. In practice the uniform custom of the firm was to keep an account only of the total number of pounds of all grades delivered by each grower, and to determine the number of pounds of each grower belonging to the different grades by making tests of his raisins, from time to time, as they were delivered, to ascertain what percentage of each grade they contained, and to find the quantity of the respective grades in the particular crop by means of the percentages thus ascertained. These tests and percentages were made by a "grader" in the employ of the firm, and under the supervision of Forsyth, and were by the grader entered in a book known as the "grade book," which was delivered to the bookkeeper at the close of the season. The grades of the raisins of the two partners, however, were entered only on sheets of paper delivered with the book.

The principal contention of Butler is that his raisins were either not correctly graded or not graded at all; that he had, and should have been credited with, a large quantity of the best quality of raisins, designated as "5 crown" and "6 crown" clusters, whereas he was not credited with any, and that he was credited with a much larger quantity of the poorer and least valuable grades of raisins than he actually had, and that, in consequence, the "proportionate amount of the net receipts" of the total sale of raisins for the season allotted to him, according to the books of the firm, and the test grading made, was much less than the true amount. The findings were against him on these points, and he claims that they are not sustained by the evidence. A vast amount of evidence, covering nearly 700 pages of the printed transcript, was introduced on this subject. We have examined it carefully, and we are satisfied that there is sufficient evidence to support the findings, not only in this, but also in all other essential particulars in which it is claimed to be insufficient, including the finding that the grading was not fraudulent.

That there were test gradings made of the raisins of Butler is established beyond doubt. There is considerable evidence tending to show that these gradings did not fairly show the actual quantity of each grade. There is also a good deal of evidence to the effect that it was a fair and just grading. The evidence being in substantial conflict, the finding is conclusive on this court. The method of grading adopted is necessarily, to some extent, inaccurate, and less satisfactory than a separation of the entire crop into grades and ascertaining the respective amounts by actual weighing of them all. It was, however, much less expensive, and there is reason to believe from the evidence as to the manner of carrying on the business that it was the only practicable method. In any event, it was the uniform method used by the firm. Butler knew the method, was fully advised of the fact that it was uniformly followed, and must have expected that his own raisins would be graded in the same way. He was informed of the grading actually made of his raisins. With this knowledge, he sold the entire output himself, and thus made it impossible thereafter to make any other or better grading. The court was justified in concluding that he had consented to the method adopted and that no fairer grading or adjustment of the matter was feasible after the goods were all disposed of. The partnership agreement contains the following provision: "In the event either of the said partners should have handled and packed by said firm more of his individual raisins than the other, the surplus is to be packed, handled and sold at the actual cost of the same to the said firm." The crop of Butler exceeded that of Forsyth by 915,899 pounds. This surplus was all of the kind known as "loose muscatels." Butler and Forsyth each signed a "grower's agreement," the same as other customers of the firm. This agreement provided that the firm should charge $10 a ton for packing this grade of raisins in 50-pound boxes. In casting the account, this rate was charged to each, so far as the crops were equal. But as the surplus was to be packed by the firm at its actual cost only, which was found to be only $4.50 a ton, Butler was not charged $4,579.49 for the packing of his surplus at $10 a ton, but only $2,060.77, the actual cost. As not alone packing, but also handling and selling, was to be done at actual cost, and it was the manifest intent of this clause of the contract that Butler was to derive no advantage or profit from the work done by the firm with respect to this surplus, the referee made a charge to Butler in favor of the firm of $1,753.80, which sum he found to be the actual cost to the firm of the handling and selling of the surplus. It was found that the cost to the firm of the handling, packing, and selling of the raisins at the Fresno house for that year, exclusive of the $4.50 a ton for packing, was a sum equal to 6.026 per cent. of their gross value. The cost of any particular lot of raisins would obviously be the same percentage of the gross value thereof. The gross value of the Butler surplus was $29,103.87, 6.026 per cent. of which is $1,753.80, the amount charged. In computing the total expenses of all the raisins which went to make up this percentage, there were included all the general and incidental expenses of the business, except certain specific charges for expense, such as packing, commissions, and the like, which were separately accounted for. This was the correct method, and was in conformity with the provisions of the contract above quoted. To find the actual cost to the firm of any lot of raisins, it would be necessary to ascertain the percentage of the general expense properly chargeable to each pound, or to each dollar's worth of the total value, as was done here. To compute the cost at the rate per pound would not be as favorable to Butler, or, at any rate no more so, since he had a greater number of pounds in proportion to value than did Forsyth. If the firm had packed no raisins except those of the two partners, and it had been agreed that the surplus of one over the other should be packed at cost, it would scarcely be contended that it would not be a fair adjustment of the expense to make the one having the surplus pay such proportion of the general firm expenses as the value of his surplus bore to the value of the total quantity, leaving the balance of such general expenses to be borne equally. This, in substance, was accomplished by the plan adopted by the referee. If Butler were not made to pay this proportion of the general expense, he would obtain the services of the firm in disposing of his surplus and escape payment of his just part of the services which he agreed to pay.

There is no double charge in this plan of settling the account. In the matter of this charge Butler stands to the firm not as a partner, but as a customer or patron. The amount he is thus made to pay goes into the firm account as part of the receipts and to that extent increases the profits, of which Butler receives one-half. The same items of expense which are taken in computing his proper percentages, of course, appear again in the statement of the firm account, but this is in no sense a double charge to him. The firm carried on seven packing houses, and the raisins of the two partners were all packed at the Fresno house. All the raisins of all the houses were taken into account in ascertaining this percentage of the general expense to the gross value of the entire pack; the expenses considered being for the general benefit of them all. It is earnestly insisted that this calculation should have been confined to the expense of the Fresno house alone. This was done, so far as the expenses in that house could be separated. With respect to the expenses common to all, the point is wholly immaterial. It could have been ascertained in the way contended for by first ascertaining what portion of the general and common expense was properly chargeable to the Fresno house, and, with that included, computing Butler's percentage on account of the surplus with reference to the output and expense of the Fresno house as thus increased. The result would have been the same. Soon after the firm began business, Forsyth and Butler each began to draw from the firm large sums of money for individual use. The partnership articles provided that each should contribute equally to the capital and share equally in the profits, that it was to continue for one year, ending April 16, 1895, and that, until the termination of the year, neither partner should draw from the funds of the firm any money for individual use, except the proceeds of his individual raisins delivered by him to the firm to be packed and sold. It further provided that an accounting should be had at the end of the year, and each should then be allowed to draw his share of the profits. No such accounting was ever made; but it does not appear to have been more due to the negligence or fault of Butler than of Forsyth that it was not done. The referee took March 10, 1897, as a proper date for balancing the account. He charged each partner with interest on the respective sums drawn by him from the firm, from the date on which it was drawn up to March 10, 1897, and from that date to June 2, 1898, which was the time of the trial. Butler's interest charge was $2,875.19 and Forsyth's $2,069.38; the excess against Butler being $805.81. The firm made a profit, computed by the referee at $23,024.55, which was equally divided in the statement of the account. The interest all went into the profits, and hence Butler obtained a return of one-half of the excess of interest charged against him over that charged to Forsyth. If the interest charge is improper, Butler is injured to the extent of one-half of this excess, that is, in the sum of $402.95. The referee found that Butler still owed the firm the sum of $1,818.74, and accordingly gave judgment against him in favor of Forsyth for one-half that sum, or $909.37, to settle the account, which, of course, included this $402.95, charged for interest.

Appellant claims that a charge of interest was improper under the evidence. The statement bears many indications of omissions of parts of the evidence which would probably throw light upon the question of interest. As it stands, we are unable to find sufficient evidence to justify a charge of interest to either partner. The rule concerning interest for moneys drawn from the firm for individual use by the partners is thus stated in Lindley on Partnership at page 391: "Inasmuch as what is fair for one partner is so for another and the firm, when debtor, is charged with interest, it seems to follow that if one partner is indebted to the firm, either in respect of money borrowed or in respect of balances in his hands, he ought to be charged with interest on the amount so owing, even though on the balance of the whole account a sum might be due him. Except, however, where there has been a fraudulent retention, or an improper application, of money of the firm, it is not the practice of the court to charge a partner with interest on money of the firm in his hands; for example, under ordinary circumstances, a partner is not charged with interest on sums drawn out by him, or advanced to him." There is no evidence that Butler fraudulently retained money of the firm. So far as the evidence indicates anything on the subject, it seems to be the fact that each partner drew approximately enough money from the firm funds to pay what was or would be owing to him on account of his crop of raisins and the balance due him on account of his half of the profits, and that, presumably by inadvertence, the account not having been stated, Butler drew about $1,000 more than his proper share. If this is the true condition of the account, Butler should be charged with interest on the overdraft from the time he drew it down to the time of settlement. But this would not require any charge to Forsyth, nor would it account for the large amount charged to Butler for interest, an amount more than double his overdraft. Butler had charge of the books of the firm, and it was his duty to attend to the bookkeeping. He could not excuse the overdraft by the fact that the account had not been stated. It was his duty to state the account, or show good reason for his inability to do so. Hence he should pay interest on the overdraft.

Nor is there any substantial evidence of an improper application of the money drawn. The articles forbid the drawing of money by either partner during the year, and if it had been drawn without other reason than the fact of his being a partner, there would have been an improper application of firm money by each partner. But, in addition to being a partner, each member of the firm stood in the relation of a patron of the firm. Each sold to the firm a large quantity of raisins which the firm packed and sold for his account, the proceeds of which would be owing to him as soon as sales were made and would be due as soon as, under the growers' agreement, settlement was to be made. It seems that, for the most part, the money was drawn against this packing account, and that it was in the nature of an advancement by the firm to the grower on account of the crop received. It was the custom of the firm to make such advancements to the other growers whose raisins it packed, and it is to be inferred, in the absence of anything to the contrary, that these sums drawn by the partners, respectively, were for the same purpose. It may be that it was the custom to charge the grower interest upon these advances until the end of the year, when a settlement was to be made with them. If so, it would be proper to charge like interest to each of the partners for the same period. But as settlement was due in April, 1895, so far as appears (the record does not satisfactorily show when the raisins packed by the firm were sold), and as it was the duty of the firm to make settlement promptly, no interest could justly be charged after a settlement was due for the raisins sold. The evidence, however, does not show whether it was, or was not, the custom to charge interest upon advances to customers. So, also, if it had been proven that the firm borrowed money with which to carry on its business and was paying interest thereon at the time of these advances, then, of course, each partner should be required to pay interest on sums drawn out by him as a partner from the time of drawing until the money became properly payable to him on final settlement, or on striking a balance of profits. The fact that the partnership agreement shows that the firm had made provision for borrowing money, and the fact that money seems to have been drawn out before it would seem possible that any sales could have been made whereby money could have been received from that source, all indicate that money may have been borrowed, but still there is no evidence that money actually was borrowed, and the money drawn may have been previously paid in by the partners. Each partner became entitled to the money drawn as advances on the crop, as soon as a settlement was due after the raisins were all sold, and no interest should have been charged on the advances after that time. The interest was computed for more than three years, instead of only for a part of one year, as would have been the case in the event stated. Both were evidently drawing against both the profits and the amounts due them from the firm for raisins sold. Butler had by far the largest crop and accordingly drew the most money. The charge of interest against him is consequently greater than that against Forsyth. He could not complain of this difference so long as interest was justly chargeable to him under an agreement to pay interest on advances. But the continuance of the interest after his money was due him would be an injustice to him to that extent.

We are unable to make any proper adjustment of this matter as the record stands. It will be necessary to retry this issue. Evidently this was not considered an important question upon this appeal. Indeed, we had some doubts whether it could be considered at all upon the record presented. The motion for a new trial was made upon the minutes of the court, and was denied on December 17, 1900. The notice of motion contained voluminous specifications as to the insufficiency of the evidence. There is nothing in the record to show whether any, or, if any, which, of the grounds of the motion mentioned in the notice of intention were "argued before the court for a new trial." See Code Civ. Proc. § 661. Ordinarily it would perhaps be presumed that the grounds mentioned in the minute order were all argued. There would be no doubt of this in the present case were it not for the fact that the statement on appeal, settled in December, 1902, two years after the motion was denied, does not anywhere state, or imply, that it contains all the evidence pertaining to all the grounds argued before the court, or relating to the specifications set forth in the notice of intention; but on the subject of what evidence is included therein contains this statement only: "The foregoing is the substance of the testimony in relation to the grading, classification, and quality of the raisins received and packed at the Fresno packing house of Butler & Forsyth during the season of 1894, including the raisins delivered by the firm of Butler & Forsyth." There are many things to indicate that nothing else was intended to be included. The respondent does not raise the objection, and because of his acquiescence we have resolved the doubt in favor of the appellant. But, under all these circumstances and others which we have not stated, we think the appellant should not recover the costs of appeal. The case is in equity, and costs are discretionary both in the trial court and in the appellate court.

We do not consider it necessary to notice the errors of law urged so very briefly by the appellant. None of them affect the merits of the case. The rulings were either correct or harmless.

It is ordered that the judgment, to the amount of $506.42, be affirmed; that it be reversed as to the excess over that amount; that the order denying the motion for new trial be affirmed, except as to the question of the charges of interest to the respective partners in the statement of the account between them; that as to that issue the order be reversed and the cause remanded to the court below for trial of that issue alone; and that the superior court proceed to take such further evidence as may be necessary, and as may be offered upon the issue aforesaid and determine, in accordance with this opinion, the proper charges on account of such interest and render an additional judgment accordingly, and that neither party recover of the other his costs upon this appeal.

We concur: SLOSS, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

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152 Cal. 557

BIEBER v. LAMBERT et al. (Sac. 1,486.)

(Supreme Court of California. Dec. 10, 1907. Rehearing Denied Jan. 9, 1908.)

1. PUBLIC LANDS—SCHOOL LANDS—SALE BY STATE—CONFLICTING PURCHASERS.

Plaintiff's application to purchase state nonagricultural timbered land was in due form, except that there was a defect in the description, whereby it appeared that one tract of 40 acres, the N. E. ¼ of the N. W. ¼, was twice described, making the application seem to cover about 360 acres, though calling for 400. The Surveyor General returned the application, stating as the reason that it called "for the N. W. ¼ and the N. E. ¼ of the N. W. ¼." Thereafter defendant's transferror applied to purchase 560 acres in the same section, including all the land covered by plaintiff's application. Plaintiff then offered another application to purchase 400 acres, wherein the description was the same as in his first application, except that the words "N. E. ¼ of the S. W. ¼" were substituted for the words "N. E. ¼ of the N. W. ¼," thus making a good description for 400 acres, in which application the original date of verification was inserted, instead of the true date. A certificate of purchase was issued to defendant's transferror, and it did not appear that at the time she made her application or the purchase money was paid and certificate issued she had notice of plaintiff's attempted application prior to her own, and plaintiff did not occupy the land. *Held*, that defendant's transferror had the better right, the state by its laws offering such lands to the person who first makes proper application, and one who by his neglect or mistake makes an imperfect application, and whose application for that reason is not received, being, by that law, afforded no protection as against another who makes a proper application, which is received before the first person has again presented his application in amended form, except in cases where such first person was occupying the land before the second person made application therefor. Pol. Code, §§ 3495, 3497.

2. SAME.

Plaintiff's first application was not good for 360 acres of the 400 acres he applied for.

3. SAME—PRIORITY OF RIGHT.

The rule applicable to conflicting purchasers of state nonagricultural timbered land is that, other things being equal, he whose application is first in time is first in right.

4. SAME—PLEADING.

Where a contest under Pol. Code, §§ 3414, 3415, concerning the rights of the respective parties to buy state nonagricultural timbered land, is brought by the one who first filed a proper application, the statement of facts, showing that the land was subject to sale, that he is a qualified purchaser, that he has made and filed due application to purchase, that defendant claims under a subsequent application, and that the order of reference has been made, sufficiently shows his own right, and he need not allege other facts to show that defendant was not entitled to purchase or that his application is void; but, where the contest is brought by the person whose application is second in point of time, in order to show that there is any contest to try, he must aver that there is a claim under an adverse application, and if he alleges that it was filed prior to his own, and it is not defective on its face, he must overcome the presumption in its favor, arising from such priority, by averment and proof of some fact establishing its invalidity.

5. SAME.

Under Pol. Code, § 3514, making a certificate of purchase of state land prima facie evidence of title, a certificate is sufficient, if not controverted, to establish the right of the holder so far as necessary to prevent a judgment establishing a subsequent claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 395.]

In Bank. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by Nathan Bieber against Ada Lambert and the Central Trust Company under Pol. Code, §§ 3414, 3415, to determine the rights of the respective parties to buy school lands of the state. Judgment for plaintiff, and the trust company appeals. Reversed. Rehearing denied; Beatty, C. J., dissenting.

J. E. Pardee (A. E. Bolton, of counsel), for appellant. R. M. Rankin, for respondent. W. A. Gett, amicus curiæ.

SHAW, J. This is an appeal from a judgment in favor of plaintiff in a contest concerning the rights of the respective parties to buy school lands from the state, instituted under the provisions of sections 3414 and 3415 of the Political Code. Ada Lambert made application to purchase the lands, obtained a certificate therefor, and transferred the same to the Central Trust Company before the action, in pursuance of the Surveyor General's order of reference, was begun. The trust company claims only as her successor in interest. She was duly served with summons in the action, but failed to appear, and her default was duly entered. The trust company answered, and appeared at the trial, but introduced no evidence in support of the right of Ada Lambert, or in opposition to the plaintiff. The only question presented is the sufficiency of the evidence, in connection with the facts admitted by the pleadings, to support certain of the findings and the judgment. There is no conflict in the evidence. The facts are as follows: The land is situated in section 36, township 35 N., range 9 E., Mt. Diablo meridian, and is nonagricultural timbered land. On May 13, 1903, Nathan Bieber sent by mail to the Surveyor General at Sacramento his verified application to purchase 400 acres of said section. The application was in due form, except that there was a defect or ambiguity in the description of the land applied for, whereby it appeared that one tract of 40 acres, the N. E. ¼ of the N. W. ¼, was twice described, and the application seemed to cover but 360 acres, though calling for 400 acres. The description was as follows: "The N. W. ¼, the W. ½ of the N. E. ¼, the S. E. ¼ of the N. E. ¼, the N. ½ of the S. E. ¼, and the N. E. ¼ of the N. W. ¼ of section 36, Tp. 35, N. R. 9, E., M. D. M., containing four hundred acres." The Surveyor General received the application on May 15, 1903, and on May 20, 1903, returned it by mail, accompanied by a letter to Bieber, stating that it was returned "for the reason that your application calls for the N. W. ¼ and N. E. ¼ of N. W. ¼" of the section. The complaint alleges, and the court finds, that it was thereby returned by the Surveyor General to Bieber "for correction"; but there is no evidence that the Surveyor General at the time made any suggestion to that effect. In a letter written by him to Bieber on November 5, 1903, the Surveyor General says that the original application was returned to Bieber for correction, and this is all the evidence on the subject. On May 27, 1903, Ada Lambert presented to the Surveyor General her application and affidavit to purchase from the state 560 acres of the same section, including all the land covered by Bieber's application of May 13th, and also the entire S. W. ¼ thereof, as well as the remaining 40 acres of the N. E. ¼. This application was on the same day received by the Surveyor General and by him filed in his office and numbered 4,237. On May 28, 1903, Bieber offered to the Surveyor General another application, duly verified, to purchase 400 acres of the section, and the same was thereupon received and filed, and numbered 4,240. The description of land in this application was the same as that in his first application except that the words, "N. E. ¼ of the S. W. ¼," were substituted for the words, "N. E. ¼ of the N. W. ¼," thus making a good description of 400 acres of land. The application was apparently verified on May 13, 1903, but Bieber testified, and the court finds, that it was in fact verified on May 23, 1903. Bieber testified that this application was made as a correction and amendatory to his application of May 13. 1903. There is nothing in the application of May 28th to show such intent, unless it may be inferred from the fact that the original date of verification was inserted instead of the true date. There is no other evidence that the Surveyor General was informed that the second application was intended as an amendment of the first. The order of reference, introduced in evidence by plaintiff, makes no mention of Bieber's first application, but recites only the two applications, the one of May 27, 1903, by Ada Lambert, and the other by Nathan Bieber on May 28, 1903. It further states that the application of Ada Lambert was approved on November 27, 1903, and that on January 20, 1904, certificate of purchase No. 4,676 was issued to her for the land she applied for. The complaint alleges that payment of the full purchase price was made upon the Ada Lambert application and a certificate of purchase issued to her by the Surveyor General. The answer admits these allegations, and they therefore stand as established facts in the case.

The complaint is in two counts. The first count is based on the theory that the second application of Bieber is to be treated as an amendment of that of May 13th, and that his rights are the same as if the second had been filed on May 15th, the day the first application was received by the Surveyor General. The second count does not mention the first application, but rests upon that of May 28th alone, and avers that some of the facts stated in the prior application of Ada Lambert are false and her entry consequently void, and upon that ground claims the better right as against her and her successor. The judgment is that Bieber, under his application of May 28, 1903, is entitled to purchase the 400 acres of land therein described, that the Surveyor General must approve the same; that the defendants are not, and never have been, entitled to purchase said 400 acres, or any part thereof; and that, as to said land, the application of Ada Lambert and the certificate of purchase issued to her are void.

1. It is not claimed, and it does not appear, that Ada Lambert, at the time she made her application and paid the fees therefor, nor at the time the purchase money for the land was paid and the certificate of purchase issued to her, had any notice or knowledge of the attempt of the plaintiff to file his application of May 13th, prior to the filing of her application, on May 27th. We are unable to perceive any sufficient ground or reason for declaring his right, by reason of that attempt, to be superior to hers. The land is timbered school land, unfit for cultivation, and Bieber did not settle upon or take possession of it. His application was for more than 320 acres, the largest quantity of tillable land that can be purchased from the state by one person. He did not apply as a settler, nor claim to have occupied the land, but applied to buy it as vacant, nonagricultural school land. The state, by its laws, offers such lands for sale to the qualified person who first makes a proper application for it, and one who, by his own neglect or mistake, makes an imperfect and uncertain application to purchase a body of such land, and whose application the agents of the state, for that reason, refuse to receive or file, is by that law afforded no protection and given no priority of right, as against another qualified person who makes a proper application for the same land, which is received and filed before the first person has again presented his application in an amended and perfect form, except in cases where such first person was occupying the land before the second party made application therefor. Pol. Code, §§ 3495, 3497. If the plaintiff had made a proper application and the Surveyor General had, without sufficient cause, rejected it or refused to receive and file it, possibly the plaintiff could claim a prior and superior right to purchase against a second applicant, although he did not occupy the land and such second applicant was ignorant of his offer to make a filing. We need not decide as to this, for the plaintiff's application was uncertain and ambiguous with respect to the land he sought to purchase, and there was good reason for rejecting it on that ground. He has no equitable grounds upon which to claim that Ada Lambert's prior application should not, if otherwise lawful, give her priority of right. There is some contention that the plaintiff's application was good for 360 acres of the 400 acres he applied for, although one tract of 40 acres was twice described therein, and that the Surveyor General should have received and filed it as an application for the land actually and properly described. There is no merit in this claim. The description was uncertain. There was no means of ascertaining therefrom what other 40-acre subdivision the plaintiff intended to describe instead of or in addition to that described twice, nor wherein the mistake lay, nor of determining that he was willing to take less than 400 acres. The reasonable and proper course was to return his application with a statement of the defect. It follows that the judgment was not authorized under the first count of the complaint.

2. In the second count the false statements made by Ada Lambert in her application were particularly alleged to be those to the effect that she was a citizen of the United States, a resident of this state; that there was no occupation of the land adverse to any that she had; that she desired to purchase it as school land, and solely for her own benefit; and that she had made no contract or agreement to sell the same, and it was alleged that her certificate was therefore void. The answer of the trust company joined issue upon these allegations, and alleged the qualifications and prior right of Ada Lambert to purchase, claiming as her assignee. The court found that her statements in the application that she desired to buy the land as school land and solely for her own use and benefit, and had made no contract or agreement to sell the same were false. This finding is challenged by a specification that it is unsupported by the evidence. We find no evidence

in the record to sustain it, and consequently it must be excluded from our consideration as a foundation for the judgment.

The principal contention of the respondent is that in land contests of this character each claimant must become an actor, and must, by an appropriate pleading, state to the court the facts necessary to give him a prior right to purchase the land and must support his allegations in that behalf by proof, and that, if he fails to introduce any evidence, he must, in all cases, fail of any relief, and judgment must go against him in any event, and that, if the adverse party produces proof that he made an application in due form, and that he was a qualified purchaser, the right of such adverse party to purchase must be adjudged accordingly, although his application may be subsequent in time to that of the other party, and no proof be made showing the invalidity of the previous application or the lack of qualification of the previous applicant. There are cases to which this rule would apply, but this case is not of that character. As before stated, this land is not suitable for cultivation and no applicant therefor need be an occupant or actual settler, and in this case neither party claimed to be, or was, an occupant. The state holds such lands for sale and the rule clearly applicable to conflicting purchasers is that, other things being equal, he who is first in time is first in right. After the order of reference is made, either party may bring an action to determine the better right. It is always necessary for the party bringing the action to state facts which will show that there is an adverse claim which creates a contest. Polk v. Sleeper, 143 Cal. 71, 76 Pac. 819. If the action is brought by the one who first filed a proper application for this class of land, the statement of facts showing that the land was subject to sale, that he is a qualified purchaser, that he has made and filed due application to purchase, that the defendant claims under a subsequent application, and that the order of reference has been made will sufficiently show his own right and the inferiority of the right of the defendant, and he need not, unless he chooses to do so, allege other facts to show that defendant was not entitled to purchase, or that his application is void by reason of false statements or other causes. Where in such a case he rests upon proof of his own right and the subsequent application of the defendant, and the defendant offers no proof in support of his own case, the plaintiff is clearly entitled to judgment; for his application, being first in time, is prima facie first in right and the defendant's subsequent application is presumptively void.

But, where the action is begun by the person whose application is second in point of time, the conditions are, or may be, reversed. In order to show that there is any contest to try, he must aver that there is a claim under an adverse application. If he alleges that this was filed prior to his own, and it is not defective on its face, he must overcome the presumption in its favor arising from such priority by averment and proof of some fact or facts establishing its invalidity. If his own proof shows a prior application by the other party and the issuance of a certificate thereon by the Surveyor General and no defect or invalidity appears on the face of these papers, and no outside evidence is given to impeach them, such plaintiff must fail. The first applicant is required to make a sworn statement showing his qualifications as a purchaser, and it is only after this has been done that the Surveyor General has authority to issue his certificate. The presumptions that the law has been obeyed, that the first applicant is innocent of the crime of perjury, and that official duty has been properly performed come to the aid of the defendant. In the absence of controverting proof, these presumptions will prevail. The certificate is made prima facie evidence of title in the holder. Pol. Code, § 3514. It is not conclusive, of course, in a contest of this character (McFaul v. PfanKuch, 98 Cal. 402, 33 Pac. 397), and perhaps in this class of cases its prima facie force is no greater than that which arises from the presumption above mentioned; but it is at least sufficient, if not controverted, to establish the right of the holder, so far as may be necessary to prevent the plaintiff from obtaining judgment establishing the subsequent claim, and to require judgment that plaintiff take nothing by the action.

The cases of Lane v. Pferdner, 56 Cal. 122, Gilson v. Robinson, 68 Cal. 543, 10 Pac. 193, Garfield v. Wilson, 74 Cal. 178, 15 Pac. 620, and Prentice v. Miller, 82 Cal. 573, 23 Pac. 189, are cited in support of the proposition that either party to such contest must fail if he does not prove his qualifications as a purchaser, and the truth of any fact stated in his application and alleged by the other party to be false. In Lane v. Pferdner the question of the effect of the lack of any evidence on behalf of a defendant is discussed and decided. It was held that he has the burden of proof to establish the averments of his answer to the effect that he is qualified to purchase. In that case, however, it does not appear that there was any proof of facts by the plaintiff, or any facts admitted by the pleadings, which would have the effect of establishing the defendant's claim and a prima facie prior right in defendant, as is the case here. If in this case the plaintiff had merely alleged that the defendants claimed a right to purchase which was inferior to that of plaintiff, and that Ada Lambert was not a qualified purchaser and had made the false statements as found, and had rested his case after proving his own right, as the plaintiff did in Lane v. Pferdner, without proving or averring facts showing a prior right in defendants, the decision in that case would control, and judgment would properly go for the plaintiff, if defendants introduced no evidence. But the case is different here, and is governed by the rule stated in Polk v. Sleeper, 143 Cal. 73, 76 Pac. 819, to the effect that, where a plaintiff in such a contest by his pleading or proof shows a prima facie prior right in the defendant, he must go farther and show some "fact, matter, or thing that would invalidate the defendant's certificate of purchase." The ordinary rules of pleading, practice, and evidence are to be followed in these contests (Hinckley v. Fowler, 43 Cal. 64), and for the purpose of defeating the plaintiff's claim the defendant may rely on proof made by the plaintiff and facts admitted by the pleading, as in other actions.

The other cases cited by respondent are not applicable to the precise point here under consideration. They merely announce the general doctrine that each party is an actor, and must allege and prove his own case. Nothing is said in regard to the effect of facts admitted by the pleadings, or proof in his favor which may be made by his adversary.

The judgment is reversed.

We concur: ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.

(152 Cal. 415)

GREENWOOD et al. v. BEELER.

(S. F. 3,756.)

(Supreme Court of California. Dec. 2, 1907.)

VENDOR AND PURCHASER—CONTRACT—MODIFICATION BY AGREEMENT.

A written agreement was made by a landowner by which he sold it, the purchaser to pay a certain sum down and the balance in monthly installments, with interest, title to be conveyed on full payment. *Held*, that a subsequent parol contract, by which the vendor agreed to advance to the purchaser money to build a house on the land, the purchaser to increase his monthly payments under the written contract, and that later a written contract should be drawn up to secure the increased loan, could not be considered a rescission of the original written agreement.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by F. M. Greenwood and others, as executors of the will of Monroe Greenwood, deceased, against Edward A. Beeler. From an order denying plaintiff's motion for a new trial, they appeal. Affirmed.

F. M. Parcells, for appellants. R. F. Mogan and F. A. Hornblower (Chas. E. Nougues, of counsel), for respondent.

ANGELLOTTI, J. In this action judgment went for defendant, and plaintiffs have appealed from an order denying their motion for a new trial. The justices of the District Court of Appeal for the First District being unable to agree upon a judgment, the matter was transferred to this court for hearing and determination.

The action is one by the executors of the will of Monroe Greenwood, deceased, to obtain a judgment fixing the amount due on a contract for the sale by deceased to Beeler of a lot of land, requiring Beeler to pay the same within a time to be fixed by the court, and providing that, in default of such payment by defendant, his right, title, and interest shall be forever barred and foreclosed, and plaintiffs' title quieted as against him. It appears by the complaint, and is admitted by the answer and cross-complaint of Beeler, that the only written contract between the parties was one entered into on February 23, 1895, whereby deceased agreed to sell the land to Beeler for $1,050, Beeler agreeing to pay said amount in installments, $50 at the date of the agreement, and the balance in monthly installments of $20 or more at his option, with interest on deferred payments at the rate of 7 per cent. per annum, and all state, city, and county taxes on the property. The contract provided that the deceased would convey the property to Beeler, by good and sufficient deed, upon full payment being made in the time and manner stated, and that any failure of Beeler to comply with the terms of the contract would release deceased from all obligations to convey, and cause a forfeiture of such money as had been paid by him. It is admitted that, as alleged in answer and cross-complaint and found by the trial court, payments were made from time to time by Beeler, aggregating such an amount that, if the same were applied solely on such written contract, there remained due thereon on March 26, 1899, the sum of $270.10 only, which amount was on said day duly tendered to plaintiffs by defendant, with a demand for a deed, and refused by them.

It appears that in May, 1896, deceased orally agreed to advance to Beeler the money necessary to construct a dwelling house on the land, and that he did, in pursuance of this understanding, between May 20, 1896, and September 23, 1896, advance sums aggregating $876.50, the cost of said house. If all money paid by Beeler was paid on the written contract, none of this $876.50 or any interest thereon has ever been paid. Plaintiffs claimed that this should be taken into consideration in determining the amount due and payable before a deed can be required, and that they were entitled to foreclose Beeler's rights in the land under the agreement, in the event of his failure to pay the same. They further claimed that the amounts paid by Beeler were paid, not only on account of the purchase price of the land under the written contract, but also on account of the amount advanced for the construction of the house, and that consequently more than $270.10 remains due on the written contract. In support of their claims, they alleged in the complaint, after alleging the written contract, first, that on or about May 1, 1896, the deceased and Beeler mutually agreed to terminate and rescind said written contract, and that the same was rescinded at that time; and, second, that on said day deceased and Beeler entered into an oral agreement whereby deceased agreed to sell the land to Beeler for $1,050, giving him credit for all amounts paid on the written agreement, to advance the money necessary to construct a dwelling house thereon, and to convey the premises by deed upon the payment by Beeler of the whole amount, purchase price and advances, with interest on deferred payments at the rate of 7 per cent. per annum, in monthly installments of at least $30. They further alleged that all subsequent payments made by Beeler were made on account of both the purchase price and the amount advanced for the house. These allegations were all explicitly denied by the answer, and explicitly found against by the trial court, which adopted the theory that the loaning of the money for the house was in no way connected with the matter of the written agreement, and that the money was loaned upon the express understanding that thereafter deceased would suggest to defendant some form of security therefor which would be agreeable to him, and defendant agreed to give such security as deceased should thereafter require. Deceased died October 10, 1896, and nothing was ever done in the matter of furnishing security. The court gave judgment, as asked in the cross-complaint, declaring Beeler to be the owner of the land, subject only to a lien in favor of plaintiffs for the amount remaining due on the written contract, $270.10.

As before stated, this is an appeal only from the order denying plaintiffs' motion for a new trial; no appeal from the judgment having been taken. The record is such that we are limited to a consideration of the question of the sufficiency of the evidence to support the findings of fact of the trial court upon the matters already specially referred to, viz., the alleged rescission of the written contract, the alleged making of the new oral contract, and the question as to whether the moneys paid by Beeler were paid on account both of purchase price of land and loan for house, or on such purchase price only. Unless it can be held that the evidence is legally insufficient to support one or more of the findings as to these matters, the order of the trial court must be affirmed. A careful consideration of the evidence shown by the record has satisfied us that it cannot be so held. The well-established rule that, where there is a substantial conflict of evidence upon any proposition, this court will not interfere with the finding of the trial court thereon, is, of course, not disputed by counsel for plaintiffs. His claim is that there is no such conflict, but there plainly is such a conflict as to all the matters embraced within the particular findings under consideration. The evidence introduced by plaintiffs as to conversations between deceased and Beeler was so far as it tended to show any attempted rescission or change in the written contract, or any attempted oral agreement relative to the subject-matter or terms thereof, opposed to the positive and unqualified testimony given by Beeler, as was also the evidence on behalf of plaintiffs tending to show admissions made by Beeler. There was nothing in the admitted facts of the case, or in the evidence given by Beeler when considered in connection with the admitted facts, that is necessarily inconsistent with the theory of defendant that the money for the construction of the house was loaned to Beeler by deceased with no understanding between the parties other than that it was a loan which was to be repaid, with interest, that by reason of having a house on the land Beeler would increase the amount of monthly payments on his contract, and that some written instrument, the terms of which were not discussed, should be at some future time prepared by deceased and executed by the parties, which would constitute an agreement furnishing adequate security to the deceased. Such a transaction could not, of course, be held to constitute a rescission or termination of the existing written contract for the sale of the land, or the making of the oral agreement alleged in the complaint. Upon the question as to the application of the payments made by Beeler, the evidence given by Beeler himself is legally sufficient to support a conclusion that he directed each payment, at the time of making it, to be applied on the amount due on the written contract. Civ. Code, § 1479, subd. 1. The specific findings attacked on the motion for a new trial must be held to be sufficiently supported by evidence.

The order denying the motion for a new trial is affirmed.

We concur: McFARLAND, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

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152 Cal. 532

PEOPLE v. HELM. (Cr. 1,398.)

(Supreme Court of California. Dec. 10, 1907.)

1. Criminal Law—Appeal—Review — Prejudicial Error — Overruling Challenge to Juror.

The erroneous overruling of a good challenge for cause, thereby compelling accused to use a peremptory challenge, is prejudicial, where accused was afterwards obliged to accept an objectionable juror because his peremptory challenges had been exhausted, and this, though no challenges for cause were imposed to any jurors called after the exhaustion of such peremptory challenges.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3117.]

2. Jury—Peremptory Challenges.

The right to challenge peremptorily is absolute, and may be exercised on the mere whim or caprice of accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 599–606.]

3. Same—Bias—Opinion.

Pen. Code, § 1076, declaring that no juror shall be disqualified for having formed an opinion founded on public rumor, statements in public journals, or common notoriety, provided it appears that he can act impartially, though changing the common-law rule does not obviate the necessity that jurors must still be indifferent and unbiased; and hence if it does not appear affirmatively that the juror's opinion is based entirely on one of the three sources of information specified, or if it is shown that his belief originated from any other source, he is incompetent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 438-448.]

4. Same—Examination.

Pen. Code, § 1076, declares that a juror shall not be disqualified because he has formed or expressed an opinion on a matter to be submitted to him for consideration if his opinion was formed on public rumor, statements in public journals, or on common notoriety alone, provided he can and will act impartially according to the law in determining the question submitted. *Held*, that the fact that jurors answered that their opinions were founded on common notoriety or statements in the public journals, etc., did not qualify them, where it appeared that they were biased, and that their opinions were not entirely so formed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 448-457.]

5. Same—Scope.

Where a juror stated on his voir dire that he had an opinion touching the guilt or innocence of accused of another murder, the defense was entitled to ask him whether, believing defendant guilty of such other homicide, he had not formed an adverse opinion toward him in the case at bar, and whether he believed the defendant in this case guilty of the prior homicide.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 438-448.]

6. Criminal Law — Appeal — Admission of Evidence—Prejudice.

In a prosecution for homicide, accused was not prejudiced by the introduction of a conversation between witness and deceased on the day of the murder, in which deceased told witness that he was unwell, and was going to see a doctor, defendant claiming that such evidence showed that defendant had no knowledge of deceased's plans, and could not, therefore, have prearranged a plot to kill him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137-3143.]

7. Same—Evidence—Opinion.

It being contended in a prosecution for murder that defendant and his brother rode bicycles to the scene of the homicide, a witness who had measured the bicycle tracks, but had lost the memorandum of the measurements, was properly permitted to give his opinion as to the width of the tracks, under the rule permitting nonexpert evidence of opinion on questions of identity, size, weight, color, quantity, distance, and time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1048, 1049, 1051.]

8. Same — Misconduct of Prosecuting Attorney—Argument.

Where, in a prosecution for homicide, there was no proof touching a prior murder of which defendant had been accused, the fact that many of the jurors on their voir dire were interrogated as to their knowledge of such previous murder and defendant's connection therewith, etc., did not justify the district attorney in referring to such murder, and to the connection of defendant and his brother therewith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1668, 1669.]

9. Holidays—Information—Filing.

Code Civ. Proc. § 73, declares that the superior court shall be always open, legal holidays and nonjudicial days excepted. Section 134 provides that no court shall be open nor shall any judicial business be transacted on a holiday, save for the purposes enumerated, and section 13 declares that whenever an act of a secular nature is appointed by law or contract to be performed on a particular day, which falls on a holiday, such act may be performed on the succeeding day. *Held* that the presentation of an information by the district attorney for filing, its reception and the placing of a file mark thereon by the clerk of the court, being ministerial acts, they might be performed on a holiday.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Holidays, §§ 2-5.]

10. Criminal Law—Instructions—Applicability to Evidence.

Where the state claimed, and there was evidence to indicate, that larceny was defendant's motive in killing deceased an instruction that it was not claimed that the homicide charged was committed in the perpetration or attempt to perpetrate another felony, was erroneous as inapplicable to the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980, 1981.]

In Bank. Appeal from Superior Court, Fresno County; George E. Church, Judge.

William Helm was convicted of murder, and he appeals. Reversed and remanded.

Everets & Ewing, for appellant. U. S. Webb, Atty. Gen. (George W. Jones, of counsel), for the People.

HENSHAW, J. Defendant was informed against by the district attorney of the county of Fresno for the crime of murder, was tried, and found guilty of murder in the first degree. He moved for a new trial and in arrest of judgment. His motions were denied, and the judgment was pronounced imposing the death penalty. From the judgment and order denying his motion for a new trial, he prosecutes this appeal.

The defendant was accused of murdering a farmer and his wife who were camped by a roadside in the county of Fresno, shooting them both with a shotgun. The apparent motive of the crime was larceny. The evidence was circumstantial in its nature. Public feeling was much aroused by other crimes of violence which had been committed, and by another murder, that of a man named Jackson. Of the commission of these crimes this defendant was also suspected. The community, as was natural, was much exercised, and there was great prejudice against the defendant. It became a matter of difficulty, therefore, to secure upon the trial the fair and impartial jury to which every defendant is entitled. Some 59 jurors called to the box were excused upon challenge for actual bias. Defendant's challenge to others upon the same ground was denied, and his counsel was obliged to interpose peremptory challenges to them. Defendant's peremptory challenges were thus exhausted when only eight members of the jury had been obtained. Three of the last four were accepted by defendant without challenge for cause. The fourth was challenged for cause, and the challenge overruled. While it is true that the erroneous overruling of a good challenge for cause, thereby compelling the use of a peremptory challenge, is not prejudicial error where it is not made to appear that the challenger was obliged afterward to accept an objectionable juror, without power to use a peremptory challenge upon him, it is equally true that where such a condition is shown to result, as here, the error at once becomes prejudicial if the defendant has been obliged to exhaust his peremptory challenges in relieving himself from jurors who should have been excused by the court under challenge for cause, and the rulings of the court upon such jurors becomes a most important matter of review. It makes no difference in this respect that no challenges for cause were interposed by defendant to any jurors called to the box after the exhaustion of his peremptory challenges had been forced by the improper rulings of the court upon his challenges for cause. It may often happen that a juror most obnoxious to a defendant may successfully pass examination upon his voir dire. That examination may disclose no ground for the interposition of a challenge for cause. Yet there may be some reason known to the defendant which would make it most prejudicial to him that the juror should be retained. Even more, the right to exercise peremptory challenges is absolute. Such a challenge may be exercised upon the mere whim or caprice of defendant. So that again we say that any rulings of a court which compel a defendant to exhaust his peremptory challenges and force him to accept jurors after his challenges have been so exhausted becomes the proper subject of review.

The modification of the common-law rule which has been worked by section 1076 of the Penal Code has often been the subject of consideration. The common-law rule which demanded the strictest impartiality upon the part of each individual juror, which declared that one and all should, as between the crown and the defendant, "stand indifferent as they stand unsworn," has, by the section before adverted to, been subjected to an exceedingly narrow change. Jurors must still be indifferent and unbiased. Where, however, a juror has formed or expressed an opinion upon the matter to be submitted to him for consideration, and that opinion it is established was formed upon public rumor, statements in public journals or common notoriety alone, such a man is not necessarily disqualified, provided that it is made to appear to the court, upon his declaration under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly in deciding the question to be submitted to him. It will be noted, therefore, that the right to unbiased and unprejudiced jurors is still an inseparable right to the trial by jury guaranteed by our Constitution. Lombardi v. Cal. St. R. R., 124 Cal. 317, 57 Pac. 66. It is for the trial court in the first instance to determine, and it must be affirmatively made to appear, when a juror is shown to have an opinion, that that opinion is founded upon public rumor, common notoriety, or statements in the public journals; and it must further be made to appear to the satisfaction in the first instance of the trial court that such opinion can and will be absolutely laid aside by the juror and that so laying it aside he can and will act with strict fairness and impartiality. If it is not made to appear that the juror's opinion is based entirely upon one or all of the three sources of information above named, if it is shown that his belief has its origin in any other source than one of the three enumerated, he is at once as thoroughly disqualified under our Code as he would have been at common law. This proposition is here emphasized because of its exceeding importance and consequence to a defendant. Thus in People v. Miller, 125 Cal. 44, 57 Pac. 770, a challenge was interposed upon the ground of actual bias. The juryman stated that he had read newspaper accounts of the killing. He had heard the matter discussed by persons, but did not know whether such persons assumed to know the facts or not. From what he had heard and read he had formed an opinion rather unfavorable to the defendant; that is, if what he had heard and read was true. He did not know who the witnesses were. It would take a little evidence to remove the opinion he had. The only impression he had about the case was a sort of impressionable opinion formed from others. If sworn as a juryman, he would try to lay aside his opinion entirely and act solely upon the evidence. He would regard the statements he had heard as of little weight. He had some idea that they might be mistaken. He would take the instructions of the court as to the law. This court held that the challenge for actual bias which was disallowed should have been allowed, and said: "Under the Penal Code of this state a single exception is found to the common-law rule, and that exception is declared in section 1076. This juror was clearly disqualified, unless he came within the provisions of the aforesaid section. The exception found in the law covers the single case where the opinion of the juror is founded upon public rumor, statements in public journals or common notoriety, and it further appears to the court from the declarations of the party under oath that he could and will, notwithstanding his opinion, act impartially and fairly upon the matters submitted to him. The court is not allowed to hold that a juror is qualified when he is impressed with an opinion as to the guilt or innocence of the defendant, unless that opinion is based alone upon one or more of the cases enumerated in the aforesaid section of the Code. * * * As far as this record discloses, any one of the parties with whom the juror conversed as to the circumstances of the killing may have been an eyewitness to the tragedy and an important witness at the trial. The record must show affirmatively a contrary state of facts to this, or the exception of section 1076 to the common-law rule cannot be invoked. There is nothing in the evidence which would justify the conclusion that the opinion of the juror was founded alone upon public rumors, statements in the public journals, or common notoriety." So, also, in People v. Wells, 100 Cal. 227, 34 Pac. 718, this court said: "Omitting from the statement of the juror that these things came to him from parties directly interested in the case, and allowing the examination to rest upon the sole fact that the juror entered the box with an opinion as to the guilt or innocence of the accused, that fact is of itself a disqualification, even though the juror should declare to the court under oath that, notwithstanding his opinion, he would and could act fairly and impartially upon the matters submitted to him. The juror would not only be disqualified at common law, but disqualified under the Penal Code, for he has not brought himself within the provisions of section 1076; as those provisions require an affirmative showing to the court that his opinion is based upon public rumor, common notoriety, or statements in public journals. Such a showing is not made in this case."

It is thus the established law that it must be affirmatively shown that the opinion which the juror holds was based upon one or all of the matters enumerated in section 1076, or he is disqualified. Again, in People v. Wiel, 40 Cal. 268, a juryman on voir dire stated that he had a fixed and settled opinion regarding the guilt or innocence of the defendant. He believed what he heard, and it would require evidence to remove the opinion now existing in his mind. He further stated on cross-examination that his opinion was not an unqualified one; that he could try the case and render a verdict according to the evidence, notwithstanding any opinion previously formed in regard to the case. The challenge was denied. This court said: "The ruling in disallowing the defendant's challenge to the proposed juror * * * was clearly erroneous. The statement of the juror on his examination in chief clearly shows that he had formed an unqualified opinion and belief as to the guilt or innocence of the defendant, notwithstanding his subsequent statement on cross-examination." "And," proceeds the court, "it appears from the above recital of facts from the record that defendant was driven to a peremptory challenge to relieve himself from this, to him, obnoxious juror, and this contributed to swell the number of peremptory challenges exercised by him to the full extent allowed by law before the panel was full, and before the last man required to complete the jury was called to the box for examination as to qualifications, so that the defendant could not exercise a peremptory challenge upon this last juror, however obnoxious to him he may have been. Thus it plainly appears that the direct result of the disallowance by the court of defendant's challenge for cause was to contract the number of peremptory challenges to which he was entitled, and that such an error may have been seriously prejudicial to the defendant." In People v. Suesser, 132 Cal. 632, 64 Pac. 1095, this court said: "No more now than formerly is the defendant compelled to submit his case to a juror who has such an opinion of his guilt as will require evidence to remove, and thus unjustly add to the burden of his defense. * * * Most of the 20 peremptory challenges allowed the defendant were exercised upon proposed jurors who stated upon voir dire that, if sworn as jurors, they would take their seats in the box with a strong opinion against the defendant which it would require evidence to remove. Some said strong evidence. Where such a state of things exists the defendant cannot have a fair and impartial trial."

These lengthy quotations have been made, not alone because they announce the well-settled law in this state, but because they are peculiarly apposite to the evidence touching the examination of jurors presented on this appeal. The juror Seklemin testified on voir dire that he had read about the case and talked with people a little about it, but with no one who claimed to know anything about the facts. He had heard other people discuss it in his presence. He had formed an opinion in reference to the case, and he had that opinion at the time he was being examined, and it would take evidence to remove it. The opinion went directly to the guilt or innocence of the defendant, and, if selected as a juryman, it would require evidence to remove it before he could be perfectly free with reference to the trial of the case. This opinion was of such a nature that it would require less evidence or evidence of less positive nature to produce a conviction in his mind than it would if he had never heard of the case. This juror was challenged for cause, and upon redirect examination and recross-examination he was asked whether he could "listen to the testimony from the mouths of the witnesses here and obey the rules that you will hear the judge tell you in the end. Can you do that?" and the witness answered "I think I can, and I will; yes." Further he testifies that he thinks he could give the defendant a fair and impartial trial. He thinks he could set aside the opinion that he has, though that opinion is one that would require evidence to remove. "It certainly would at this time, in my present frame of mind, require evidence to remove that opinion from me. I could set that opinion aside very easy, but not until I had heard some evidence on the part of the defendant. That is a positive fact. These statements that I have heard spoken by people I do not know whether they are true or false. I never heard them denied. Have no reason now to think they were untrue, and I would continue with that idea in view until the defendant placed some evidence before me to the contrary." Again interrogated by the district attorney as to whether he could not and would not set aside this opinion and obey the instructions of the judge, he answers: "I think I can; yes." To the next appeal of the district attorney, "Won't you do that if the judge tells you that it is the law?" he answers, "I think I can set aside my present opinion. I will obey the instructions of the court, but I have a certain opinion. I think I can set that opinion aside." The final question is then asked: "Your conscientious opinion now is that you can and will do it, is that right? A. Yes." The court then interrogates the juror: "Q. And you can do that and will do it? A. I think I can and I will. Q. You say you think you can. Do you know that you can? A. I know that I can." The challenge was denied. E. R. Winters testified that he discussed the case with his neighbors; read it in the papers. The people with whom he talked made statements in a general way about the case. They were people in whom he had confidence and had no reason to disbelieve them, and accepted their statements as true. From these statements and from what he had heard and read generally he had formed an opinion touching the guilt or innocence of the defendant, and he had that opinion still. "It is a fixed and settled opinion, at least to the extent that it would require some evidence to remove it. If selected as a juryman, I would possibly require the prosecution to convince me beyond a reasonable doubt of the guilt of the defendant. In my present state of mind it would not require as much evidence to convince me of the guilt of this defendant in this case as it would where I had never heard anything about the facts and circumstances. It might require more evidence on the part of the defense to prove the young man innocent than it would in a case I had never heard anything about. Feeling as I do, and taking everything into consideration, what I have heard and read, and the opinion I have I do not see why I could not fairly and impartially try the case at this time. From these things I have formed an opinion in a certain way, and that opinion would require evidence to remove it. The mere direction or request on my part on my mind to lay aside that opinion would not be sufficient. I certainly would have to have evidence to lay aside that opinion that I now have." Further, he testifies that the opinion is formed solely upon statements in the newspapers and public rumors. It is not an unqualified opinion. That he is in a state of mind which would not prevent him from acting with entire impartiality. The challenge for cause interposed by the defense being denied by the prosecution, the juror further testifies: "By an unqualified opinion, I mean that I have not such an opinion, if there was sufficient evidence, that it could not be changed. I could change that opinion if there was evidence, but it would require, in my present frame of mind, evidence to change that opinion. Q. You read of the fact that the defendant had been accused of several different murders. A. Yes, sir. I don't know as that would tend to prejudice me against the defendant. It would take evidence to remove my opinion now. The opinion is based upon whether or not those things that I heard and read are true or not." Upon this juror the defendant was required to exercise a peremptory challenge. E. Neeley testified that he had read some of the accounts of the preliminary examination of the defendant, and never discussed the case, only just passing remarks with his neighbors. He had formed an opinion. "The opinion is one that, until evidence is introduced to remove it, I will take with me into the jury box. I would have to have evidence on the part of the defense to change my mind. If the evidence brought out here in this case is different from what I have read that came out at the preliminary examination, then I have no opinion. I don't believe I could act just as fairly and impartially in this case if selected as a juryman as I could in a case that I have never heard anything about. The little impression that I have would bob up until all the evidence was in. I think that opinion or impression that I have would crop up in my consideration of the case. I don't know that I could handle this case as a juryman with the same degree of fairness and impartiality that I could in a case that I knew nothing about. I think that is the way I feel." This juror was challenged, and upon examination by the district attorney he testified that his impression would go into the jury box with him; that he did not think it would prevent him from obeying the instructions of the court, and he did not think it would prevent him from acting with entire impartiality. If taken as a juror, he would give his verdict according to the evidence and the instructions of the court. He would have to do it. He would do it to the best of his ability. Defendant's challenge for cause was disallowed. George Wells read of the case in the newspapers and talked it over with people. He did not know whether the people he talked with knew the facts or not. The people with whom he talked were people in whom he had confidence. He never heard any statements to the contrary from what he heard from them. He did not know whether they were witnesses in the case or not. From what he had heard he had formed an opinion with reference to the guilt or innocence of the defendant. The opinion was based on what he heard and read. "Do not know whether or not the things I have heard were from people who were witnesses or not. It would require evidence upon the part of the defendant to change my opinion. I could disregard the opinion if I heard different evidence. It is not such an opinion that it would influence me in the rendition of my verdict." He thinks that he feels that he could meet the qualifications of a juror. If he heard the same evidence he would have the same opinion. It is an opinion such that it would require less evidence to convict the defendant than if he had never heard of the case. To that extent it would influence his mind as to the rendition of a verdict until the opinion was changed. The opinion is adverse to the defendant, and based not only upon what he had read, but upon the statements of people with whom he talked. The people were not witnesses that he knew of. Does not know whether they are or not. He could absolutely discard from his mind any opinion and listen to the evidence and nothing else, and upon that alone, under the instructions of the court, render his verdict, and would not be influenced by the opinion that he then had; but still that opinion is so strong that it would require evidence to remove it from his mind. It is a fixed and settled opinion until it is changed. It is not absolutely changeless. Upon examination by the district attorney, in answer to the question: "Well, now, this is based upon newspaper reports and public rumor, is it not?" he said, "Yes. Q. Solely based on that? A. Yes." The challenge was denied, and the juror peremptorily excused by the defense. N. N. Norton upon voir dire testified that he had read pretty much all about the case, and conversed in regard to it with his neighbors. He did not know whether the people he talked with knew anything about the facts in the case or not. "I do not think they knew any more than I read in the papers, but I don't know." Had an opinion in reference to the guilt or innocence of the defendant. He thought that opinion would go with him into the jury box. It was unfavorable to the defendant, and it would take evidence on the part of the defendant to remove it. Was pretty sure that, unless some affirmative evidence was introduced to change his mind with reference to the matter, the opinion would influence him in the rendition of the verdict. On cross-examination he testifies that the opinion formed in his mind is from newspaper reports alone. Asked if he would obey the instructions of the court and regard only the evidence introduced, he answers that he would try to do that. Asked whether he would find anybody guilty of a crime on newspaper report, says he does not think he would. He does not think he would allow an unsworn newspaper report to influence his mind against testimony sworn to in court. Finally, asked by the court if he could fairly and impartially try the case and make up his verdict solely from the evidence and from the instructions, he answers, "I think so." The challenge to this juror was disallowed, and the defendant exercised a peremptory challenge upon him. John Cobbey had read and heard of the crime with which the defendant was charged, and attended the preliminary examination of this defendant charged with the murder of Mr. Jackson. He had discussed the case, and heard it discussed. He did not know whether the people with whom he talked were witnesses in this case or not. He does not think he talked with any one who was a witness. He does not know that they were. "Do not think I have talked with any of the officers in the case." He had formed an opinion as to the guilt of the defendant. He recalled portions of what he heard and statements made in reference to the case. He heard people make statements in reference to this defendant being seen on the White's Bridge road on the afternoon the crime was committed. (Witnesses in the case did testify to seeing the defendant on the White's Bridge road on the afternoon of the day when the crime was committed.) Further, he testifies that the opinion could be removed by the same kind of evidence that it was formed with; that it was from public rumors. He rather thought he could try the case fairly and impartially; rather thought he could act with the same degree of fairness if selected as a juror as he could in a case where he had never read or heard anything about it. He would require just as much evidence on the part of the prosecution in this case as if he had never formed an opinion or impression. Further, he testifies that feeling as he does now it would require evidence of some kind or character to remove from his mind the opinion that he has touching the guilt of the defendant. Challenged, he testified that the opinion is made up of public opinion and newspaper reports. He thinks he could give the defendant the presumption of innocence. He thinks he could wholly discard the impression which he has, not act upon it and not take it into consideration; but until he does receive some evidence, something of some kind, he would have this opinion, and it would require evidence—sworn or unsworn evidence—something to remove it from his mind. The challenge for cause to this juror was disallowed and a peremptory challenge exercised upon him. J. J. Wash, examined after the defendant had exercised all of his peremptory challenges, had read of the case, heard it discussed and discussed it with others. He had an opinion and believed that it would require evidence on the part of the defense to remove the opinion. It was adverse to the defendant. If the evidence was strong enough, he could lay aside the opinion. The opinion was created from rumors and newspaper reports. "I could lay aside the opinion, provided there was sufficient evidence produced to convince me that it was a mistake I am laboring under. Until that evidence was introduced I would have the opinion, but not necessarily a fixed or settled opinion. It would require evidence on the part of the defendant to remove the opinion, but until it was removed by evidence it would influence me to the extent of requiring evidence to remove it." Challenge for cause interposed by the defense being denied, the juror further testified that, if sworn as a juror, he could and would depend upon the testimony as he heard it from the lips of the witnesses and the instructions of the court.

With these extracts from the examination of the jurors before us, we think little need of comment is required. The jurors were doubtless conscientious in their answers, but as to some it certainly cannot be said that they gave evidence of the impartiality of mind which alone would qualify them. In other instances, while in answer to leading questions from the district attorney they stated that their opinions were founded upon common notoriety or the public journals, it is made equally apparent that their opinions were not so founded. One had attended the preliminary examination of the defendant, which preliminary examination he thinks was for the murder of Jackson. He talked with a man who saw the defendant at White's Bridge on the afternoon of the homicide. Witnesses did testify to seeing this defendant at White's Bridge at that time. Other jurors testified that they did not know whether or not the persons with whom they talked were witnesses or purported to know the facts. In each and all of these cases there is a failure to establish affirmatively that the opinion of the juror was based wholly upon public rumor or statements in the public journals or common notoriety. It is not sufficient to qualify a juror that he should be led to say that his opinion is based upon common rumor, when from his own lips the evidence discloses that it is not so founded. As to some of the jurors, it is apparent that they were biased within the meaning of the Code. As to others it is not made apparent that their opinions were founded exclusively upon matters enumerated in section 1076 of the Penal Code. "In criminal cases," says Judge Cooley (Holt v. People, 13 Mich. 224), "wherein, after full examination, the testimony given upon the challenge leaves a reasonable doubt of the impartiality of the juror the defendant should be given the benefit of the doubt."

In contemplation of the new trial which must necessarily result from the foregoing views, certain questions which must arise upon such new trial demand consideration. A juror upon voir dire had stated that he held an opinion touching the guilt or innocence of the defendant in reference to the Jackson murder case. He was then asked if, believing the defendant guilty in the Jackson Case, he had not formed an adverse opinion toward the defendant in the case at bar. The prosecution objected to this question, and was sustained. The defense then propounded the following question: "Now, Mr. Colburn, you believe the defendant in this case is guilty in the Jackson matter?" To this, likewise, the prosecution's objection was sustained. These questions should have been allowed—not only as tending to throw light upon the juror's condition of mind as to the matter under investigation, but also as legitimate inquiry for the purpose of determining whether a peremptory challenge should be interposed to him. In the very nature of the workings of the human mind, if the juror did believe the defendant to have been guilty of the Jackson murder, he was more likely to have believed him guilty of the murder here charged, and if, in fact, the juror did believe the defendant guilty of the Jackson murder, the defendant was clearly entitled to know this, to the end that he might peremptorily excuse him from sitting upon the jury. A witness testified that on the day of the murder he met Mr. Hayes (the murdered man) and his wife at White's Bridge. They were going west. He was asked if he had had any conversation with Mr. Hayes, and, answering "Yes," was told to give the conversation. The defense objected. The witness answered: "He said he was going to Fresno. He said he was unwell, and was going to Fresno to see a doctor." It cannot be perceived how this evidence, even if in strictness inadmissible, could have been in the slightest degree injurious to the defendant, while elsewhere in defendant's brief it is contended that this very evidence is of importance and value to defendant, as showing that he could not have had any knowledge of the Hayes' plans, and thus could not have prearranged any plot for the murder. The witness McSwain had taken measurements of the size of certain tracks made by bicycle wheels; it being contended by the prosecution that the defendant and his brother rode bicycles to the scene of the murder. The witness had lost the memorandum of the measurements, and was permitted, over objection, to testify that one of the tracks was about an inch wide, and that the other was somewhat smaller. The rulings of the court were proper. In the absence of the memorandum, the testimony was the best which could be afforded, and the evidence was admissible under the well-settled rule that a person may give his opinion on the question of identity, or his judgment of size, weight, color, quantity, distance, and time, matters of opinion open to all men of ordinary information. Raymond v. Glover, 122 Cal. 475, 55 Pac. 398; Commonwealth v. O'Brien, 134 Mass. 198; 1 Wigmore on Evidence, § 413, 559, 1977; 5 Encyclopædia of Evidence, p. 476 et seq.

Repeatedly, in the argument before the jury, the district attorney referred to the murder of Jackson, and of this defendant's and his brother's connection with it: "Then all at once they were arrested and both in jail —two charges—Jackson killed, lonely old man out here—unoffending woman and man murdered. * * * He could not have sworn to it if he had not been charged with the Jackson murder. * * * We sought to prove that he had recognized him [defendant] before he was arrested and before the Jackson murder." It is sought to justify these remarks of the district attorney upon the ground that many of the jurors upon voir dire were interrogated as to their knowledge of the Jackson murder and of defendant's connection with it, as to whether or not the fact that the defendant was charged with this murder tended to influence the jurors' opinions in the case at bar, and other like questions. But, while it is apparent that the Jackson murder was a matter of common knowledge and notoriety in the community, and was doubtless in a general way known to every man upon the jury, yet, so far as this record discloses, there was no evidence upon the trial touching the murder, and the references of the district attorney to it, and to defendant's connection with it, were therefore improper.

The information in this case was filed upon the 26th day of May, 1906. This date was one of the holidays declared by the chief executive following the earthquake and fire in the city and county of San Francisco. It is contended by defendant that the information was illegally filed, and is therefore void. Section 73 of the Code of Civil Procedure declares that the superior court shall be always open, legal holidays and nonjudicial days excepted. Section 134 of the same Code declares that no court shall be open nor shall any judicial business be transacted on a holiday, saving for the purposes enumerated. The presentation of an information by the district attorney for filing and the reception of this information and the placing of its file mark thereon by the clerk of the court are all purely ministerial acts. Ex parte Sternes, 82 Cal. 245, 23 Pac. 38; People v. Nogiri, 142 Cal. 596, 76 Pac. 490. The only provision of the law other than those cited bearing upon this question is that contained in section 13 of the Code of Civil Procedure, which declares that, whenever an act of a secular nature is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day. But this amounts to no more than a legal permission for the postponement of the act, and in no sense prohibits the doing of the act upon the designated day. It follows that it was not error, therefore, to file the information upon a legal holiday.

Coming, finally, to the instructions, as to the one to the effect that there need be no appreciable space of time between the formation of the intent to kill and the act of killing, it is perhaps not necessary to suggest that such instruction should be given in the language indicated by People v. Maughs, 149 Cal. 253, 86 Pac. 187. As has been said, throughout the case of the prosecution it was indicated and argued that larceny was the motive for these murders. The court instructed the jury as follows: "In this case it is not claimed by the prosecution that the homicide charged was committed in the perpetration or attempt to perpetrate another felony." It is manifest that the contention of the prosecution was at variance with this instruction, and, while it may not be perceived that the giving of it was injurious to the defendant, yet certainly under the evidence it had no proper place in the case.

The evidence, while circumstantial, was sufficient to sustain the verdict.

We perceive no other matters calling for consideration; but for the reasons given the judgment and order are reversed and the cause remanded.

We concur: BEATTY, C. J.; McFARLAND J.; LORIGAN, J.

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BONNEAU v. NORTH SHORE R. CO.

(S. F. 4,196.)

(Supreme Court of California. Dec. 2, 1907. Rehearing Denied Dec. 30, 1907.)

1. CARRIERS—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—CARE REQUIRED OF CARRIER.

A carrier of passengers must exercise the highest degree of care for their safety and transportation, and is liable for any injury sustained by them in the course of transportation through failure to exercise such care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1085–1106.]

2. SAME—ACTIONS—PRESUMPTIONS.

Proof that an injury to a passenger occurred through some accident happening to the train on which plaintiff was riding in the course of its operation by the carrier raises a presumption of negligence on the part of the carrier in the operation of the train, makes a prima facie case against it, and throws on it the burden of proving that the injury sustained was without negligence on its part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1288.]

3. SAME—INSTRUCTIONS—CONSTRUCTION.

In a personal injury action by a passenger, where it appeared that the coach in which plaintiff was riding left the rails, turned over, and was thrown into a creek, it was not error to instruct that the fact that the train overturned is all that plaintiff need establish to recover for injuries sustained, unless his want of care contributed to the overturning or to his injury, and that to rebut this presumption of negligence defendant must show that the overturning was the result of inevitable casualty, or some cause which could not have been prevented by human care and foresight, and in doing this the defendant must necessarily explain how the overturning occurred, and, if it fails to do this, the presumption of negligence remains; for, notwithstanding the latter part of the instruction it merely required the defendant to show that the car overturned without any negligence on its part.

4. SAME—BURDEN OF PROOF.

In a personal injury action by a passenger, an instruction that, in order to recover for such injuries as plaintiff received, it was only necessary to show that he was a passenger of the defendant, and that the car that he was riding in was overturned without his fault, and that, when this was done, the legal presumption arose that the overturning occurred through the negligence of defendant, and the burden of proving that there had been no negligence was cast upon the defendant, did not require the defendant to prove by a preponderance of evidence that it was not negligent, but simply declared that under the circumstances the presumption of negligence would prevail, and entitled plaintiff to recover, unless it was met or overcome by evidence of equal or greater weight, and the instruction was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1334.]

5. SAME — MISLEADING INSTRUCTIONS — BURDEN OF PROOF.

The instruction could not have misled the jury as to the burden of proof, where the jury was told in eight separate instructions that plaintiff, to recover, must prove negligence of the defendant by a preponderance of the evidence, and in three other places that, if they found the evidence on the question of negligence equally balanced, they should return a verdict for defendant, and, at the request of defendant, the court instructed that the presumption of negligence from the happening of the accident was not conclusive, but might be rebutted by the defendant, and that in rebutting the presumption it was not necessary to overcome it by a preponderance of the evidence, but it was sufficient if enough evidence was introduced to balance the presumption, for in that event it was overcome in the eyes of the law.

6. TRIAL—REFUSAL OF INSTRUCTIONS—EQUIVALENT INSTRUCTIONS.

In an action by a passenger for injuries received through the overturning of a car, refusal of an instruction that, if the railroad company has shown the exercise of the required degree of care, it is not obliged to go further and explain the cause of the accident, is not error, where the court instructed that the law permits the defendant in answer to any presumption of negligence to show the facts connected with the accident, and if it appears that the company had used proper care the presumption of negligence was overcome, and if at the time of the derailment the train was being operated with proper care, and the roadbed, ties, and rails at such time and place were constructed, etc., with proper care, and from some unforeseen cause, not to be anticipated by defendant in the exercise of the required degree of care, the wheels left the rails, defendant would not be responsible; for the instruction given was a correct statement, and embodied all that was material in the instruction refused.

7. DAMAGES — PERSONAL INJURIES — LOSS OF TIME AND EARNING CAPACITY.

In an action for damages for personal injuries, the value of time lost during the disability resulting from the injuries, and the impairment of capacity for future earnings, are proper elements of damage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 237–241.]

8. SAME—EVIDENCE — ADMISSIBILITY — PAST EARNINGS.

In an action for damages for personal injuries, evidence of earnings for the past several years prior to the accident is admissible on the question of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 490.]

9. SAME—EXCESSIVE DAMAGES—GROUNDS OF OBJECTION.

A verdict in an action for damages for personal injuries can only be disturbed as excessive when it appears that the award can be sustained on no other theory than that it was the result of passion or prejudice on the part of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 357.]

In Bank. Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Action by Thomas S. Bonneau against the North Shore Railroad Company for personal injuries. Judgment for plaintiff. From an order refusing a new trial, defendant appeals. Affirmed.

Jesse W. Lilienthal and J. W. Cochrane, for appellant. John Flournoy and Thomas P. Boyd, for respondent.

LORIGAN, J. This action was brought by plaintiff to recover damages for personal injuries sustained by him on June 21, 1903, through the derailment, overturning, and wrecking of one of defendant's passenger cars in which he was a passenger, occasioned, it is alleged, through the negligence of defendant in operating its train between Tomales and San Anselmo, in Marin county. Plaintiff obtained a verdict and judgment for $7,500, and defendant appeals from an order denying its motion for a new trial.

The points made on appeal relate to certain instructions given and to other certain instructions refused, rulings as to evidence offered, and the sufficiency of the evidence to justify the amount of the verdict. The evidence showed that the train of defendant on which plaintiff was a passenger consisted of an engine, tender, and one passenger coach; that, as the train was passing over a bridge across a small creek near Pt. Reyes, the passenger coach in which plaintiff was riding left the rails, turned over, and was precipitated into the creek, the plaintiff sustaining thereby the injuries for which he sought compensation.

As to the instructions attacked by appellant: The court instructed the jury that "the fact that the train did so overturn is all that he [plaintiff] need establish in order to recover for such injuries as he may have sustained, unless his want of ordinary care contributed to such overturning or to his injury. In order to rebut this presumption of negligence, the defendant must show that the overturning was the result of inevitable casualty or of some cause which human care and foresight could not prevent, for the law holds it responsible for the slightest negligence, and will not hold it blameless, except upon the most satisfactory proofs. In doing this the defendant must necessarily explain how the overturning occurred, and, if it fails to do this, the presumption of negligence remains." There can be no question of the accuracy of the general principle of law contained in this instruction. A carrier of passengers is held to the exercise of the highest degree of care for their safety and transportation, and liable for any injury sustained by them in the course of transportation through failure to exercise such care. And, where an action is brought by a passenger against a carrier to recover for injuries, he makes a prima facie case against the carrier when he shows that his injuries were sustained by some accident happening to the train on which he was riding in the course of its operation by the carrier. Such proof raises a presumption of negligence on the part of the carrier, in the operation of the train, and the burden is then thrown on it to show that the injury sustained by plaintiff was without negligence on its part. This has been the rule in this state for upwards of 40 years, being first announced in Boyce v. California Stage Co., 25 Cal. 468, and since reaffirmed, among other cases, in the recent case of McCurrie v. Southern Pacific Co., 122 Cal. 561, 55 Pac. 324. Counsel for appellant, however, criticise the last portion of the instruction given, in which it is declared to be the duty of the defendant to explain the cause of the overturning of the car, insisting that the defendant was not called on to prove how it overturned—what was in fact the cause of its overturning—but only that it occurred without any negligence on the part of the defendant. But, taking into consideration the entire instruction, it is apparent that the portion criticised only casts on the defendant the duty of showing that fact. The explanation that the defendant is required to make, as the instruction states it, is one which will show that the accident was the result of inevitable casualty, or that it resulted from some cause which care and prudence on the part of the carrier could not have prevented. In other words, that the accident was the result of some cause other than the negligence of the carrier itself. This is the only explanation the instruction calls for, was the only one which was stated and reiterated in the other instructions to the jury given by the court of its own motion and at the instance of the defendant, and was the one to which the evidence on the part of defendant was addressed. The instruction as given was taken from the language of the court in the Boyce Case, and is in the exact language of an instruction given in the case of Mitchell v. Southern Pacific Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130, and approved by this court as a correct statement of the law.

It is also insisted that the court erred in giving another instruction. It told the jury: "That the plaintiff was a passenger of the defendant, and that the car in which he was riding was derailed or overturned without his fault, is all that the plaintiff need establish in the first instance in order to recover for such injuries as may have been proximately caused him thereby. When the plaintiff has done this, the legal presumption arises that the derailment or overturning of the car occurred through the negligence of the defendant, and the burden of proving that there has been no negligence is cast upon the defendant." Complaint is made that this instruction incorrectly declares the rule as to the burden of proof; the position of the appellant being that, in an action where the only question is as to the negligence of the defendant, the burden of proof is always upon the plaintiff to show by a preponderance of the evidence such negligence; that the burden of proof never shifts, and that it was error to instruct the jury that "the burden of proving that there has been no negligence is cast upon the defendant"; that in effect this was to instruct the jury that the burden was cast upon it to prove by a preponderance of evidence that it was not negligent. But it is quite clear that this instruction had nothing to do with declaring any rule as to the burden of proof in the case; that is, the burden of proving by a preponderance of evidence the negligence of defendant. This is always on the plaintiff, and never shifts. All that is declared by the instruction criticised is that as a presumption of negligence on the part of the carrier arises from proof of the overturning of the car in which plaintiff was riding, which, in the absence of any evidence on the part of defendant meeting it, would entitle the plaintiff to recover, it is incumbent on the defendant, if it would avoid the effect of the presumption, to produce evidence of equal or greater weight to meet or overcome it, or it will prevail. That there was no error in the giving of the instruction complained of, and that the construction placed upon it by appellant is unwarranted, is so clearly established by the authorities in this state that further general discussion of the proposition would be unprofitable. In the recent case of Cody v. Market St. Ry Co., 148 Cal. 90, 82 Pac. 666, the following instruction given by the trial court was presented for review: "Hence, when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part." It will be observed that there is no essential difference between the instruction immediately quoted and the one involved at bar. There is a difference in phraseology only. In the Cody Case, discussing the objection urged against the instruction there presented, this court said: "It is claimed that the court erred in giving this instruction. It is suggested that the effect of this instruction was to make it incumbent on defendant to overcome the showing of plaintiff by a preponderance of evidence, whereas, under the universally recognized rule, no verdict could be rendered for plaintiff in the absence of a preponderance of evidence showing negligence on the part of defendant. That this contention is not well founded is shown by the opinion of this court in several cases where the question has been discussed. Such an instruction simply informs the jury that, when the facts stated therein are shown, a presumption of negligence on the part of the carrier arises, which is sufficient to make out a prima facie case for the plaintiff, and requires the defendant to meet the case thus made, or, in other words, to answer the prima facie case, or it will prevail. But it does not require a defendant to show want of negligence by a preponderance of evidence. It does no more than to require him to make such showing as to want of negligence as will leave the jury, with all the evidence before it, unsatisfied as to whether there was negligence on defendant's part, and if, on the whole case, the scale does not preponderate in favor of the presumption of negligence, and against the defendant's proof, plaintiff is not entitled to a verdict, for he has not established his case by a preponderance of evidence, as he was compelled to do under the well-settled rule. The term 'burden' or 'burden of proof' is frequently used to signify simply the burden of meeting a prima facie case, rather than the burden of producing a preponderance of evidence, and as used in the instruction in question imported nothing more." The distinction pointed out is equally shown in previous decisions (Scott v. Wood, 81 Cal. 389, 400, 22 Pac. 871; Kahn v. Triest, etc., Co., 139 Cal. 340, 344, 73 Pac. 164; Patterson v. S. F. & S. M. Ry. Co., 147 Cal. 178, 183, 81 Pac. 531; Valente v. Sierra Ry. Co. [Cal.] 91 Pac. 481), which are conclusive against the objection to the validity of the instruction urged by appellant.

Neither, when we examine the entire charge of the court, is there any room for reasonable contention that the jury could have understood the instruction in question to mean anything more than that the defendant was required to meet by evidence the presumption of negligence arising from the derailment and overturning of the car, or that it should prevail and warrant a verdict for the plaintiff. In eight separate instructions the jury was told by the trial court that the plaintiff, in order to recover, must prove negligence on the part of the defendant by a preponderance of the evidence. They were also told three several times in the instructions that, if they found that the evidence in the case on the question of negligence was equally balanced, they should return a verdict for defendant, and, at the request of the defendant, the court instructed the jury that the presumption of negligence arising from the happening of the accident was not a conclusive presumption, but might be rebutted by the defendant; that in rebutting the presumption it was not necessary for the defendant to overcome it by a preponderance of evidence; that it was sufficient if it introduced enough evidence simply to balance the presumption, for in that event the presumption was overcome in the eye of the law. With these instructions before them there could be no misconstruction by the jury of the instruction we have been considering.

It is next claimed that the court erred in refusing to give the following instruction tendered by defendant: "If the railroad company has shown the exercise of the required degree of care, it is not obliged to go further and explain the cause of the accident." All that was pertinent in this instruction was, however, embodied in the instructions given. The jury was told that the law permits the defendant in answer to any presumption of negligence to show the facts connected with the accident, and, if it appear from them and on the whole evidence that the company had used proper care, the presumption of negligence was overcome, and that if at the time of such derailment the train was being operated with proper care, and, further, that the roadbed, ties, and rails at such time and place were constructed, laid, and maintained with proper care, and that, from some unforeseen cause, not to be anticipated by the defendant in the exercise of the required degree of care, the wheels left the rail, the railroad company would not be responsible. This was a correct statement of what showing would relieve the defendant from liability, and embraced all that was really material in the instruction refused.

These are the only points made on the instructions.

As to the rulings on the admission of evidence: Plaintiff at the time of the accident was, and for many years prior thereto had been, an insurance solicitor for the New York Life Insurance Company, receiving commissions upon all business secured by him and written by said company. Over the objection of defendant, he was allowed to testify to the commissions earned by him for several years prior to the accident, which during that period varied in amounts from $2,000 to $3,700 per annum. It is insisted that it was error to allow this proof. We think not. As elements entering into the damage which plaintiff was entitled to receive as pecuniary loss were the value of his time for the period during which he was disabled by the injuries and if the injuries impaired his capacity for future earnings, such an amount as would compensate him for loss of such capacity. We know of no better method, and none has been suggested, whereby proof of such pecuniary loss can be presented to the jury than by the testimony of the plaintiff himself as to what his earnings as insurance solicitor were for a number of years and immediately prior to the accident. Naturally the earnings of one following a vocation such as the plaintiff was engaged in as they varied in the past must be uncertain as to the future, but evidence as to what they were in the past must furnish the best basis from which the jury may determine the extent of the pecuniary loss plaintiff has sustained as to either or both of the elements of damage suggested. The authorities sustain the admissibility of such evidence. Ehrgott v. City of New York, 96 N. Y. 264, 48 Am. Rep. 622; Symons v. Metropolitan St. Ry. Co. (Sup.) 58 N. Y. Supp. 227; Missouri, etc., R. R. v. Vance (Tex.) 41 S. W. 167.

As to the other points made by appellant on the rulings as to evidence, we deem them so untenable as to require neither mention nor discussion.

Lastly, it is claimed that the damages are excessive. We can only disturb a verdict in this class of cases for that reason when it appears that the damages are so excessive that the award can be sustained on no other theory than that it was the result of passion or prejudice on the part of the jury. Nothing of the kind appears here. The evidence in the case justified the jury in finding that the plaintiff had been damaged upwards of $2,000 for expenses—medical services, nursing, etc.—incurred by him by reason of the injuries and for loss of time while entirely disabled from pursuing his vocation as insurance solicitor. It appeared, further, that, aside from the pain and suffering he endured incident to his injuries, such injuries were of a permanent character and materially impaired his capacity for future pursuit of his vocation as such solicitor. Under this evidence, it was for the jury to exercise an intelligent discretion in the award of damages, and there is nothing in the amount awarded to indicate that it was the result of other than the exercise of such discretion.

The order appealed from is affirmed.

We concur: McFARLAND, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.

Mr. Justice ANGELLOTTI did not participate herein, deeming himself disqualified.

152 Cal. 426

BUNTING v. HASKELL et al. (S. F. 4,304.)

(Supreme Court of California. Dec. 2, 1907. Rehearing Denied Dec. 30, 1907.)

1. Judicial Sales—Redemption.

As a general rule, the redemption allowed by statute cannot be effected after the expiration of the statutory period allowed therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Judicial Sales, § 116.]

2. Execution—Redemption—Failure to Redeem—Relief.

Courts of equity may, upon a proper showing of fraud, mistake, or other circumstances appealing to the discretion of the chancellor, relieve judgment debtors whose property has been sold on execution from a failure to redeem within the statutory period.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 849.]

3. Appeal—Right of Review—Waiver—Acceptance of Payment on Judgment.

Where plaintiff secures defendants' property on a judgment sale, and thereafter defendants obtain a decree of redemption upon payment of a specified sum within 30 days, plaintiff's acceptance of the sum within the time given would involve a waiver of his right of appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 984, 985.]

4. Quieting Title—Adverse Claim of Title.

Plaintiff secured defendants' property on a judgment sale. More than a year thereafter defendants obtained a decree of redemption upon payment within 30 days of a specified sum and 7 per cent. interest thereon, whereupon plaintiff must convey the property to defendants. The sum was tendered, but plaintiff refused it, and appealed from the decree. The judgment was affirmed, and 30 days afterwards plaintiff demanded the sum, tendering a conveyance of the property. Defendants refused to pay, claiming that, under Code Civ. Proc. §§ 703, 704, providing that redemption by the debtor terminates the effect of the sale, and restores the debtor to his estate, and that a tender is equivalent to payment, their tender accomplished the redemption, and that, when it was refused, it was not necessary thereafter to keep it good or pay the amount to plaintiff. *Held*, in an action to quiet title, that defendants had lost their right of redemption, and that the title vested in plaintiff by the commissioner's deed following the judgment sale, was unaffected by any adverse claim arising from the decree of redemption; the right to redeem given by the decree being not the same right given by statute, and being governed by the conditions in the decree and not those mentioned in the act.

5. Judicial Sales—Redemption.

Civ. Code, § 1504, providing that "an offer of payment * * * stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof," has no application to a tender under a decree allowing judgment debtors to redeem their property within a specified time upon specified conditions, since the decree, being a mere option to redeem, imposed no "obligation" upon them, and neither the title to the land nor its possession was an "incident" to any obligation within the meaning of the section.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by William L. Bunting against Burnette G. Haskell and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Wm. B. Sharp, for appellants. Edward C. Harrison, for respondent.

SLOSS, J. This is an action to quiet title to real property. The plaintiff recovered judgment, and the defendants appeal on the judgment roll.

On June 1, 1897, Margaret Reese was the owner of the land described in the complaint, subject to a mortgage made by her on February 20, 1892, to one Iburg. Iburg brought action for the foreclosure of this mortgage, recovering judgment under which the property was sold to Bunting, plaintiff herein, on June 1, 1897. After the expiration of 12 months from said sale a deed of the property was executed and delivered to Bunting by the commissioner who had made the sale. Thereafter, on June 28, 1898, Margaret Reese and some of the defendants herein commenced an action against Bunting, the plaintiff herein, in which action the superior court on January 28, 1901, rendered a judgment that the plaintiffs therein and each of them were entitled to redeem the property from said sale within 30 days from the entry of said judgment, upon payment to the defendant therein (the plaintiff herein) of the sum of $819.89. This judgment was entered January 30, 1901, and within 30 days thereafter the plaintiffs in that action tendered to Bunting the amount of money necessary under the terms of the judgment to effect the redemption thereby allowed and provided for, but the said defendant refused to accept the said money. Thereafter the said defendant (plaintiff herein) appealed from the judgment, and deposited with the clerk of the superior court a conveyance of the property to the plaintiffs in said action to abide the judgment of the Supreme Court on said appeal. He also surrendered and delivered the possession of the property to said plaintiffs. The judgment appealed from was affirmed by this court on December 29, 1903 (Benson v. Bunting, 141 Cal. 462, 75 Pac. 59), and the remittitur filed in the superior court on February 26, 1904. After the filing of the remittitur, Bunting made a demand in writing upon the defendants herein (plaintiffs in said action of Benson v. Bunting) for the payment of the money provided by said judgment for said redemption, and at the same time tendered to them a conveyance by him to them of said property. But the defendants refused to pay the money so demanded, or any part thereof, specifying no objection to the tender or demand, excepting to state that said defendants were entitled to 30 days' time from and after such demand wherein to make the payment demanded. This tender and demand were made on the 27th day of April, 1904, and 30 days thereafter, to wit, on the 28th day of May, 1904, the plaintiff herein made a second tender to said defendants of a conveyance of the property, and again demanded of them the payment of said sum fixed by the court as the amount required for redemption, but said defendants refused, and ever since have refused, to pay the said sum of money so demanded or any part thereof. Thereupon the plaintiff brought the present action. The judgment appealed from determines that the plaintiff is the owner in fee simple absolute of the property, and adjudges that his title thereto be quieted as against any and all of the claims of any of the defendants, that said defendants be enjoined from asserting any claim whatever in or to said land adverse to said plaintiff, and that possession of said land be restored to said plaintiff. The contention of the appellants is that their tender to the plaintiff within 30 days after the entry of judgment in Benson v. Bunting of the amount required for redemption was in itself sufficient to accomplish the redemption, and that, when such tender was refused, it was not necessary thereafter to keep it good, or to pay the amount to plaintiff. If we were dealing with the question of a redemption from execution sale, effected by act of the judgment debtor in the manner and within the period fixed by law, this contention would undoubtedly be sound, and that for the simple reason that the statute expressly so provides. Section 703 of the Code of Civil Procedure declares that, "if the debtor redeem, the effect of the sale is terminated and he is restored to his estate." Section 704 declares that "a tender of the money is equivalent to payment." Speaking of a tender in redemption made within the time prescribed by law, this court, in Leet v. Armbruster, 143 Cal. 663, 77 Pac. 653, said that "the tender operated instantaneously to redeem the property and revest the title in the redemptioner."

But was the redemption authorized by the decree in Benson v. Bunting the redemption provided for in sections 702 et seq. of the Code of Civil Procedure? As a general rule, the redemption allowed by statute cannot be effected after the expiration of the statutory period allowed therefor. Tilley v. Bonney, 123 Cal. 118, 123, 55 Pac. 798; Davidson v. Gaston, 16 Minn. 230 (Gil. 202). It is well settled, however, that courts of equity may, upon a proper showing of fraud, mistake or other circumstances appealing to the discretion of the chancellor, relieve judgment debtors whose property has been sold on execution from a failure to redeem within the statutory period. In such cases equity "in its discretion will grant relief on a proper bill, and allow the judgment debtor to redeem after the expiration of the redemption period." 17 Cyc. 1330; Graffam v. Burgess, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839; Branch v. Foust, 130 Ind. 538, 30 N. E. 631; Smith v. Huntoon, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 646. But such redemption, when authorized by the decree of a court of equity, finds its support, not in the provisions of the statute allowing redemption within a given time as a matter of right, but in the provisions of the decree granting to a party the privilege of redeeming upon terms fixed by the court as just. In the case at bar, the decree permitting redemption is described in the complaint, and no issue is made as to the allegations regarding it. Those allegations are that the court adjudged and decreed that certain defendants were entitled to redeem the property within 30 days from the date of entry of said judgment and decree, upon payment to the plaintiff of $819.89, with interest thereon at the rate of 7 per cent. per annum until payment, subject to certain reductions, and that in said decree it was further ordered and adjudged that, if the said defendants should fail to redeem the property within 30 days, the said action might, upon motion of Bunting, the plaintiff herein, be dismissed. The complaint contains further allegations from which it appears that the decree required the plaintiff to make and deliver to the defendants a deed of conveyance of the property in question.

Assuming that a court of equity may, in granting a right to redeem after the expiration of the statutory period, prescribe in its decree that the redemption so allowed shall be accomplished in the manner and subject to the conditions provided for statutory redemption, we think the decree in Benson v. Bunting should not be construed as giving to the plaintiffs in that action a right to a statutory redemption to be exercised within a new period of 30 days. The redemption authorized by the decree differed in several respects from that allowed by the Code. In the first place, the rate of interest to be computed on the amount required for redemption was not that fixed by law. Code Civ. Proc. § 702. Again, the decree provided for a conveyance by the plaintiff, whereas, in case of a redemption under the statute, payment, or even tender, would "ipso facto work a restoration to the judgment debtor, or his successor in interest, of his title." Leet v. Armbruster, supra. But a more substantial reason for holding that the decree in Benson v. Bunting should not be construed as intending to merely extend the statutory right of redemption, which had been lost by lapse of time, is that the decree does not contain any language indicating such intention, and that every consideration of equity demanded of the court that no such relief should be granted. The plaintiffs in Benson v. Bunting came into a court of equity asking to be restored to a right which under the law had passed from them. Such relief could properly be granted them only on condition that they themselves did equity. To give to the decree the construction advanced by appellants would be to hold that they, having come into a court of equity and obtained a decree permitting them to redeem property on payment of a certain sum, might merely by reason of a tender once made hold all the substantial fruits of the decree while repudiating the obligations imposed by it upon them. This is not equity, and the decree in the former suit should not be construed so as to permit such result. It must be remembered that that decree was not final. The plaintiff, Bunting, had the right to appeal from it, and did, in fact, appeal. An acceptance of the tender made by defendants would have involved a waiver of his right of appeal. 2 Cyc. 652; Wolff v. Canadian Pac. Ry., 89 Cal. 332, 338, 26 Pac. 825. If the decree had the effect attributed to it by appellants, they by their tender compelled the plaintiff to waive his right of appeal, under penalty of losing the property, if he should decline to make such waiver and the decree should be affirmed. But he was not bound to waive his right of appeal. If the decree were erroneous, the mere tender of the money did not entitle the plaintiffs in that action to redeem, and, while the right of appeal subsisted, Bunting's title could not be finally divested by a tender which was not accepted and was not kept good. No doubt the appellants (plaintiffs in Benson v. Bunting) had a right to make the tender within 30 days after entry of the decree, and after so doing they could not be put in default until the plaintiff should tender them a deed and demand payment of the amount due. After the judgment had been affirmed, their right to redeem still existed, but it was a right to redeem upon the condition fixed by the decree, which was that the money should be paid by the defendants. This condition they refused to comply with, and, that refusal having persisted after demand for the period of 30 days allowed them, the court below properly concluded that they had lost their right of redemption, and that the title vested in plaintiff by the commissioner's deed was unaffected by any adverse claim arising from the proceedings in Benson v. Bunting.

Appellants rely on section 1504 of the Civil Code, providing that "an offer of payment * * * stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof." We think this section has no application here. As we construe the decree in Benson v. Bunting, it gave to the defendants a mere option to redeem. That option imposed no "obligation" upon them, and neither the title to the land nor its possession was an "incident" to any obligation, within the meaning of this section.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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152 Cal. 432

KATZ v. FITZGERALD et al. LESSER v. DORNIN. (S. F. 4,747, 4,205.)

(Supreme Court of California. Dec. 2, 1907. Rehearing Denied Dec. 30, 1907.)

1. ELECTIONS — PRIMARY ELECTION LAW — CONSTITUTIONALITY.

The primary election law is not violative of Const. art. 2, § 2½, empowering the Legislature to determine the conditions on which electors may participate in any primary election, in that secrecy in voting is not preserved; that the law arbitrarily classifies voters and discriminates between the classes so made; that it destroys the right of self-preservation of political parties; that it impairs the right of citizens to assemble together and to instruct their representatives; and that it invests state officers with judicial functions.

2. SAME.

Const. art. 2, § 2½, empowers the Legislature to determine the conditions on which electors may participate in primary elections. *Held*, that the primary election law is not invalid because declaring that political parties shall be, as to their mode of holding conventions and nominating candidates for public office, regarded as public bodies, whose methods are to be controlled by the state.

3. SAME.

Pol. Code, § 1188, relating to nominations of candidates for public offices, and authorizing the clerk or other officer with whom the petition of any independent candidate is filed to strike from the list of names of candidates nominated by petition the names of those who have voted at any primary election, is not unconstitutional as vesting judicial powers in the Secretary of State, clerks, and others officers, since no judicial function is exercised in determining that one who voted at a primary election is the same person whose name is appended to a petition.

4. SAME.

Pol. Code, § 1190, prohibiting one who has voted at a primary election from signing a petition for another candidate, is not unconstitutional as providing an arbitrary classification of voters.

5. SAME.

Const. art. 2, § 2½, empowers the Legislature to determine the conditions on which electors may participate in primary elections, and provides that such conditions may be different from the conditions required at other elections authorized by law. *Held*, that Pol. Code, § 1361, extending the operation of the primary law to such political parties only as have polled 3 per cent. of the total vote, is not invalid as discriminating between large and small political parties, or as conferring any special privilege on parties which have cast more than 3 per cent. of the vote which is not conferred on all such parties.

In Bank. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Proceedings by A. B. Katz against George Fitzgerald and others and by M. Lesser against George W. Dornin. Judgment for defendants in each proceeding, and plaintiffs appeal. Affirmed.

Lewis & Royce, for appellants. J. E. McElroy, for respondents.

HENSHAW, J. These cases both represent attacks upon the constitutionality of the primary election law, and may be considered and disposed of together.

The propositions advanced against the law are: Secrecy in voting is not preserved. The law arbitrarily classifies voters and discriminates between the classes so made. It destroys the right of self-preservation of political parties, and impairs the right of citizens to assemble together and to instruct their representatives, and invests state officers with judicial functions. These objections, for the most part, were advanced and answered in the case of Schostag v. Cator (Cal.) 91 Pac. 502, and Rebstock v. Superior Court, 146 Cal. 308, 80 Pac. 64, decided by this court in bank since the appeals in the present cases were taken and the briefs therein filed. In the Schostag Case it is said that the evils sought to be remedied by the adoption of section 2½ of article 2 of our Constitution were the corrupt practices by which, in the absence of proper public control, primary elections were made to defeat, instead of to express, the will of political parties. It is further pointed out that the state has a general interest in guarding the purity of primary elections, since party elections have become an essential feature of our system of choosing public officers, and at the same time each political party has a special interest in reserving to its own members the control of its own affairs. In none of these respects does it appear that the legislative enactments violate the spirit or intent of section 2½ of article 2 of the Constitution. While primary election laws are now conducted under the law, and, are to that extent, a part of the elective system of the state, it is the secrecy of the ballot which the law protects, and not secrecy as to the political party with which the voter desires to act. The primary law does not prevent him from voting secretly. We cannot perceive where this law exposes any person advocating doctrines distasteful to any section of the community to its enmity any more than such a person would be exposed if he cast his ballot at a primary election held under the direction of the party managers without control of the law. Nor do we perceive that the right of self-preservation of a political party is destroyed. For, in addition to the tests which the Legislature has prescribed, it remains with the managing bodies of the political parties to require additional tests of qualification before a citizen may be allowed to vote the party ticket.

To the objection that it makes a public body of that which is, in its essence, a private association of citizens to accomplish a public purpose, it is sufficient to say that the conception that a political party is merely a private association of citizens, a conception which in the past found wide acceptance, has, under the development of modern political parties, been very generally abandoned, and, where not abandoned, the conception itself has been destroyed, as in this state by force of the Constitution and the statutory laws enacted under it. By virtue of the constitutional provision the state has seen fit to declare that political parties shall be as to their mode of holding conventions and nominating candidates for public office, regarded as public bodies whose methods are to be controlled by the state. Against the constitutionality of sections 1188 and 1190 of the Political Code, it is urged that judicial powers are vested in the Secretary of State, clerks, and other officers, in that they are empowered to strike from the list of names of candidates nominated by petition the names of those who have voted at any primary election. We perceive no force in this objection. Ordinarily the identity of the person will be established by the identity of names, and, even if other facts are required for the establishment of such identity, it will scarcely be said that a judicial function is exercised in the determination that the John Smith, who voted at a primary election, is the same John Smith whose name is appended to a petition.

As little force attaches to the objection that there is an arbitrary classification of voters by the provision prohibiting one who has exercised the right to vote at a primary election from signing a petition for another candidate. If it be said that hardship to the individual voter may result in preventing him from petitioning for the nomination of candidates of his choice, if his party should fail to nominate those whom he desires, his individual grief should be more than assuaged by the fact that he is not compelled to vote at a primary election, and that, if the rule were otherwise, it would open the door to endless frauds, and be destructive to all party organization. It would not alone enable vicious electors to vote at the primary of one or another political party, but would permit them, after doing so, to join in the petition for the nomination of any number of men for any number of offices. The provision is one frequently found in the election laws of the states, and when found has always been upheld. 10 Am. & Eng. Ency. of Law, 635; Phillips v. Curtis, 4 Idaho, 193, 38 Pac. 405; Southall v. Griffiths, 100 Ky. 91, 37 S. W. 577.

As to the objection that there is a discrimination between large and small political parties because of the provisions of section 1361 extending the operation of the primary law only to such political parties as have polled 3 per cent. of the total vote, it must be said that the constitutional amendment in question was framed and adopted after the decisions of this court in Marsh v. Hanly, 111 Cal. 371, 43 Pac. 975, Spier v. Baker, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196, and Brittain v. Board of Commissioners, 129 Cal. 341, 61 Pac. 1115, 51 L. R. A. 115, and it was adopted to meet and avoid the very objections to the primary law which this court found were interposed by the Constitution in its then existing form. Under the Constitutional amendment adopted, it must suffice to say that there is no constitutional recognition of any body of men calling themselves a party until 3 per cent. of the vote has been cast by such body. Three per cent. is an exceedingly small percentage. All bodies of men casting less than this percentage are treated alike. Some classification is made necessary, else any two, three, or four men might call themselves a party, and impose the burden of placing the names of their candidates upon the ballot provided by the state law—a condition which could easily be made intolerable to the state, as well as to the voter. Classification becoming necessary, the one here adopted is rational, and does not impose any burden upon one of a class that is not imposed upon all; nor, upon the other hand, does it confer any special privilege upon parties which have cast more than 3 per cent. of the vote, which is not conferred upon all such parties. Ladd v. Holmes, 40 Or. 167, 66 Pac. 714, 91 Am. St. Rep. 457.

For the foregoing reasons, the judgments appealed from are affirmed.

We concur: BEATTY, C. J.; LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.; McFARLAND, J.

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152 Cal. 419

PUCKHABER v. HENRY. (S. F. 4,240.)

(Supreme Court of California. Dec. 2, 1907. Rehearing Denied Dec. 30, 1907.)

1. Limitation of Actions—Effect of Bar—Payment of Debt.

A debt is not satisfied or extinguished by mere lapse of time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 650.]

2. Pledges—Recovery of Pledged Property—Conditions Precedent—Payment.

In the absence of express provision to the contrary, a pledgor cannot recover possession of the pledged property without paying his debt, even though it is barred by the statute of limitations.

3. Limitation of Actions—Effect—Bar of Debt as Affecting Security—Statutory Provisions—Pledges.

Civ. Code, § 2911, providing that a lien is extinguished by the lapse of the time within which an action could be brought upon the principal obligation, applies both to mortgages and pledges, and was adopted as a part of the original Code to declare the rule previously laid down by the courts, to the effect that, when an action on an indebtedness is barred by the statute of limitations, action on a contract given to secure the debt is also barred, but it was not designed to aid a debtor in the recovery of possession of his property, or in removing any cloud upon his title, without paying his debt, and, while the statute will prevent an affirmative action on the part of a mortgagee or pledgee to enforce his lien after the debt is barred, the fact that a note secured by a policy of life insurance is barred by the statute of limitations does not bar an action on the policy by the pledgee after the death of the insured, if the note has not been paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 651-653.]

4. Trial—Special Findings—Immaterial Issues—Failure to Find.

In an action on a life insurance policy, it appeared that the policy had been assigned and delivered to plaintiff to secure a note. The insurance company paid the money into court, and had the administrator of the insured substituted as defendant. The court found that the note had not been paid, but failed to find whether it was barred by the statute of limitations. *Held*, that the issue was immaterial, since defendant was not entitled to possession of the policy, and the money paid into court should be deemed to be in plaintiff's possession for the purpose of the action.

5. New Trial—Grounds—Failure to Find on Issues—Immaterial Facts.

Failure of the court to find on an immaterial issue will not warrant the granting of a new trial.

6. Pledges—Rights of Pledgee—Statutory Provisions—Collection of Pledged Insurance Policy.

Under Civ. Code, § 3006, providing that a pledgee of an evidence of debt pledged to him may collect it when due, where a life insurance policy was assigned and delivered to plaintiff to secure a note, and the note was never paid, though it became barred by the statute of limitations, plaintiff was entitled to collect the insurance on the death of the insured.

McFarland, Henshaw, and Lorigan, JJ., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Charles R. Puckhaber against Kate Henry, administratrix, etc. From an order granting defendant a new trial, plaintiff appeals. Reversed.

See 81 Pac. 1105.

Mullany, Grant & Cushing and Cushing, Grant & Cushing, for appellant. T. Z. Blakeman and Chickering & Gregory, for respondent.

ANGELLOTTI, J. This is an appeal from an order granting defendant's motion for a new trial. The action was originally one against the Mutual Life Insurance Company of New York, a corporation, to recover the amount due on a policy of insurance issued by that company to John P. Henry, upon the life of said Henry; the plaintiff alleging that said policy had been assigned to him by Henry on August 22, 1896. Henry died on January 9, 1902, and the action was commenced May 8, 1902. The insurance company, admitting the validity of the policy and alleging that both plaintiff and Kate Henry, administratrix of estate of Henry, claimed the proceeds of said policy, obtained an order substituting said administratrix as defendant, and discharging it from liability to either party upon depositing in court the amount due on the policy, viz., $2,511. This deposit was made. Said administratrix, having been substituted as defendant, filed her answer and so-called cross-complaint. By this pleading, she denied the allegations of the complaint as to assignment of the policy. She also alleged that plaintiff's only claim to the policy or any of the proceeds thereof was that he held the policy as security for the payment of a promissory note made and delivered by Henry to Puckhaber in the year 1896 and payable one day after its date, and "that the obligation evidenced by the said promissory note and all thereof had prior to the death of the said John T. Henry become barred by the provisions of the statute of limitations of the state of California, to wit, by the provisions of section 337 of the Code of Civil Procedure of the state of California." She asked that plaintiff take nothing by his action, and that the money deposited be paid to her. Plaintiff answered this so-called cross-complaint, alleging the execution and delivery by Henry to him on August 22, 1896, of a promissory note for $688.50, together with interest from that date at 8 per cent. per annum, and the assignment and delivery of said policy as security for such payment. He alleged that no part of this note had been paid, and denied that the obligation evidenced by the promissory note or any part thereof had prior to the death of Henry become barred by the statute of limitations, and also alleged that his rights in and to said policy were not barred. The trial court found in accord with these allegations of plaintiff as to the assignment and delivery of the policy as security, and the nonpayment of the amount due or any part thereof. It further found that plaintiff's "cause of action herein" is not barred by any provision of the statute of limitations, but made no finding upon the issue as to the barring by such statute of the obligation evidenced by the promissory note. Judgment was given that plaintiff receive out of the sum deposited in court the amount due on said note, and that defendant receive the balance of such sum. Defendant's motion for a new trial was based upon the grounds, among others, that the evidence was insufficient to sustain the finding that the plaintiff's cause of action was not barred by the statute of limitations, and that the decision was against law, in that the court had failed to find upon the issue as to the obligation evidenced by the promissory note being barred by such statute prior to Henry's death.

The evidence showed without conflict that the obligation evidenced by the said promissory note and all thereof had become barred by the provisions of section 337 of the Code of Civil Procedure prior to the death of Henry. Section 2911 of the Civil Code provides: "A lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." This section is contained in the article relating to extinction of liens, and by section 2877 of the Civil Code both contracts of mortgage and pledge are expressly made subject to its provisions. In the case of Mutual Life Insurance Co. v. Pacific Fruit Co. et al., 142 Cal. 477, 76 Pac. 67, this court held that, by reason of section 2911, Civ. Code, the pledgee of a life insurance policy situated precisely as is the plaintiff here could not share in the proceeds of the policy. The effect of that decision is that, by reason of this section, a pledgee who has allowed his remedy upon the principal obligation to become barred cannot retain possession of the pledged property. If this decision is to be followed, it necessarily requires an affirmance of the order granting a new trial. This is conceded by counsel for plaintiff; their claim being that the case cited was incorrectly decided and should be overruled.

We are satisfied that this court in that case misconceived the effect of section 2911 of the Civil Code. There can, of course, be no question that under its terms the lien of the pledge is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation. This is all that is said in the opinion as to the effect of this section, and it is apparently assumed from this that, the lien of the pledge being extinguished, the pledgee can no longer retain possession of the pledged property, even though the debt for which it was given as security has not been paid. It is in attributing this effect to the extinguishment of the lien that we think the decision is erroneous. Section 2911, adopted as a part of the original Code in 1872, was designed simply to declare the rule previously laid down by the decisions of this court, to the effect that, when an action upon the indebtedness is barred by the statute of limitations, action on any contract given by way of security for the debt is also barred. This rule was contrary to the rule existing at common law and in many of our sister states, under which an action might be maintained to foreclose a mortgage not barred by the statute, although the debt for which it was given as security was barred. It was, however, thoroughly established by a line of decisions rendered before the enactment of the Codes, commencing with Lord v. Morris, 18 Cal. 482, in which the matter was exhaustively discussed in an opinion delivered by Chief Justice Field. It clearly appears from the note of the Code commissioners to the original section that this was the reason for the elimination of the word "not" from the section of the New York Code, when such section was otherwise taken as a part of our own Civil Code, the New York section reading "a lien is not extinguished," etc., which was in accord with the rule theretofore established in that state. The effect of the California rule is undoubtedly to prevent any affirmative action on the part of the mortgagee or pledgee to enforce his lien, after the debt is barred by the statute of limitations. In such a case the lien no longer exists. It has been "extinguished." But the section was not designed to prevent the application of the equitable principle which has always been recognized as warranting courts in refusing to aid the debtor in the recovery of possession of his property from the mortgagee in possession or pledgee, or in removing any cloud upon his title created by an instrument in writing given as security, without paying his debt. This is thoroughly established in this state by the decisions in regard to mortgages, to which the section is equally applicable, and between which and pledges of personal property there is no distinction material to the question under discussion. Although the lien of a mortgage is "extinguished" by the barring of the debt by the statute of limitations, the mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee, or maintain ejectment against his mortgagee in possession. This is firmly settled in this state by decisions rendered since the adoption of the Code sections. Booth v. Hoskins, 75 Cal. 271, 276, 17 Pac. 225; De Cazara v. Orena, 80 Cal. 132, 22 Pac. 74; Spect v. Spect, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; Brandt v. Thompson, 91 Cal. 458, 462, 27 Pac. 763; Hooper v. Young, 140 Cal. 274, 280, 74 Pac. 140, 98 Am. St. Rep. 56; Burns v. Hiatt, 149 Cal. 617, 87 Pac. 196. See, also, Grant v. Burr, 54 Cal. 298. This is in accord with the practically universal rule. A debt is not satisfied or extinguished by mere lapse of time. "The rights which grow out of the relations existing between mortgagor and mortgagee, as well as the remedies for the enforcement and protection of those rights, are of equitable origin, and are to be determined by the principles of equity, whether the right be asserted or the remedy sought in an action at law or in equity. * * * Courts look to the substantial rights of the parties for the purpose of determining the remedy to which they are entitled, irrespective of the form of the complaint under which the remedy is sought. Whenever a mortgagor seeks a remedy against his mortgagee, which appears to the court to be inequitable, * * * the court will deny him the relief he seeks, except upon the condition that he shall do that which is consonant with equity. * * * The statute of limitations is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor. It is available in judicial proceedings only as a defense, and can never be asserted as a cause of action in his behalf, or for conferring upon him a right of action." Spect v. Spect, supra. It is impossible to reconcile these decisions as to the rights of a mortgagor whose debt has not been paid with the decision under discussion, and no attempt has ever been made to do so. Section 2911 applies alike to mortgages and pledges. The pledgee is in precisely the position occupied by the mortgagee in possession. Property has been placed in his possession by the debtor as security for the discharge of his obligation. It would be as inequitable to assist him in recovering the possession thereof without paying his debt, as to assist a mortgagor in so recovering his property. It is the general rule enunciated by courts of last resort that a pledgor cannot recover possession of the pledged property without paying his debt, although the debt be barred by the statute of limitations, and this rule is based on the equitable doctrine already stated. This court has announced the same rule in regard to a pledge, although perhaps never in a case where it was necessary to the decision. See Spect v. Spect, supra; Zellerbach v. Allenberg, 99 Cal. 57, 69, 33 Pac. 786; Commercial Sav. Bank v. Hornberger, 140 Cal. 16, 20, 73 Pac. 625. We have no doubt that it is the correct rule in the absence of express provision to the contrary, and that section 2911 of the Civil Code should not be construed as providing to the contrary. To hold otherwise not only implies a legislative intent not shown by the language of the section, but deprives our numerous decisions as to the rights of a mortgagee of real property of the foundation upon which they are based. If Mutual Life Insurance Company v. Pacific Fruit Co., supra, is to be followed, either the decisions as to a mortgagee in possession must be overruled, or, accepting the doctrine of those cases as established as a rule of property which should not now be changed, we shall have two diametrically opposed constructions of section 2911, one for the mortgagee in possession and the other for the pledgee. We cannot see that property rights can by any possibility be injuriously affected by our now declaring what we are satisfied is the true rule in this matter, and declining to follow the decision under discussion.

The case of Conway v. Supreme Council, 131 Cal. 437, 63 Pac. 727, is cited in the opinion in Mutual, etc., Co. v. Pacific, etc., Co., supra, as sustaining the views therein enunciated. The opinion in the Conway Case fails to show that the claimants had received or were in possession of the policy, or that they had anything more than a mere equitable lien. The decision goes no further than to hold that in such a case it was essential to the claimant's rights to obtain possession from the beneficiaries of proceeds of the policy, that the lien had not been extinguished by the barring of the principal indebtedness. In this case, as in Mutual, etc., Co. v. Pacific, etc., Co., supra, the position of the beneficiary is clearly that of the pledgor or his successor seeking to recover possession of the pledged property from the pledgee without paying the debt for which it was pledged. The money paid into court as proceeds of the policy has merely taken the place of the policy held in possession by the plaintiff, and for all the purposes of this action should be deemed to be in the possession of the plaintiff. It follows from what we have said that the issue as to the debt being barred at the time of the death of Henry was an immaterial issue in this action, and the failure of the court to find on an immaterial issue would not warrant the granting of a new trial. It also follows that the evidence without conflict showed that plaintiff's "cause of action herein" is not barred.

There was no conflict in the evidence upon the proposition that Henry assigned and delivered the policy to plaintiff in pledge as security for the debt evidenced by the note. The right of the plaintiff to collect from the insurance company the amount of the policy when it fell due followed as a matter of law. Civ. Code, § 3006. A new trial could not therefore be granted on the ground of insufficiency of evidence to support the finding as to these matters. There is no other point made in support of the order granting a new trial. It is evident that the new trial was granted by the lower court solely because of the decision of this court in Mutual, etc., Co. v. Pacific, etc., Co., supra.

The order granting a new trial is reversed.

We concur: SHAW, J.; SLOSS, J.

BEATTY, C. J. I concur in the judgment, and also in the opinion, except that portion thereof referring to the case of Conway v. Supreme Council, 131 Cal. 437, 63 Pac. 727, which case was again before this court on a second appeal (137 Cal. 384, 70 Pac. 223). I think the effect of the opinion in this case is to overrule, not only the decision of this court in the Mutual, etc., Co. v. Pacific, etc., Co., 142 Cal. 477, 76 Pac. 67, but also the Conway Cases.

McFARLAND, HENSHAW, and LORIGAN, JJ. We dissent. In our opinion the law on the point at issue was correctly declared in the case of Mutual Life Ins. Co. v. Pacific Fruit Co., 142 Cal. 477, 77 Pac. 67, and cases cited in the opinion filed in said case.

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152 Cal. 515

BOARD OF EDUCATION OF THE CITY & COUNTY OF SAN FRANCISCO v. HYATT. (S. F. 4,832.)

(Supreme Court of California. Dec. 6, 1907.)

1. SCHOOLS AND SCHOOL DISTRICTS—CONSTITUTIONAL PROVISIONS—CONSTRUCTION.

Under Const. art. 9, § 6, providing that the public school system shall include primary and grammar schools and such high schools, evening schools, commercial schools and technical schools as may be established by the Legisture or by municipal or district authority, the words "evening schools" were merely intended to obviate doubt as to the power to provide for schools holding evening sessions, so that the section did not prevent the conduct of an evening high school as a part of the public school system.

2. SAME—HIGH SCHOOLS IN CITIES—ESTABLISHMENT—NECESSITY OF VOTE—STATE HIGH SCHOOL FUND—RIGHT TO SHARE.

Pol. Code, § 1616, declares that boards of education shall be elected in cities under the laws governing such cities, and their powers and duties shall be as prescribed therein, except as otherwise provided in such chapter. St. 1871–72, p. 846, c. 576, § 1, conferred on the board of education of San Francisco power to maintain public schools as then organized, and to establish additional ones as required, etc. *Held*, that high schools being a part of the public school system, as provided by Const. art. 9, § 6, the San Francisco board of education had power to establish high schools, which thereupon became entitled to share in the benefits of the state high school fund, if otherwise qualified, as provided by Act March 6, 1905, p. 58, c. 65, conferring such benefits on high schools organized under the laws of the state, or recognized as existing under the high school laws of the state, though such high schools were not organized pursuant to an election held in the manner prescribed by Pol. Code, § 1670.

3. STATUTES—LOCAL AND SPECIAL LAWS.

St. 1871–72, p. 846, c. 576, authorizing the board of education of the city of San Francisco to establish high schools, having been passed before the adoption of Const. 1879, was not affected by the restriction therein, prohibiting the passing of local or special laws.

4. SCHOOLS AND SCHOOL DISTRICTS—ORGANIZATION OF HIGH SCHOOLS—DEFECTS—CURATIVE ACTS—HIGH SCHOOL FUND—RIGHT TO SHARE.

A high school having been established by the board of education of the city of San Francisco in October, 1897, any defects existing in such organization were cured by St. 1901, p. 299, c. 140, providing that all proceedings for the establishment of high schools in previously established, incorporated cities were thereby declared legal, and by Acts 1905, amending Pol. Code, § 1671, subd. 11, legalizing all proceedings for the formation of high school districts, and the establishment of district high schools, so that such school became "duly organized under the laws of the state," regardless of defects, within St. 1905, p. 58, c. 65, § 5, providing for the distribution of the high school fund only among schools so organized.

5. MUNICIPAL CORPORATIONS—POWERS—CURATIVE ACTS—POWER OF LEGISLATURE.

The Legislature has power to pass acts curing a failure to comply with statutory requirements that might originally have been dispensed with in the proceedings of municipal corporations.

6. SCHOOLS AND SCHOOL DISTRICTS — HIGH SCHOOLS—LENGTH OF SESSIONS—RIGHT TO FUNDS.

There being no statute providing a minimum duration of daily sessions of high schools, the fact that the sessions of an evening high school were only two hours per day did not prevent it from participating in the benefits conferred on regularly established high schools by Act March 6, 1905, p. 58, c. 65.

7. SAME—COURSE OF STUDY.

Act March 6, 1905, p. 58, c. 65, providing for the distribution of the state high school fund, limits the distribution to schools which have maintained the grade of instruction required by law, and have had at least two duly certified high school teachers, and a regular average attendance of 20 or more pupils, and Pol. Code, § 1670, subd. 12, prescribes that the course of study shall be such as will prepare graduates therein for admission to the State University. *Held*, that where an evening high school offered two courses of study, only one of which complied with University admission requirements, such school was only entitled to participate in the high school fund if it maintained two or more regularly certified high school teachers and an average attendance of 20 or more pupils in such course; the right of a school to share in the fund being determined only according to those teachers and pupils engaged in high school work.

8. SAME—LENGTH OF COURSE.

Under Pol. Code, § 1670, subd. 12, providing that the high school course fitting students for entrance to the State University shall not be less than three years, the fact that an evening high school course, intended to meet University requirements, extended for five years, did not affect the right of such school to participate in the distribution of state high school funds, as provided by St. 1905, p. 58, c. 65, § 5.

In Bank. Application by the board of education of the city and county of San Francisco for a writ of mandamus against Edward Hyatt, as superintendent of public instruction. Petition dismissed.

Wm. G. Burke, City Atty., and A. S. Newbergh, Asst. City Atty., for petitioner. U. S. Webb, Atty. Gen., for respondent.

SLOSS, J. Upon an application to this court by the board of education of the city and county of San Francisco for a writ of mandate to compel the state superintendent of public instruction to include the Humboldt evening high school in said city and county among the schools participating in the apportionment of the state high school fund, an alternative writ issued. The respondent appeared, and, after filing a demurrer and an answer, entered into a stipulation with the petitioner, agreeing upon the essential facts. By section 1 of the act entitled "An act creating a fund for the benefit and support of high schools and providing for its distribution," etc., approved March 6, 1905 (St. 1905, p. 58, c. 65), provision is made for the annual levy of a tax for the support of regularly established high schools of the state. The money so collected is to be turned into a "State High School Fund," created by the act and is appropriated for the use and support of regularly established state high schools. Sections 3, 4. Section 5 of the act directs the superintendent of public instruction to apportion the fund to high schools of the state upon this basis: One-third of the annual amount equally among the county, district, city, union, or joint union high schools of the state, irrespective of the number of pupils enrolled or in average daily attendance therein, and the remaining two-thirds pro rata according to the average daily attendance for the last preceding school year, "provided that such high schools have been organized under the law of the state, or have been recognized as existing under the high school laws of the state and have maintained the grade of instruction required by law for the high schools; and provided, that no school shall be eligible to a share in said state high school fund that has not during the last preceding school year employed at least two regularly certificated high school teachers for a period of not less than one hundred and eighty days with not less than twenty pupils in average daily attendance for such length of time. * * *; and provided, that before receiving state aid, each school shall furnish satisfactory evidence to the superintendent of public instruction of the possession of a reasonably good equipment of building, laboratory, and library and of having maintained, the preceding school year, proper high school instruction for a term of at least one hundred and eighty days. * * *" It appears from the stipulation above referred to that the Humboldt evening high school was established and organized by the board of education of the city and county of San Francisco in October, 1897, at a time when said city and county was governed by the provisions of the consolidation act and the amendments thereto. In the establishment and organization of said school no election, as provided by sections 1670 and 1671 of the Political Code, was held. The sessions of said school are held in the evening only and continue during two hours of each of five evenings per week.

The respondent contends, in the first place, that under the Constitution of this state no high school holding evening sessions only can be established. This contention is based upon section 6 of article 9 of the Constitution, providing that "the public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools and technical schools as may be established by the Legislature, or by municipal or district authority." The argument is that the Constitution, by enumerating the various classes of schools and making evening schools a distinct class in this enumeration, distinguished such evening schools from all other classes enumerated, and that an evening school could not therefore at the same time be a high school, since high schools form a class separately provided for in the section. But this argument proves too much. It would lead equally well to the conclusion that an evening school could not be either a primary, a grammar, a normal, or a technical school, a conclusion which seems on its face to be untenable. We are satisfied that the framers of the Constitution, in including in this section the words "evening schools," intended to obviate any doubt that might exist as to the power to provide for schools which should hold their sessions in the evening, and that it was not intended thereby to make a separate class of such schools in the sense that evening schools could not, as to the nature of the course of study pursued, possess the character of primary, grammar, high, normal, or technical schools.

Further, it is objected that the Humboldt evening high school was not organized pursuant to an election held under the provisions of section 1670 of the Political Code. By section 5 of the act of March 6, 1905, the benefits of the "state high school fund" are limited to high schools that "have been organized under the laws of the state, or have been recognized as existing under the high school law of the state." By this provision the act furnishes its own definition of the phrase "regularly established high schools of the state," used in the earlier sections, and impresses the character of regularly established high schools upon schools which comply with either of the last quoted requirements of section 5. As appears from the stipulation, the Humboldt evening high school was established by the board of education of the city and county of San Francisco in October, 1897. Section 1616 of the Political Code reads: "Boards of education are elected in cities under the provisions of the laws governing such cities, and their powers and duties are as prescribed in such laws, except as otherwise in this chapter provided." Under section 1 of an act entitled "An act to provide for the support of the common schools of the city and county of San Francisco and to define the powers and duties of the board of education thereof," approved April 1, 1872 (St. 1871–72, p. 846, c. 576), the board of education of the city and county of San Francisco is given power "to maintain public schools as now organized in said city and county, and to establish additional ones as required, and to consolidate and discontinue schools, as may be deemed best for the public interest." That high schools may properly be included within the term "public schools" will hardly be questioned. Indeed, article 9, § 6, of the present Constitution, quoted above, expressly makes them a part of the "public school system." This statute, therefore, in conferring upon the board of education of the city and county of San Francisco power to establish public schools, gave to it the power to establish high schools. The act, having been passed before the adoption of the Constitution of 1879, was not affected by the restrictions contained in that instrument prohibiting the passing of local or special laws. Nevada School Dist. v. Shoecraft, 88 Cal. 372, 26 Pac. 211. It would appear clear, therefore, that the Humboldt evening high school is a school that has "been organized under the law of the state." But, if there were any doubt as to the legality of the original organization of the school, two curative acts, passed after its establishment, had the effect of obviating any defects existing at the outset, or, at least, of making it a school "recognized as existing under the high school laws of the state." An act of March 15, 1901 (St. 1901, p. 299, c. 140), provides that "all proceedings for the establishment of high schools heretofore established in incorporated cities are hereby declared legal"; and in 1905 the Legislature amended section 1671 of the Political Code, including in said section a subdivision 11, providing that "all proceedings for the formation and organization of high school districts and the establishment of county, city and county, union, joint union, and district high schools had prior to the passage and approval of this act are hereby validated and declared legal, and said high school districts and high schools are hereby declared to be legally formed, organized and established." It is well settled that the Legislature has power to pass acts curing the failure to comply with statutory requirements that might originally have been dispensed with in the proceedings of municipal corporations. 6 Am. & Eng. Ency. of Law (2d Ed.) 941. In the recent case of Chase v. Trout, 146 Cal. 350, 80 Pac. 81, this court fully expressed its views regarding the validity of curative acts. The statute there in question undertook to validate defective proceedings for the collection of taxes, but the principle declared is no less applicable to proceedings of the kind here involved. See, also, Baird v. Monroe (Cal. Sup.) 89 Pac. 352. If this school was in all other respects entitled to participate as a high school in the apportionment, these curative acts were clearly sufficient to bring it within the statutory definition of a "regularly established high school."

The further objection is made on behalf of respondent that the shortness of the daily session held in the school in question—i. e., two hours per day—takes the school out of the class of high schools contemplated by the law. While it appears that this session is considerably shorter than that regularly held in day high schools, we find no provision of law regulating the length of the daily sessions, with the exception of section 1673 of the Political Code, which provides that "no school must be continued in session more than six hours per day." No statute provides a minimum duration, and, if the school complies with all the requirements of law, the fact that its sessions are of shorter duration than those of other high schools does not deprive it of the character of a regularly established high school, or prevent it from participating in the benefits conferred upon regularly established high schools by the act of March 6, 1905. But, while the facts already set forth do not, in our opinion, tend to show that the school in question is not a "regularly established high school of the state," and do not, therefore, furnish any reason for excluding it from the apportionment, we think that the stipulation of facts fails to show that the Humboldt evening high school, considered as a high school, complied with the provisions of section 5 of the act of March 6, 1905, as to employment of teachers and average daily attendance. It might be said that the answer, tested by strict rules of pleading, does not raise a clear issue on this point. It may, however, without straining the meaning of words, be construed as raising such issue, and, inasmuch as this is a controversy between public officers, each of whom is doubtless desirous of ascertaining and performing his exact duty under the law, we are not disposed to allow any technical construction of the pleadings to prevent the consideration of a question whose determination is necessary to a proper understanding of the rights and obligations arising under the statute in question. The petition alleges, and it is not denied, that during the school year 1905–06 the Humboldt school employed 26 teachers for not less than 180 days, and that the average daily attendance was 546 pupils. It appears that graduates of grammar schools have been admitted to said school without examination. Pol. Code, § 1670, subd. 13. A course of instruction, extending over three years, and leading to a high school diploma, is given, but there is no suggestion that this course is such as to prepare graduates for admission to the State University. During the year 1905–06 the school had a course of study known as "course B," which extended for a period of five years, and which was adopted by the petitioner to comply with the admission requirements of the University of California. As we have seen, the act of March 6, 1905, limits the distribution of its benefits to schools which have maintained the grade of instruction required by law for the high schools. That grade of instruction, as declared by subdivision 12 of section 1670 of the Political Code, is "such as will prepare graduates therein for admission into the State University." If a school offers two courses, one of which falls short of this standard, it does not, as to such course, maintain the grade of instruction required by law of high schools. Accordingly, in the case at bar, the Humboldt evening high school is to be considered a high school only so far as concerns the instruction given and received in "course B." But the stipulation does not disclose that it has the requisite number of teachers and pupils in this course. It is true that the parties agree that the school, as a whole, has 26 teachers and 546 pupils, but it nowhere appears how many of these teachers or pupils are engaged in high school work, and how many are occupied in the three-year course, which is not up to the high school standard. Unless that part of the school which can properly be regarded as a high school has two or more regularly certificated high school teachers and twenty or more pupils in average daily attendance, no right to apportionment under the statute arises. Here these conditions are not shown to exist. That, in determining the right of a school to share in the benefits of this act, only those teachers and pupils engaged in high school work can be considered, is made manifest by the manner of the apportionment. Two-thirds of the fund is to go to schools in proportion to the number of pupils in attendance. This must mean the number of pupils who are receiving the grade of instruction required by law. It cannot have been intended to distribute a high school fund to schools maintaining a certain grade of instruction, and to base this distribution on the number of pupils to whom a lower grade of instruction is being given.

For these reasons, we conclude that the petitioner has on the record before us failed to show any right in the Humboldt evening high school to participate in the allotment of the high school fund. If, however, it shall furnish to the respondent satisfactory evidence of compliance with the requirements of section 5 of the act of March 6, 1905, having regard solely to the teachers and pupils engaged and the equipment employed in "course B" or any other course preparing pupils for admission to the State University, it will then be entitled to an allotment of the state fund, based, as to two-thirds of the fund, on the average daily attendance in such course or courses.

We may add that we attach no importance to the fact that "course B" extends over five years. The only provision of law regulating the length of the course is that it "shall embrace a period of not less than three years." Pol. Code, § 1670, subd. 12. That it may extend over a longer period than three years is clearly shown by subdivision 13 of section 1670, which contains a provision relating to schools "where the course of study embraces a period of four years."

The proceeding is dismissed.

We concur: ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; McFARLAND, J.

SHAW, J. I concur. I agree that the mere fact that the daily sessions of the Humboldt evening high school are of but two hours' duration does not deprive it of its character as a high school organized under the law of the state, or as a high school recognized as existing under the high school laws of the state. But I suggest that, in view of the practically universal custom of holding sessions of the public schools at least five hours each school day, and the manifest inequality and lack of uniformity in the law if it is held to give the same amount for its support to a school in session only two hours daily as is given to one in session three times as long and, during each year, imparting presumably three times as much training and instruction at three times the expense, it may be a serious question, if it ever arises, whether the "average daily attendance" for the "term of at least one hundred and eighty days" required of high schools to entitle them to receive state aid, under the statute, does not mean a daily attendance for 180 days of, at least substantially, the same number of hours as is usual and customary. If the aid can be secured by 2 hours' daily instruction for 180 days—that is, by 360 hours each year—instead of the customary 900 hours each year, why not by means of daily sessions for that period of 1 hour, or less?

6 Cal. App. 730

In re GOODRICH'S ESTATE. (Civ. 310.)

(Court of Appeal, Third District, California. Nov. 1, 1907.)

1. CONSTITUTIONAL LAW—JUDICIAL POWER—ENCROACHMENT OF LEGISLATIVE DEPARTMENT.

The judicial department should refrain from any unwarranted invasion of the functions of the legislative department.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 129–132.]

2. SAME—VALIDITY OF STATUTE—PRESUMPTIONS.

All doubts should be resolved in favor of the constitutionality of regularly enacted laws, and courts should be disposed to uphold, rather than overthrow, them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 46.]

3. EXECUTORS—COMPENSATION—FEES—DISCRETION OF COURT.

Where the statutes prescribe the exact rate of compensation to which an executor is entitled, the court has no discretion, and can neither add to nor vary the compensation, based on the degree of good or bad faith displayed in the management of the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 2070, 2132–2136.]

4. SAME—STATUTORY AUTHORITY.

All matters of probate, including rights of inheritance, succession, testamentary disposition, and taxes on inheritances, are subject to statutory control, and a statute regulating the disposition of the property of decedents may prescribe uniform and reasonable fees for the services of executors and their attorneys.

5. SAME.

Act March 22, 1905 (St. 1905, p. 727, c. 561), providing that executors shall be allowed for fees of their attorneys the same amounts as are allowed as compensation for executors for their own services, modifies the previous law on the subject, embodied in St. 1850, p. 396, c. 129, §§ 220, 222 (St. 1851, p. 476, c. 124, §§ 220, 222; Code Civ. Proc. §§ 1616, 1618), authorizing reasonable attorney's fees, etc., and provides a uniform standard, and is valid as providing for reasonable fees.

6. SAME.

Under Act March 22, 1905 (St. 1905, p. 727, c. 561), providing that executors shall be allowed for fees of their attorneys a specified amount, an attorney of an executor has no claim against the estate of the decedent, but the allowance is made to the executor on account of money actually paid by him to the attorney for services actually performed, and, where an executor employs an attorney to perform the legal services for less than the prescribed fees, the executor will only be allowed his actual expenditures, but otherwise he will be allowed for the full amount prescribed and actually disbursed by him.

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Accounting by Clayton A. Douglas and another, as executors of Almon Luther Goodrich, deceased. From an order surcharging the executors, they appeal. Reversed.

F. O. Houskin (Plummer & Dunlap, of counsel), for appellants.

BURNETT, J. Appellants state the case as follows: "The question involved is the validity of the act of the Legislature approved March 22, 1905 (St. 1905, p. 727, c. 561, § 2), relating to expenditures by administrators and executors for and on account of the services of attorneys retained by them in the matter of the administration of estates. * * * In the case at bar, the executors, appellants herein, retained as their attorney F. O. Housken, and had the benefit of his services in the conduct of all the legal proceedings pertaining to the said estate, and agreed to pay him for such services the amount fixed by said act of the Legislature, and did pay him such sum therefor, but on the settlement of the account of the executors the court refused to allow the amount paid by them, but allowed the sum of $150 for such purpose, and surcharged the executors with the amount of $215.42, the difference between the amount paid by the executors as provided by the statute and the sum allowed by the court." From the portion of the order and decree disallowing the full amount paid for the services of the attorney, the appeal has been taken by the executors.

A brief historical review of the statutory regulation of the fees and expenses allowed executors and administrators is considered not inappropriate. By an act passed April 22, 1850 (St. 1850, p. 396, c. 129), the Legislature provided in section 220 thereof that an executor or administrator "shall be allowed all necessary expenses in the care, management and settlement of the estate and for his services such fees as the law provides," etc. Section 222 of the same act prescribes the commissions to be allowed the executor when no compensation is provided by the will, or when the executor renounces all claim thereto, and provides that an administrator shall be entitled to the same commissions. In 1851 (St. 1851, p. 476, c. 124) said section 220 was re-enacted, as was also said section 222, except that the rate of commission was reduced. On the adoption of the Codes in 1873 said section 220 became section 1616, and said section 222 became section 1618, of the Code of Civil Procedure. There was no change till 1880, when to said section 1616 there was added the following: "Including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in court." In 1905 the phraseology of said section 1616 was changed somewhat, the fees provided in said section 1618 were reduced, and there was added section 1619, which, as far as involved in this proceeding, is as follows: "Executors and administrators shall be allowed for fees of their attorneys for conducting the ordinary probate proceedings, the same amounts as are allowed by the last section as compensation for executors and administrators for their own services." The law as it exists now, it will be observed, provides a uniform standard for the determination of what shall be allowed for the services of an attorney, instead of leaving it, as formerly, to the discretion of the court without any legislative guidance, except the general limitation that the fees shall be "reasonable." We are not concerned with the wisdom or policy of the law.

However, in view of the striking difference of opinion exhibited by trial judges in their rulings as to what constitute reasonable fees for such services, it would seem to be just and equitable for the Legislature, if practicable, to provide for uniform and proportionate compensation to be paid for similar services in all estates. As to the validity of the act in question, there is no apparent reason why it should not be upheld. It seems to be within the domain of legitimate legislative enactment. The judicial department should, of course, refrain, if possible, from any unwarranted invasion of the function of the legislative department of the government. It has been often held that all doubts should be resolved in favor of the constitutionality of regularly enacted laws, and courts should be disposed to uphold rather than overthrow them. During all the years that the law has been in force, it has not been questioned that it was and is a constitutional exercise of power for the Legislature to provide for definite fees to be awarded to executors and administrators for their own services, and also an allowance to be made to them for their necessary expenses in the administration of the estate, including reasonable attorney's fees. It seems clear that the two sections 1618 and 1619 of the Code of Civil Procedure must stand or fall together. We can see no difference in principle between an act establishing certain fees for the services of an executor and one providing what he shall be allowed as payment for the services of an attorney. The latter is as much a part of the necessary expense of administration as is the former. In fact, under our practice, the services of an attorney are not only essential, but the burden and responsibility of his work are usually much greater than those of the executor or administrator. The effect of the law is simply to allow the executor an additional fee for a certain expense of administration. It is the same as though in one section it were provided that certain fees should be allowed the executor, of which one-half should be for the expense of employing an attorney. There is no more reason, in our opinion, why the court should be clothed with discretion in fixing the value of the attorney's services rather than those of the executor. It is competent for the Legislature to provide, as it has done, for both.

As to the validity of the act fixing the fees of executors the following quotations are sufficient: "The statutes in some jurisdictions prescribe the exact rate of compensation or percentage which shall be allowed, and the courts cannot vary the amount which may be allowed, except so far as they may be authorized to award special compensation for extraordinary services." 2 Am. & Eng. Ency. of Law, p. 1288. And in 2 Woerner on American Law of Administration, § 526, the author says: "But it would seem that the language of the statute in most states fixing the compensation of executors and administrators precludes all discretion in this respect." "The court can neither add to nor in any wise vary the compensation directed to be allowed by the statute. It can neither allow nor disallow commissions scaled by the degree of skill or of vigilance, of good or bad faith, displayed in the management of the estate, unless such discretion is vested in the court by statute." Again, as suggested by appellant, "all matters of probate, including rights of inheritance, succession, testamentary disposition of property, and taxes upon inheritances, are subject to statutory control." It is by virtue of the statute that the heir or devisee is entitled to receive any of the estate of the decedent, and the authority which thus regulates the disposition of such property can subject it to any reasonable condition or expense. This is the basic principle that justifies the Legislature in providing uniform fees for the services of executors and their attorneys in the proper administration of estates. Of course, we are not to be considered as holding that the courts would not interfere if it were manifest that the allowance was excessive and entirely disproportionate to the value of the services performed. The discretion to be exercised by the Legislature must be within reasonable limits. But we cannot say that the allowance provided for the services of an attorney is unfair or unreasonable, and hence there is no ground here for the revisory action of the court. It may be observed that under the law the attorney has no claim against the estate, but the allowance is made to the executor on account of money actually paid by him to an attorney for services actually performed. There is nothing in the law to prevent an executor from making a contract with an attorney to perform the legal services for the estate for less than the fees provided by the statute, and in that event obviously he would be allowed only his actual expenditure. But here the contract was for the full amount, and it was actually disbursed by the executors, and hence the reduction should not have been made by the court.

The order is reversed.

We concur: CHIPMAN, P. J.; HART, J.

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6 Cal. App. 715

WILLIAMS v. SAN FRANCISCO & N. W. RY. CO. (Civ. 375.)

(Court of Appeal, Third District, California. Nov. 1, 1907. Rehearing Denied by Supreme Court Dec. 31, 1907.)

1. HIGHWAYS—INJURIES FROM OBSTRUCTIONS—LIABILITY OF PERSONS CAUSING OBSTRUCTIONS.

Though, as between the public and the traveler the latter, if he leave a portion of the road laid out and prepared for the customary use and travel and go upon the unprepared and customarily unused part, does so at his own risk, yet he is entitled to the unobstructed use of the entire width of the highway as against the unlawful acts of other persons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 417–422.]

2. NEGLIGENCE—PROXIMATE CAUSE.

Negligence proximate in causal relation to the damage is actionable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 69–77.]

3. SAME — NATURAL AND PROBABLE CONSEQUENCES.

A person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would at the time of the negligent act have thought reasonably possible to follow, if they had occurred to his mind.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 71, 72.]

4. HIGHWAYS — OBSTRUCTION — INJURIES — PROXIMATE CAUSE.

Defendant owned a pile of wood, one corner of which extended over the highway, though not the traveled portion, for about two feet, but there was left sufficient room in the highway for the ordinary use thereof. The highway was parallel to a railroad track, and in close proximity thereto. While plaintiff's wife was driving along the road, the horse became frightened by a train, and started to run. When the woodpile was reached, the buggy struck the part extending into the highway, and was overturned, and plaintiff's wife thrown with such violence as to cause her death. *Held*, that the maintenance of the woodpile, as it was, by defendant, was the proximate cause of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 494–497; vol. 36, Municipal Corporations, § 1669.]

5. SAME—QUESTION FOR JURY.

Whether the maintenance of a woodpile, one corner of which extended over the highway, though not the traveled portion, for about two feet, and against which the buggy in which plaintiff's wife was riding struck while the horse was running away, was negligence, *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 535–537.]

6. APPEAL—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

A verdict resting on evidence in which there is at least a substantial conflict is conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935–3937.]

7. DEATH—ACTIONS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In an action for the death of plaintiff's wife, the burden of showing contributory negligence by decedent or plaintiff is on defendant, unless plaintiff's evidence discloses contributory negligence, or that the accident would not have occurred but for the inexcusable fault of decedent or plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 75–78.]

8. TRIAL — SPECIAL FINDINGS — QUESTIONS FOR SUBMISSION—IMMATERIAL ISSUES.

Code Civ. Proc. § 625, requires the court, on request, to direct the jury to find a special verdict. In an action for the death of plaintiff's wife, who was killed by being thrown from a buggy which struck a woodpile, a corner of which extended into the untraveled portion of the highway, her horse having been frightened by a train, the court refused to submit the following questions requested by defendant, the owner of the wood: "Was the woodpile an obstruction to the free use of the highway in the usual and customary manner? Would the accident have happened if the horse had been under control and driven in the usual and customary manner? Was the accident due to the running away of the horse? Did the woodpile have anything to do with the horse becoming frightened and running away? At the point in question, was the main traveled portion of the highway sufficiently wide and safe for the usual, ordinary, and customary travel thereon by horses under control?" *Held*, that a finding favorable to defendant on any of the questions would not have been inconsistent with the general verdict for plaintiff, and therefore would have been immaterial, so that the court properly refused to present them to the jury.

9. SAME—VERDICT—SPECIAL QUESTIONS—MISLEADING.

Where, in an action for the death of plaintiff's wife, who was killed by being thrown from a buggy which struck a woodpile, a corner of which extended over the untraveled portion of the highway, the horse having been frightened by a train, it was not contended that the woodpile was an obstruction to the free use of the highway in the usual and customary manner, nor that the accident would not have happened if the horse had been under control, nor that the accident was not partly due to the running away of the horse, requested special questions of fact—Was the woodpile an obstruction to the free use of the highway in the usual and customary manner? Would the accident have happened if the horse had been under control and driven in the usual and customary manner of driving horses? Was the accident due to the running away of the horse?—were misleading in form.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 840–845.]

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by John Williams against the San Francisco & Northwestern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Gillett & Cutler, for appellant. Gregor & Connick, for respondent.

HART, J. This is an action for damages for causing the death of plaintiff's wife. The case was tried by a jury and plaintiff secured a verdict and judgment for the sum of $3,000. From said judgment, upon a bill of exceptions, the defendant presents this appeal.

The facts as established by the evidence and found by the jury are: The defendant corporation owns and operates a steam railroad about 25 miles in length, between the city of Eureka, in Humboldt county, to some point beyond the town of Scotia, in said county. On the line of the road are situated the towns of Fortuna and Singley's Station; the latter being about three miles in a northerly direction from the former. A county road, used for many years by the traveling public as a public highway, runs between and connects these towns or railroad stations. On the 23d day of July, 1903, while the wife of the plaintiff was on her way to Fortuna, in a buggy, drawn by a horse, driven by herself, and at a point between the two stations mentioned, a train of cars belonging to the defendant came along and the noise produced by the engine and the train caused the animal to become frightened and to start on a wild run over the road toward and in the direction of Fortuna. The right of way and track of defendant adjoin and parallel said public highway for a considerable distance. At a point on said county road, about one mile from Fortuna, was situated on the day the fatal accident occurred a large pile of wood, the property of the defendant. The complaint alleges, and it appears to be satisfactorily shown by the evidence, that one corner of said woodpile extended over and projected into a portion of said public highway for a distance of approximately two feet. When the animal, running at a lively rate, reached the point at which the woodpile was situated, the buggy struck or collided with that portion of the wood extending into the highway, the impact resulting in the overturning of the vehicle, and throwing the deceased to the ground with such violence as to produce fatal injuries, death being almost instantaneous. There does not appear to be any attempt to contradict the claim of the plaintiff that the woodpile with which the buggy collided occupied a part of the public highway, although not the traveled portion; but it is contended by the defendant, and there is no dispute upon the proposition, that that part of said highway so used by the defendant had been thus used by it for many years prior to the day upon which the unfortunate mishap occurred, and that, notwithstanding the existence of the obstruction, there was still left sufficient room in the highway at that point to facilitate and admit of the ordinary and customary use of the road by the traveling public. Those persons who saw the horse start to run and watched the animal running as far as the circumstances by which they were situated would permit them were passengers on the train, the noise from which caused the animal to become frightened. Testifying for the plaintiff, they all stated that the horse ran so fast that he kept up with the speed of the train; that the deceased seemed to be holding the animal with taut reins, and that she appeared to be perfectly calm, cool, and "collected," evincing no signs of the loss of control of her judgment; that "the woman was sitting firmly in the buggy seat," and "I should judge," testified the witness Robertson, "her feet were well braced, and she was holding her arms in a driving position. She had hold of both lines, one in each hand, was holding them tight and was guiding the horse." Some of the witnesses testified that on the day following that upon which the accident occurred they followed the track made by the vehicle used by the deceased from a point a considerable distance from the woodpile to the latter point, and that the buggy was kept in the center of the road until it struck said woodpile. The woodpile consisted of three tiers of "2-foot" wood. The width of the road, measuring from the outer edge of the woodpile to the fence on the opposite side of the highway, was about 20 feet, of which about 12 feet were graveled. On behalf of the defendant testimony was offered to the effect that the projection of the woodpile into the highway did not interfere with or obstruct the customary travel upon it. The witness Newell said that the corner of the woodpile projected upon the graveled portion of the road, and that, "if one was to use the whole of that road that was turnpiked, and graveled, he would get pretty near the edge of the woodpile." It also appears that just a short distance from where the woodpile was situated there is rather a sharp curve in the road, around which the horse ran at a high rate of speed, going in the direction of said woodpile. Newell declared that said curve "was a difficult one to make if the horse was running fast." Testimony was also introduced by the defendant tending to show that the horse driven by the deceased was high-spirited and easily excited, and that the "bridle-bit" used on the animal at the time of the accident was not of the kind which should be used on a horse of an excitable and unruly nature; that it was the "bit" ordinarily used on horses, and with which it would be difficult, if not impossible, to stop a frightened horse in the act of "running away." The witness Quill, a livery man, who sold the mare in question to the plaintiff in the year 1901, testified that the animal was of racing stock and a "saddle horse"; that he had driven her himself, but that no one else had up to the time that he sold her to plaintiff; that he told the latter, at the time of the sale, that the mare was "very high lifed, and hard to handle when she got warmed up, and was all right, except when she got excited." This witness said that, after selling the mare to plaintiff, she had foaled a colt, and that he knew "from experience that sometimes having a colt has a quieting effect upon a mare," and that said mare was much quieter after she had the colt; that he had often seen plaintiff drive the mare, and that on such occasions "she was going along like any ordinary horse would." Testimony was introduced in rebuttal to show that the deceased had often driven the mare, taking with her in the buggy at different times certain ladies, who said that the mare always behaved well on those occasions. The deceased was described as a "large, strong, healthy woman," from which fact the inference is that she was capable, in point of physical strength, of controlling the animal. The foregoing embraces, in substance, the principal testimony introduced by both sides, and from which, of course, arise the legal propositions submitted for solution.

The main questions discussed in the briefs involve and revolve around two propositions, viz.: (1) What was the proximate cause of the accident resulting in the death of plaintiff's wife? (2) Was plaintiff's right to recover barred by negligence contributed either by himself or his wife or by both? An important question is also presented in the contention of appellant that the court committed prejudicial error by its refusal to submit to the jury for findings thereon certain particular questions of fact requested in writing to be so submitted by the defendant. The specific contentions of the appellant upon the merits of the record are: That the direct cause of the accident was the fright and running away of the horse, due, presumably, to the noise made by the locomotive and train; that the horse, after starting to run, became unmanageable, and got beyond the control of the deceased, and that her inability to keep the animal in the middle or center of the road and thus have avoided the collision of the buggy with the woodpile constituted upon her part such culpable negligence as to destroy a right of recovery in plaintiff; that deceased was guilty of negligence in driving an animal claimed to be "high-lifed," nervous, and of an excitable nature. And, in connection with the question of the character of the horse driven by the deceased, it is also charged that the plaintiff himself was guilty of contributory negligence by the act of permitting his wife, unaccompanied by any one capable of lending her effective assistance in the event the horse became frightened and unruly, to drive an animal which, it is contended, was shown by the evidence to be at the time of the accident high-spirited and of a highly nervous temperament, and so known to be at the time by the plaintiff, along or near a railroad track over which a train of cars was likely to pass at any moment. It is also contended that the obstruction did not interfere with the usual and customary use of the highway.

Before proceeding with an examination of the respective positions of the parties to this appeal, these three self-evident and undisputed propositions may be declared: (1) That the defendant had the right to run its train over its track in the usual and customary manner of running railway trains, propelled by steam power; (2) that the deceased had the right to use the public highway in the usual and customary manner in which such highways are used and designed to be used; (3) that no one has any lawful right to maintain an obstruction or purpresture of any character or nature upon a public highway, or road laid out for and dedicated to the purposes of public travel.

In connection with the first of the propositions thus stated, it may be said that there is no claim that the defendant's train of cars, the noise from which it is alleged frightened the horse driven by deceased, made on the occasion of the accident an unusual or unnecessary noise, but it is conceded that the noise thus made was only the usual and ordinary noise necessarily incident to the running of railway trains by means of a steam locomotive.

Was the act of the defendant in maintaining the woodpile upon an untraveled portion of the highway culpable negligence, and if so, was said woodpile the proximate cause of the accident, or, as we think the latter proposition may be as accurately and at the same time more explicitly stated, would the accident have occurred but for the maintenance of the woodpile under the circumstances disclosed by the evidence? The theory of the appellant upon the law of the case may best be presented in the language of the following instruction which was requested by it and refused by the court: "I further instruct you that if you find from the evidence that the wood piled by defendant was off of the main traveled portion of the highway, and at a place where it was not dangerous to persons driving along said highway in the customary and ordinary manner, and if you further find that the horse driven by plaintiff's said wife became frightened some distance from where said wood was piled and ran away, and got beyond her control and was unmanageable, and while so running away and beyond her control left the well-beaten track of the road, and ran to one side thereof and against the end of said wood, thereby causing her death, then I instruct you that the proximate cause of the accident was the fright and running away of the horse, and not the pile of wood against which the buggy collided, and you must find a verdict for the defendant." The portion of the foregoing rejected instruction bearing upon contributory negligence was covered by other instructions of the court; but by the instruction, it will be observed, it was also sought to induce the court to tell the jury that, as a question of law, the fact that the woodpile was "off of the main traveled portion of the highway and at a place where it was not dangerous to persons driving along said highway in the customary and ordinary manner," exculpated defendant from all blame and responsibility for the accident and its consequences. Our attention has been invited to no case decided in California in which the precise question presented by the rejected instruction, or a question arising upon facts substantially corresponding with those here, has been adjudicated. We have, however, devoted much time to an examination of all the cases cited by both sides from other jurisdictions in which a similar question, with its concomitant propositions, and growing out of facts in marked analogy to those of the case at bar, has been considered and decided. While those authorities appear to be (and in a few instances are) widely divergent, and seem to present a contrariety of views upon the application of the principles of law involved in the class of cases to which the one under review belongs, a careful examination, analysis, and comparison of them, as to the facts, will, we think, show that, generally speaking, whatever apparent difference there may be in the conclusions reached is founded upon a distinction based upon the measure of liability resting upon a town or county, charged with the duty of maintaining public highways, and that attaching to an individual or private corporation, where damage results from a defect in such highways through the fault or default of the one or the other. For illustration, it has been held that the duty of the public authorities is fully discharged when the traveled portion of the road—that part which has been graveled, turnpiked, or otherwise prepared for the purposes of the customary travel—is kept and maintained in proper repair and in such shape as to admit of the usual, ordinary, and customary use. And while, as between the town or county or public authorities having supervision of public highways and the traveler, the latter will leave the portion of the road laid out and prepared for the customary use and travel and go upon and use the unprepared and customarily unused part at his own risk, he is nevertheless entitled to the unobstructed and uninterrupted use of the entire width of the highway as against the unlawful acts of other persons, either real or artificial. The principle, upholding the distinction suggested, and here sought to be stated, is well explained in Dickey v. Maine Telegraph Co., 46 Me. 485, as follows: "* * * But the right of travelers to use any part of a highway, if they see fit, is not restricted by the limitation of the liability of the town in case of accident. A person may go out of the beaten track at his own risk, as between himself and the town, and yet be entitled to protection against the unlawful acts of other persons or corporations. Any part of the highway may be used by the traveler, and in such direction as may suit his convenience or taste. [Citing Stinson v. Gardiner, 42 Me. 248, 66 Am. Dec. 281.] No private person has a right to place or cause any obstruction which interferes with this right on any part of the highway within its exterior limits. The extent of the liability of the town is no measure for such private person's liability. If the owner of the fee in the land, or any other person, should dig a pit, or stretch a cord, or place a pile of stones on the highway near the outer limit, and at a considerable distance from the traveled way, and a traveler passing, using due care, should be injured thereby, it would be no sufficient answer to his claim for damages to aver and prove that, under the circumstances, the town was not liable. The duty of the town is to perform a positive act in the preparation and preservation of a sufficient traveled road. The duty of others is to abstain from doing any act by which any part of the highway would become more dangerous to the traveler than in a state of nature, or than in the state in which the town has left it." See, also, State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117, and Johnson v. Whitfield, 18 Me. 286, 36 Am. Dec. 721. In the last-named case it is said: "It is contended that the owner of land adjoining a public highway may lawfully use that part of it which is not prepared for the public travel. His ownership and right of use, so far as may be consistent with the rights of the public, need not be questioned. But it is a mistake to suppose the public rights of travel are restricted to the prepared and usually traveled path. While the town has done its duty when it has prepared a pathway of suitable width in such manner that it can be conveniently and safely traveled with teams and carriages, the citizens are not thereby deprived of the right to travel over the whole width of the way as laid out. And they have the right to do so without being subjected to other or greater dangers than may be presented by natural obstacles, or those occasioned by making and preparing the traveled path."

The rule as stated in the foregoing authorities is supported by the soundest reason and the most salutary principles of justice, and meets with our approval. The court properly, in our opinion, refused to give to the jury an instruction which would have taken from it the question of whether the act of the defendant was culpable negligence. The situation here, according to the undisputed facts, is that the appellant maintained an unlawful obstruction upon a public highway, paralleling which and in close proximity thereto was its railroad track, over which it operated and ran, by steam, its railroad trains. It is not denied that the buggy in which the deceased was driving collided with said obstruction, and that the collision caused the vehicle to upset and precipitate the deceased to the ground with such force as to cause her death. The rule is that the defendant is answerable in law for negligence proximate in causal relation to the damage; or, in other words, it is liable if the obstruction for the existence of which it was responsible was the direct cause of the accident, with its resulting damages. The difficulty, indeed insuperable, with which the courts and textwriters have been and always will be confronted with regard to the right of action founded in negligence, is to formulate an invariable, iron-clad rule, applicable alike to all cases of personal injury, upon the question of the proximate cause of the damage, or "the connection between the negligent act or omission and the damage." It should therefore be a case in which there is very clearly wanting, under the evidence, the essential connection between the negligent act or omission and the damage to warrant the court in taking it from the jury, either through a motion for a nonsuit or a direction to find for the defendant or the instructions. "The proximate cause of an event," say Shearman and Redfield, page 27 of volume 1 of the fifth edition of their treatise on the "Law of Negligence," "must be understood to be that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred." But, say the same authors, very great difficulty has been found in determining what damages should be considered as flowing, in a "natural and continuous sequence," from an act of negligence, especially when it is not a matter of contract liability. The difficulty of laying down a rule which will include all possible cases has caused some of the ablest judges to decline to state any fixed rule; thus indicating a disposition of the courts to leave all doubtful cases to the jury. The authors of the work from which we have just quoted have, however, undertaken to state a general rule as follows: "That a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not) would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind." This formula is sensible and sound. Testing, therefore, the facts of the case at bar by the rule as thus declared, little, if any, difficulty is to be experienced, we think, in tracing the proximate cause of the damage to the negligent act of the defendant. That a horse, howsoever gentle he may be for ordinary driving purposes, is likely to become frightened upon the sudden approach of a steam railway train, producing its customary and necessary noise, is not only a reasonably possible, but, in our opinion, a reasonably probable fact, which all men of experience and prudence must know. It is one of the contingencies which are likely to occur upon a highway adjacent to a railroad track over which a steam railway is operated, and of which a prudent person, familiar with facts existing within the domain of common human experience, must reasonably have known and thought, had it occurred to his mind. It is an event which it was possible would happen at any time under the existing and known circumstances, and one, therefore, which it was the defendant's duty to think of and consider when it established and maintained the obstruction complained of. It is, in other words, one of those probable occurrences under the circumstances shown here which the defendant, having full knowledge of said circumstances, must be held to have reasonably anticipated. The meeting or overtaking of passing teams by a railway train traveling over a track adjoining a public highway is an event which is likely to occur at any moment, and which the owner of the railway must reasonably expect to happen. Therefore, had it "occurred to defendant's mind," fully acquainted, as it must be assumed to have been, with all the circumstances which in fact existed, it would have known that the consequences which might reasonably follow the frightening and consequent rapid running of the horse, hitched to a buggy, on and over the highway would be the collision of the vehicle with the obstruction maintained by it upon said highway, and resulting damage to either person or property or both, if the frightened animal ran in the direction of the point of obstruction.

As is said in Borough of Pittston v. Hart, 89 Pa. 391, so it is true here: "It is true that without the frightening of the horses, there would have been no accident; but the horse is naturally a timid animal, and is so liable to fright that those having charge of the public highways ought to make reasonable provision for a matter so common and so likely to happen at any time. Horses abound, but horses that never frighten, or are never fractious, are exceedingly rare, and, if roads were to be constructed only for such animals, there must needs be but little traveling upon them." The defendant was primarily at fault in maintaining the obstruction upon the highway. Its act was an act of trespass. It had no lawful right to thus use a public highway, although the part obstructed was not customarily used by the traveling public. But in principle it had just as much right to thus use the highway a distance of 10 or 20 feet as 2 feet, although the danger of accident would be greater and the proof of negligence attended with less difficulty in the former than in the latter case. As was said in Cohen v. Mayor, etc., 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506: "There is always reasonable ground for apprehending accidents from obstructions in the highways, and any person who wrongfully places them there or aids in so doing, must be held responsible for such accidents as may occur by reason of their presence." This declaration is, of course, subject to the qualification that the plaintiff has not by his own default or negligence, contributed to the damage. And our own Supreme Court, in the case of McKune v. Santa Clara, etc., 110 Cal. 480, 42 Pac. 980, likewise holds that "one who maintains any unauthorized obstruction upon a highway by means of which another, through no fault of his own, is injured in person or property, is responsible in damages therefor."

The question here, it must be understood, is not whether the highway was dangerous only when a horse traveling over it became frightened and "ran away," but whether the highway, as maintained, is shown by the evidence to be dangerous for use as such, and this fact was and is dependent for its establishment upon all the circumstances by which it was maintained and surrounded—its condition, width, closeness to places of danger, the probability of accidents originating primarily through circumstances to which it was peculiarly subject by reason of its unusual situation. Nor is the question here, under the pleadings, whether the obstruction of the highway by the defendant involved the maintenance of a public nuisance. The defendant is charged in the complaint with actionable negligence in maintaining an unauthorized obstruction, and whether such allegation was true or not depended on what the evidence established. The evidence, it is true, developed facts showing that the obstruction constituted a public nuisance, for the maintenance of which the defendant might have been criminally prosecuted. Pen. Code, § 370. And if the plaintiff, by his averments and proofs, had relied upon the theory of a public nuisance, the negligence so established would be such per se. But, as suggested, the theory of negligence advanced is independent of any consideration of whether the obstruction was a public nuisance, and upon that theory the whole question was one for the jury. "The decision of such questions," says the Supreme Court of Pennsylvania, in Plymouth Tp. v. Graver, 125 Pa. 34, 17 Atl. 249, 11 Am. St. Rep. 867, "is most appropriately made by submission of them to the practical judgment and experience of a jury upon a consideration of all the proofs respecting them." The learned judge of the trial court in leaving with the jury the question of negligence imputed to the defendant and the counter charge of contributory negligence pursued the course required by the issues tendered by the pleadings and as developed by the evidence, and declared to the jury the principles of law applicable to all the essential points in the case in language of singular perspicuity. Therefore, as to the claim of the defendant that the plaintiff and the deceased contributed by their own culpable negligence to the accident and its consequences, the answer is that the verdict of the jury resting upon evidence in which there is at least a substantial conflict, although it can well be said that the proofs appear to distinctly preponderate in favor of plaintiff, is conclusive here. The burden of showing such negligence upon the part of the deceased or the plaintiff was upon the defendant, unless plaintiff's evidence itself disclosed contributory negligence, or that the accident and resulting damage would not have occurred but for the inexcusable fault of the deceased or plaintiff. The proof upon the alleged contributory negligence was purely circumstantial, and, in our judgment, exceedingly weak. The evidence fully supports the verdict.

It is submitted that the court below erred to the prejudice of defendant by refusing to present to the jury, at its request, for findings thereon certain special questions of fact. Under the terms of the amendment by the Legislature of 1905 of section 625 of the Code of Civil Procedure, it is undoubtedly mandatory upon a trial court to submit special issues or particular questions of fact to the jury in all cases, when requested to do so in writing by either of the parties. In fact, the amendment is so construed in an opinion recently filed, and written by the learned chief justice of the Supreme Court, in the case of Plyler v. Pacific Portland Cement Co. (Cal.) 92 Pac. 56. It is said in that case, however: "What the judge has to determine, from an examination of the questions themselves, is whether the parties presenting them have a right to demand their submission to the jury in the form in which they are presented, and this depends, alike in the case of an issue and in the case of a special fact involved in the issues, upon two conditions: First, is the question so framed as to admit of a plain and direct answer? and, second, would an answer favorable to the party preferring the request be inconsistent with a general verdict for his adversary?" The "special issues" or particular questions of fact requested by the appellant and refused by the court are as follows: "(1) Was the woodpile an obstruction to the free use of the highway in the usual and customary manner? (2) Would the accident have happened if the horse had been under control and driven in the usual and customary manner of driving horses? (3) Was the accident due to the running away of the horse? (4) Did the woodpile have anything to do with the horse becoming frightened and running away? (5) At the point in the highway where defendant piled its wood was the main traveled portion thereof sufficiently wide and safe for the usual, ordinary, and customary travel therein by horses under control?" Where a finding upon a special issue or a particular question of fact would be so inconsistent with the general verdict as to destroy the effect thereof, the former would certainly control, and the party against whom the verdict went would be entitled to judgment non obstante veredicto. The question here is: Would a finding favorable to the defendant upon any of the foregoing questions of fact have been inconsistent with the general verdict found? We cannot see where or how there could be any incongruity between the conclusion of the jury as manifested by the general verdict and an answer favorable to the defendant to any of the questions proposed, assuming that the jury would have so answered them. However answered, therefore, we think the findings on the proposed special questions of fact would have been immaterial. It is not contended that the woodpile was an obstruction to the free use of the highway in the usual and customary manner; nor that the accident would not have happened if the horse had been under control and driven in the usual and customary manner of driving horses; nor that the accident was not partly due to the "running away" of the horse; nor that the woodpile had anything to do with the horse becoming frightened and running away; nor that the highway, at the point where defendant piled its wood, was not the main traveled portion of the road and not sufficiently wide and safe for the usual, ordinary, and customary travel therein by horses under control. The contention is, as we hold is his right, that the traveler is entitled to the use of the entire width of the highway as against the interference of private persons and corporations, if he desires to so use it, or in case it becomes necessary to so use it by reason of the happening of such a contingency, so liable to arise at any time upon a highway environed as this, as occurred here. It is not claimed that the deceased was driving the mare, after she started to run, in the "usual and customary" way, in the sense in which those terms are ordinarily or colloquially used and understood; but it is contended that while so driving the mare over the public highway, as she had a right to do, the animal became frightened—an event likely to happen at any time under the circumstances—and that, by reason of such fright, proceeded over the road at an unusual rate of speed, and that, under those circumstances, she was entitled to the free use of the whole width of the highway, unobstructed or uninterrupted by the unauthorized and negligent acts of a private person, in which to manage, control, and probably restore the animal to a state of calmness and composure, without injury to herself or property. It would be absurd to say that the reining or driving of a "runaway" horse would be driving the animal "in the usual and customary manner of driving horses." The jury would probably have treated the question as calling for an answer in the sense in which the words "usual and customary" are commonly accepted and used, and such an answer would obviously have meant nothing more than that the deceased was not driving the animal at the usual gait, and therefore using only the physical force ordinarily necessary to guide an animal, attached to a buggy, over a road. And, if the animal had been "under control" in the usual sense of that phrase, she would not have been running with unusual speed, and it is therefore manifest that the jury could have consistently answered the question in the negative, and yet have intended nothing militating against or impairing the force of the general verdict returned. If the purpose of the special question was to ascertain from the jury, by a categorical answer thereto, whether the deceased had the animal "under control" in the sense that she was guiding and keeping it, while running, in the center of the highway, the question should have been more clearly phrased and specific. In the form in which it was requested it was misleading. The same reasoning applies to special questions 1 and 2, and, as to the third, it is not contended, nor could it be, that the "running away" of the horse was not a contributing cause of the accident and damage. This last question, in the form requested, was also misleading.

The motion for a nonsuit presented by the defendant, upon the close of plaintiff's original case, and denied by the court, was based upon grounds involving the vital points in the case herein discussed, and the ruling thereon was, of course, under the views we have expressed, proper.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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6 Cal. App. 707

BLAKELEY v. KINGSBURY. (Civ. 364.)

(Court of Appeal, Third District, California. Nov. 1, 1907.)

1. Public Lands—Disposal by State—Contest—Time.

Pol. Code, § 3414, provides that, when a contest arises concerning a certificate of purchase or other evidence of title before the register, the officer must, when either party demands a trial in the courts of the state, make an order referring the contest, etc. *Held* that, in the absence of a question involving the statute of limitations, a contest is in time if begun before the patent has been issued, and as a general rule, after such contest is begun, the state officers have no right to issue the patent, but must abide the judgment of the court having jurisdiction to determine the controversy by reason of the reference.

2. Same—Adverse Claims—Right of State to Prescribe Method of Determination.

A state owning lands has the right to prescribe what steps shall be taken by one desiring to secure title and how adverse claims to the same tract shall be determined; and the question is one of legislative regulation and control.

3. Same—Right to Patent—Effect of Delay—Filing of Contest.

Every intending purchaser of state lands is charged with notice that he must establish certain facts to secure the approval of the Surveyor General and make certain payments, and that, after a certain time, he may demand and secure his patent, providing a contest has not been filed, which imposes the additional duty of proving that the statements in the application to the Surveyor General are true, and, where an application to purchase has been approved by the Surveyor General, and there was a time during which the applicant might have secured the patent by surrendering the certificate of purchase before a contest was filed, by waiting until after the filing of a contest and transfer of the matter to the Superior Court before demanding patent, the applicant was too late.

4. Same—Statutory Provisions—Payment.

Pol. Code, § 3476, relating to reclamation of state lands, provides that whenever the trustees or owners of lands certify that the works of reclamation are completed, or that $2 per acre has been expended thereon, the board of supervisors must certify such facts to the register. Section 3477 provides that the register must thereupon credit each purchaser in the district with payment in full for such lands, and the purchasers are entitled to patents therefor. *Held*, that these sections do not exclude the operation of section 3414, in reference to contests before the patent has been issued, to determine whether the claimant's verified application is true.

5. Same—Method of Payment.

Whether a payment for public land has been made directly in coin or by reclamation does not affect the liability to a contest before the patent has been issued.

6. Same—Effect of Payment.

An applicant to purchase public land cannot, by making complete payment, prevent or nullify a contest, so as to become the real owner of the land and render the state a mere trustee of the legal title, with the obligation to convey on demand after expiration of the proper time.

7. SAME—MANDAMUS—ISSUE OF PATENT.

Plaintiff made application to purchase certain state lands under Act March 24, 1893 (St. 1893, p. 341, c. 229), relating to sale of previously overflowed lands. She paid 20 per cent. of the purchase money and interest on the balance, and the Surveyor General issued her a certificate of purchase. Afterwards a reclamation district was formed, and the board of supervisors made an order adjudging that the work of reclamation was completed and the land claimed by plaintiff was credited with full payment. Subsequently other persons claimed portions of the land, and filed protests, together with demands that the conflicting claims be referred to the proper court for adjudication. The Surveyor General made an order referring the contests to the superior court, proferts were issued and filed, and within 60 days plaintiff filed in that court complaint against each of the contestants, setting up the facts upon which she relied to establish her right. While these actions were pending she brought mandamus to compel the Surveyor General as register to prepare a patent for the land in question from the state to plaintiff for execution according to law, etc., together with a certificate that the laws in relation to the execution of the patent had been complied with; that payment had been made in full, and that plaintiff was entitled to the same. *Held*, that mandamus would not lie.

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Mandamus by Laura W. Blakeley against W. S. Kingsbury, Surveyor General, etc. From an order granting a peremptory writ, defendant appeals. Reversed.

U. S. Webb, Atty. Gen., and Malcolm Glenn, Asst. Atty. Gen., for appellant. H. P. Brown, Charles G. Lamberson, and Frank Lamberson, for respondent.

BURNETT, J. On the 10th day of December, 1903, plaintiff filed in the office of the Surveyor General and register of the land office her duly verified application to purchase from the state under the provisions of an act entitled, "An act regulating the sale of the lands uncovered by the recession or drainage of the waters of inland lakes and unsegregated swamp and overflowed lands and validating sales and surveys heretofore made" approved March 24, 1893 (St. 1893, p. 341, c. 229), all of section 15, in township 22 south, range 18 east, M. D. M., situated in Kings county, this state. The said application contained the statement of facts required by law. On June 10, 1904, the application was approved by the Surveyor General of the state, and on July 30, 1904, plaintiff paid 20 per cent. of the purchase money and the interest on the balance till January 1, 1905, and on August 5, 1904, the Surveyor General issued to plaintiff a certificate of purchase. Afterwards the board of supervisors of Kings county formed a reclamation district including all of said section 15. Plaintiff paid the assessments levied by said board on her land. On June 5, 1905, after proper proof was received, the said board of supervisors made an order adjudging that the work of reclamation of said district had been fully completed, and that the lands therein had been fully reclaimed, and the board directed the clerk of the board to certify said facts to the register of the state land office. This was done, and the said register made his return to the treasurer of the county of Kings crediting each tract of said land, including section 15, with full payment. July 26, 1905, C. W. Porter filed in the office of said Surveyor General an application for the northwest quarter of said section 15 with a duly verified protest against the issuance of any further evidence of title to the said quarter to plaintiff, together with a demand that the matter of the conflicting claims to the right to purchase said land be referred to the proper court for adjudication. On July 27, 1905, one R. R. Cadwell filed in the same office a similar protest in reference to the east half and the southwest quarter of said land, and a similar demand for reference. On the latter date the Surveyor General made an order referring said contests to the superior court of Kings county, and proferts were regularly issued and filed, and within 60 days from the order of reference plaintiff filed in the superior court of said county a complaint against Porter and also one against Cadwell, in each of which she set forth the facts upon which she relied to establish her right to purchase all of said section 15. Both actions are still pending and undetermined in said superior court of Kings county. On the 12th day of December, 1905, plaintiff filed in the superior court of Sacramento county her affidavit and petition for a writ of mandate to compel the Surveyor General as register of the state land office "to prepare a patent from the state of California to plaintiff for execution according to law, for the land hereinbefore described * * * together with a certificate that the laws in relation to the execution of such patent have been complied with; that payment in full has been made and that the plaintiff herein is entitled to the same." An alternative writ was issued, and, an answer having been filed, a trial was had and the writ was made peremptory, from which the Surveyor General has appealed.

The law provides that the writ shall issue "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." Section 1085, Code Civ. Proc. The contention of appellant is that under the circumstances of the case the law not only did not impose upon him the duty to issue the patent, but that, by the order of reference, he became divested of authority to proceed any further in the matter of confirmation of plaintiff's title, and that the whole question was relegated to the said superior court of Kings county which thereby acquired exclusive jurisdiction to determine to whom the patent should be issued. The basis for the contention is section 3414 of the Political Code, which provides: "When a contest arises concerning the approval of a survey or location before the Surveyor General or concerning a certificate of purchase or other evidence of title before the register, the officer before whom the contest is made may, when the question involved is as to the survey, or one purely of fact * * * proceed to hear and determine the same; but when, in the judgment of the officer, a question of law is involved, or when either party demands a trial in the courts of the state, he must make an order referring the contest to the district [superior] court of the county in which the land is situated and must enter such order in a record book in his office." As to the subsequent proceedings, section 3415 provides that: "After such order is made either party may bring an action in the superior court of the county in which the land in question is situated to determine the conflict, and the production of a certified copy of the entry, made by either the Surveyor General or the register, gives the court full and complete jurisdiction to hear and determine the action." These provisions have been considered more than once by the Supreme Court. It has been held that the jurisdiction of the court depends upon the order of reference. Keema v. Doherty, 51 Cal. 7; Vance v. Evans, 52 Cal. 93; Danielwitz v. Temple, 55 Cal. 42.

Again, the statute is silent as to when the contest before the Surveyor General must be initiated; but—disregarding the question of the statute of limitations which does not arise here—the contest is not too late if begun before the patent has been issued; and as a general rule applicable to state lands, after such contest is inaugurated the state officers have no right to issue the patent but must await the result of the proceedings brought, in other words, must abide by the judgment of the court having jurisdiction by reason of the order of reference to determine the controversy between the parties. People v. Carrick, 51 Cal. 325; Gilson v. Robinson, 68 Cal. 539, 10 Pac. 193; Garfield v. Wilson, 74 Cal. 176, 15 Pac. 620; McFaul v. Pfankuch, 98 Cal. 400, 33 Pac. 397; Youle v. Thomas, 146 Cal. 544, 80 Pac. 714. See, also, Miller v. Engle, 3 Cal. App. 325, 85 Pac. 159. It is true that before the contests here were filed there was a period of about 45 days during which respondent, by surrendering the certificate of purchase, could have secured the patent. Pol. Code, §§ 3519, 3521. As the application of plaintiff was approved by the Surveyor General June 10, 1904, the course suggested was open to her at any time between June 10, 1905, and July 26, 1905, when Porter's application was filed. But she slept on her rights until October 28th following when she demanded the patent. This was too late, as we have seen, because in obedience to the requirements of the statute the Surveyor General had transferred the matter to the superior court of Kings county.

But respondent's contention is not that she is entitled to a patent because more than one year had expired after the approval of her application to purchase and before a contest was filed, but when, in the language of her brief, "her application was approved there was then and there a contract entered into between her and the state, by which, if she caused the land to be reclaimed as provided by the laws relating to the reclamation of such land, she would after the statutory period of one year be entitled to the issuance of a patent for said land. And the fact that respondent had thus by the lapse of time become entitled to a patent, coupled with the fact that she had, before the expiration of the year, paid in full for the land by reclaiming it, gave to the respondent the absolute right to a patent for said land." But respondent seems to be begging the question. She assumes the very proposition in dispute, that, when the year has elapsed and she has paid for the land, the Surveyor General must issue the patent, although in the meantime he had transferred the contest to the superior court in consequence of the question having arisen in the orderly way as to whom must be issued "other evidence of title." It is clear that the rights of the plaintiff and the duty of the defendant must be determined by a consideration of the provisions of the statute. The question is one entirely of legislative regulation and control. The state in its sovereign capacity owns these lands, and it has the incontestable right to prescribe what steps shall be taken by an individual desiring to secure title in himself and how adverse claims to the same tract shall be determined.

We are not concerned as to the doctrine of estoppel, nor is it a case where payment alone entitles the claimant to a patent. Every intending purchaser is charged with notice that he must establish certain facts to secure the approval of the Surveyor General, that he must make certain payments, and that, after the expiration of a certain time, he may demand and secure his patent upon the contingency, however, that in the meantime a contest may be filed which shall impose upon the claimant the additional duty of proving to the satisfaction of a superior court that the statements in his application to the Surveyor General are true. These provisions of the law enter into and become a part of the contract with the state. It is true that the Legislature has provided a complete scheme for the reclamation of this species of state lands, and has intrusted to certain local officers the administration of its details, and has required of them important duties and has directed that "whenever the trustees, or owners of lands, if there be no trustees, certify under oath to the board of supervisors who form the district and show to their satisfaction that the works of reclamation are completed, or that two dollars per acre in gold coin has been expended on the works of reclamation, the board of supervisors must thereupon credit each purchaser in the district with payment in full for such lands and the purchasers are entitled to patents therefor." Pol. Code, §§ 3476, 3477. But there is nothing herein which excludes the operation of the general provision in reference to contests before the patent has been issued to determine whether the claimant has stated the truth in his verified application to the Surveyor General. He is "entitled to the patent" upon the assumption, of course, that he has complied with the law, and has not committed perjury, but, if the issue as before indicated has been properly referred, he must meet it in court. Is there anything in the said act of 1893 excluding the operation as to claimants thereunder of the general provision of the law in reference to contests? The only allusion to the question is found in section 4, which provides that "no application to purchase land under this act shall be approved by the Surveyor General until the expiration of ninety days from the filing thereof in his office and meanwhile the land shall be subject to the adverse claim of any actual settler who has resided thereon when the said application was filed."

In Wrinkle v. Wright, 136 Cal. 494, 69 Pac. 150, it is said that "the above provision was only intended for the purpose of giving those who were actual settlers at the time the application was filed the preferred right to purchase"; and it would seem to be contemplated that within the 90 days this preferred right of "actual settlers" might be established before the Surveyor General who would thereupon decline to approve the original application to purchase. In the Wrinkle Case, supra, it is further stated in regard to this act that "section 1 prescribes the conditions which entitle a party to purchase; and any applicant to purchase may show in a contest that he possesses the qualifications which entitle him to purchase, and that the party with whom he is contesting does not possess the requisite qualifications. The right to contest follows from the right of a qualified applicant to purchase."

As to the liability of a contest before the patent has been actually issued, the law makes no distinction between a claimant who has paid the purchase price directly in coin, and him who has been subjected to his just proportion of the expense of reclamation, and there certainly can be no difference in principle.

Respondent's argument that she is entitled to a patent because she has a vested right to it by reason of having complied with the requirements of the law would be of compelling force if addressed to the court wherein the aforesaid actions are pending; but, when presented to this forum in this proceeding, it ignores the fact that the Legislature has provided the other course for the determination of whether she has in fact complied with the requirement of the statute. The following cases are cited by respondent as upholding her contention that, after the payment in full for the land, she became the owner and the state a mere trustee of the legal title, which it was bound to convey on demand. People v. Shearer, 30 Cal. 647; Bludworth v. Lake (No. 1) 33 Cal. 262; Pratt v. Crane, 58 Cal. 533; McCabe v. Goodwin, 106 Cal. 488, 39 Pac. 941; Pioneer Land Co. v. Maddux, 109 Cal. 640, 42 Pac. 295, 50 Am. St. Rep. 67; Stark v. Starr, 6 Wall. (U. S.) 402, 18 L. Ed. 925; Huff v. Doyle, 93 U. S. 558, 23 L. Ed. 975; Wirth v. Branson, 98 U. S. 118, 25 L. Ed. 86; Benson Mining Co. v. Alta Mining Co., 145 U. S. 432, 12 Sup. Ct. 877, 36 L. Ed. 762. They are not in point here for reasons already stated. When respondent proves in the suits pending in Kings county that she has complied with the statutory requirement, under the authority of those cases, the judgment must necessarily be in her favor; and it must be presumed that the proper officers in consonance with said judgment will do their duty and issue to her the patent. Respondent's argument that because of full payment she has a vested right to the patent would in effect lead to this: Within fifty days after the approval of the application by the Surveyor General (Pol. Code, § 3440) an applicant if he desires may make a complete payment, and thereby prevent or nullify a contest although the patent could not be issued until 10 months thereafter. This view is not countenanced by the decisions we have already considered. Again, the application for a writ of mandate seems an unnecessary proceeding. The suits begun in Kings county afford a specific and adequate remedy for respondent and one which is equally convenient, beneficial, and effective as the proceeding by mandamus. It is true that the Surveyor General is not therein made a party, but the contestants are, and they will be bound by any judgment rendered therein, although not affected by the judgment in the case at bar; and it must be assumed that due effect will be given to the proceedings and judgment in said court. At least the duty of the Surveyor General to prepare the patent and certificate as claimed by respondent is not so clear under the circumstances as to justify the issuance of the writ of mandate.

Besides, since the suit in the said superior court of Kings county was brought by respondent and the questions involved can be properly and finally determined in that proceeding, respondent should be held to have voluntarily selected that forum in which to litigate her rights and she might well be considered as estopped by her own conduct from afterwards seeking to transfer the controversy to another jurisdiction and invoking other forms of relief. Spelling on Injunction and Other Extraordinary Remedies, § 1376, and cases cited.

At any rate, we find ourselves unable to agree with the learned trial judge that the writ should issue, and the judgment is therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

152 Cal. 566

Ex parte SMITH. (Cr. 1,428.)

(Supreme Court of California. Dec. 16, 1907.)

1. Holidays—Criminal Law — Sentence — Void Sentence—Effect.

A sentence pronounced on a legal holiday is void for all purposes, but does not have the effect of vacating the bench warrant under which the arrest was made on the filing of the information.

2. Courts—Overruling of Previous Decision.

The construction of Const. art. 6, § 5, providing that the superior courts shall always be open, legal holidays and nonjudicial days excepted, by a decision of the Supreme Court as leaving the Legislature at liberty to allow or disallow the transaction of all or any class of judicial business on legal holidays, will not be set aside in deference to the supposed views of framers of the Constitution, expressed in the debate which took place when an amendment was offered to that section, providing that injunctions and writs of prohibition may be issued and served on legal holidays, which debate, it is claimed, shows that in the opinion of the members of the convention the part of the section first quoted positively prohibited the transaction of any judicial business on legal holidays, since the construction given by the decision is in evident accordance with the terms of the section, and, where there is nothing in the language of the members necessarily implying that they were actuated in supporting the amendment by any desire except to guard against a legislative enactment, forbidding all judicial business on legal holidays, and the decision was made after the Legislature had amended Code Civ. Proc. § 134, relating to the power of the courts to do business on holidays, to conform to their understanding of the Constitution, and the court, therefore, did but follow the contemporaneous construction by the Legislature.

3. Holidays—Judicial Proceedings—Statutory Provisions.

Code Civ. Proc. § 134, as amended March 19, 1907 (St. p. 681, c. 358, § 1), provides that no court other than the Supreme Court "must" be open on any of the holidays mentioned in section 10, except to give instructions to juries on their request, to receive a verdict or discharge a jury, or for the exercise of the powers of a magistrate in a criminal action, and that injunctions and writs of prohibition may be issued on any day. Previous to the amendment of 1907 the section read no court "shall" be open nor shall any judicial business be transacted, etc., provided that the Supreme Court and the superior courts shall always be open for the transaction of business, and that injunctions and writs of prohibition may be issued on any day. Among the holidays mentioned in section 10 is any day appointed by the Governor for a holiday. Section 133 provides that courts of justice may be held and judicial business transacted on any day except as provided in section 134. Section 135 provides that, if any day mentioned in section 134 happens to be the day appointed for the holding of a court or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day. *Held*, that section 134 as amended March 19, 1907, still means what it has always meant, that the superior court shall not on a legal holiday transact any judicial business outside of the constitutional and statutory exceptions, notwithstanding the substitution of the word "must" for "shall"; and hence a sentence pronounced on a day appointed by the Governor as a legal holiday was void.

In Bank. Habeas corpus by John B. Smith against Carroll Cook, judge of the superior court of the city and county of San Francisco. Prisoner remanded to the custody of the sheriff to await the further action of the superior court upon the verdict of the jury.

Milton Newmark, Charles A. Strong, and John Cotter Quinlan, for petitioner. W. H. Langdon, Dist. Atty., and William Hoff Cook, Asst. Dist. Atty., for respondent.

BEATTY, C. J. The prisoner in whose behalf this proceeding was instituted, having been convicted of the crime of burglary, was arraigned for sentence on the 29th day of November last. He objected to the proceeding upon the ground that, the Governor having appointed that day a legal holiday, the court was without authority to perform any judicial act except those enumerated in section 134 of the Code of Civil Procedure. This objection was overruled, and the judge pronounced sentence, upon which a commitment was issued to the sheriff requiring him to deliver the prisoner to the proper officers of the state prison at San Quentin. The contention is that said judgment and commitment are void, and that the prisoner must be discharged. It does not by any means follow that the prisoner must be discharged if the judgment and commitment are void; for it appears from the return to the writ that on the filing of the information charging him with the crime of which he was found guilty a bench warrant was issued in the usual form under which he may be lawfully detained until it is superseded. The contention on the part of the prisoner that the sentence pronounced on November 29th is utterly void for the purpose of committing him to the state prison, but is nevertheless valid for the purpose of vacating the bench warrant, and ending the felony case, is illogical in the last degree, and finds no support in the decisions which he cites. In Ex parte Kelly, for instance (65 Cal. 154, 3 Pac. 673), it was not a question involved, and, of course, was not decided either expressly or by implication, that a judge by pronouncing a void sentence thereby deprives himself of the authority—otherwise unquestioned—to proceed in disregard of his void act to pronounce a valid sentence. It was not decided there, or in any of the cases, that a void act has any positive force in itself, or that a void judgment under which a prisoner could not be held would have the effect of vacating other valid process under which he could be held. The only point involved or decided was that a judgment of imprisonment unauthorized in part was wholly void, and could not be enforced as to the portion which the court was competent to pronounce. Upon that point it was overruled by the decision of this court in bank (In re Fil Ki, 80 Cal. 201, 22 Pac. 146), and in many cases since it has been uniformly held that a judgment of imprisonment for too long a time or including provisions not warranted by law could be enforced to the full extent of the power of the court to render it. The case of Ex parte Bernert, 62 Cal. 524, has no more bearing on the point to which it is cited than Ex parte Kelly, but that case, questioned in Ex parte Soto, 88 Cal. 626, 26 Pac. 530, was finally overruled by the unanimous decision of the whole court in Ex parte Joseph Reed, 143 Cal. 634, 77 Pac. 660, 101 Am. St. Rep. 138. Without further reference to the cases cited by counsel for petitioner, it is sufficient to say that there is no decision of this court which stands opposed to the plain and common-sense proposition that, if the sentence pronounced by Judge Cook on the 29th day of November was void for the reason that he was forbidden by the Constitution or statute to perform that judicial act on that day it is void for all purposes, and the prisoner is lawfully held to-day, as he was held prior to that time, under the bench warrant issued on the filing of the information, and subject to be again arraigned for judgment at any time when the court is competent to act.

But the prisoner is entitled in this proceeding to have it determined in what capacity and under what process he is lawfully held—whether under the bench warrant for arraignment for sentence, or under the commitment to the penitentiary, and this involves the construction of the constitutional and statutory provisions in respect to holidays and non-judicial days. The only constitutional provisions requiring consideration are contained in section 5, art. 6, and are as follows: (a) "They [the superior courts] shall be always open (legal holidays and non-judicial days excepted). * * *" (b) "Injunctions and writs of prohibition may be issued and served on legal holidays and nonjudicial days." The first of these clauses was considered, and the section construed in People v. Soto, 65 Cal. 621, 4 Pac. 664, where it was held that nothing was prohibited to the Legislature except the establishing of terms of court, during which alone judicial business could be transacted; the result being that full liberty remained "to allow or disallow the transaction of all or any class of judicial business upon legal holidays."

It is here contended that this construction was erroneous and would not have obtained if the attention of our predecessors had been called to the debate which took place in the constitutional convention, when an amendment embodying the clause marked "b" was offered to the section as originally proposed—a debate which it is claimed shows that in the opinion of the members of the convention the first clause, "a," standing alone, positively prohibited the transaction of any judicial business on a legal holiday. We are now asked, in deference to these supposed views of the framers of the Constitution, to reopen the question and set aside a decision which has been followed for nearly a quarter of a century. The reasons are very abundant for declining to do so. In the first place, the construction given to the section in People v. Soto is in evident accordance with its terms, and courts do not resort to the debates of a constitutional convention in construing a provision which is not, in its terms, ambiguous or uncertain. And, besides, when such resort is had to the debates, it is less for the purpose of learning the opinion of particular members upon points of verbal construction than for informing ourselves historically of the evil which it was intended to guard against, or the benefit to be secured. Upon these points the debates in and outside of the convention furnish us abundant information. The main object in view was not to hamper the courts by suspending their powers on holidays and during vacations, but to prohibit the Legislature from imposing such limitations in all but the excepted cases (legal holidays and nonjudicial days). On these days the Legislature was by the first clause left at liberty to authorize or forbid the transaction of any or all judicial business, and the only effect of the amendment proposed and adopted (clause "b") was further to restrict that liberty by prohibiting any law disabling the superior courts to issue and cause the service of writs of injunction and prohibition. Outside of these limitations the legislative power was left unrestrained. Moreover, there is nothing in the language of the two members of the convention whose language is quoted in this connection which necessarily implies that they were actuated in moving and supporting the amendment by any desire except to guard against a legislative enactment forbidding all judicial business on legal holidays. It is to be remembered, also, that People v. Soto was decided in September, 1884, nearly five years after the Legislature had amended section 134 of the Code of Civil Procedure to conform to their understanding of this provision of the then recently adopted Constitution. The court, therefore, did but follow the contemporaneous construction by the Legislature of a provision, the object and purpose of which was certainly familiar to the professional members of the Senate and Assembly. In view of the long and universal acquiescence which this contemporaneous legislative construction has commanded, we should not feel warranted, even if the question were new, in searching the debates of the convention for a construction of the Constitution not required by its terms, and inconsistent with legislation hitherto unquestioned.

Nothing, therefore, remains to be considered but the proper construction of section 134 of the Code of Civil Procedure as amended March 19, 1907. St. p. 681, c. 358, § 1. It reads as follows: "No court, other than the Supreme Court, must be open for the transaction of judicial business on any of the holidays mentioned in section 10, except for the following purposes: (1) To give, upon their request, instructions to juries when deliberating on their verdict; (2) to receive a verdict or discharge a jury; (3) for the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature. Injunctions and writs of prohibition may be issued and served on any day." Among the holidays mentioned in section 10 is any day appointed by the Governor for a holiday and the 29th of November was so appointed. The judge of the superior court in overruling the objection of the prisoner to the passing of sentence on that day based his construction of the section upon the fact that by the last amendment the word "must" in the first line had been substituted for the word "shall" as it had previously read. He concluded that the Legislature would not have changed the word unless the intention had been to change the meaning, and that, since the word "shall" had the effect of forbidding the court to open or transact ordinary business on legal holidays, the substitution of the word "must" was intended to relax that prohibition, so that, although the court could not be compelled to open on a holiday, it might nevertheless be opened if in the discretion of the judge it was deemed necessary that its ordinary business should proceed, without interruption. There is much force in this reasoning, and the rule of construction upon which it is based is unquestioned, but it is not of compelling force in all cases, and we think another explanation will better account for the general revision of the section as re-enacted by the last previous amendment. St. 1897, p. 15, c. 19, § 2. At that time it was made to read as follows: "No court shall be open, nor shall any judicial business be transacted on Sunday, on the first day of January, on the 22nd day of February, on the 30th day of May, on the 4th day of July, on the 9th day of September, on the first Monday of September, on the 25th day of December, on a day upon which an election is held throughout the State, or by the Governor of this State for a public fast, thanksgiving, or holiday, except for the following purposes: (1) To give, upon their request, instructions to a jury when deliberating on their verdict. (2) To receive a verdict or discharge a jury. (3) For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature. Provided, that the supreme court and the superior courts shall always be open for the transaction of business, and provided further, that injunctions and writs of prohibition may be issued and served on any day." The imperfections and self-contradictions of this amendment were so glaring as to call loudly for a thorough revision, and, where so much was to be changed, it is not surprising that a word here and there should have been changed without intending to change the sense. On the other hand, we think it highly improbable that the Legislature, if actuated by the deliberate intention of making so radical a change in the powers and practice of the superior courts as is involved in the construction in question, would have left that intention to be gathered from language of such dubious import, when it could have been made plain and unmistakable by the addition of half a dozen words. We think it a safer construction to hold that the section still means what it has meant from the beginning, i. e., that the superior courts cannot upon a legal holiday transact any judicial business outside of the constitutional and statutory exceptions. In further support of this view it may be added that our construction is in harmony with, and gives effect to, sections 133 and 135 of the Code of Civil Procedure (which must be considered in connection with section 134), while the construction of the superior court renders them superfluous and unmeaning. They read as follows: Section 133: "Courts of justice may be held and judicial business transacted on any day except as provided in the next section." Section 135: "If any day mentioned in the last section happens to be the day appointed for the holding or sitting of a court, or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day." At the hearing, Mr. Tum Suden, as a friend of the court, suggested the question whether the Legislature can delegate to the Governor the power to appoint a legal holiday. We have not felt at liberty to decide or discuss a question of such serious import when it has not been presented or discussed by any party to the proceeding. For the purpose of this decision, we assume that the Governor has the power to make the appointment, and our conclusion is that the judgment of the superior court is void.

The prisoner is remanded to the custody of the sheriff to await the further action of the superior court upon the verdict of the jury.

We concur: ANGELLOTTI, J.; LORIGAN, J.; SHAW, J.; McFARLAND, J.

152 Cal. 549

RILEY et al. v. NORTH STAR MINING CO.
(S. F. 4,041.)

(Supreme Court of California. Dec. 10, 1907.)

1. MINES AND MINERALS—DEEDS—CONSTRUCTION.

A patentee of a mining claim executed a deed to plaintiff's predecessor in title conveying all that portion of the claim conveyed by the government to the patentee lying east of the west bank of a creek and west of the east line of such survey, being all that portion of the ground and mining claim embraced within the patent. The deed also recited that it was understood that it embraced only that portion of the claim surveyed, applied for, and included in the patent which was included in the Ford and Reilly survey outside of, etc., "together with all mining right, property, possession, claim, and demand whatsoever of the grantor of in or to the premises," "and every part and parcel thereof." *Held*, that such deed included all the grantor's mining right in the lands conveyed, and estopped such grantor and his successors in interest from subsequently claiming extralateral rights in such ground.

2. SAME—CONTRACT—CONSTRUCTION.

B. having applied for a patent for a mine, P. asserted ownership of a conflicting claim. To avoid an adverse suit a contract was made by which, in consideration of P.'s agreement not to file an adverse, B. on receiving a patent agreed to convey part of the land to P.: the contract providing that that portion of the ground embraced within lateral lines drawn easterly from the northeast corner of the Ford and Reilly location and the northeast corner of the Stockbridge location should be conveyed, it being understood that the agreement embraced only that portion of B.'s claim as surveyed and applied for and which was included in the Ford and Reilly survey outside and east of the actual lines and boundaries of that location. *Held*, that such contract did not indicate an intention that such conveyance should be of surface rights only, and hence was not in conflict with a deed conveying all of B.'s interest, including extra lateral rights in the ground described.

3. DEEDS—CONTRACT—VARIANCE.

Where a deed is unambiguous, it will govern the contract of sale in so far as the two are in conflict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 266.]

4. EVIDENCE—PAROL EVIDENCE—DEED.

When property is clearly conveyed by deed, the grantee's title cannot be disturbed by extrinsic evidence indicating that the grantor did not intend to convey such property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1719–1728.]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by George E. Riley and another against North Star Mining Company. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

The following is the opinion in department of McFARLAND, J., with whom HENSHAW and LORIGAN, JJ., concurred.

"This action was brought by plaintiffs as owners of certain mining ground and premises to recover judgment against defendant for the value of gold-bearing quartz rock alleged to have been wrongfully taken by defendant from said premises. By its answer defendant denied that it had wrongfully taken any rock from said premises; admitted that it had taken rock, which it avers was of no value, from beneath the surface of plaintiffs' mining ground; but avers that the rock so taken was from a lode or vein of quartz, the apex of which was within the surface ground of the adjoining mining claim of defendant, and which in its downward course dipped laterally under plaintiffs' ground, and that defendant had the right to follow said vein under the surface of plaintiffs' ground and extract rock therefrom. The case was submitted upon a stipulated statement of facts. The court held that upon the agreed facts the defendant had the right to do the acts complained of, because the rock taken was from a lode under the surface of plaintiffs' ground which had its apex in an adjoining mining claim of defendant and dipped laterally under plaintiffs' ground. Upon this theory objections were sustained to evidence offered by plaintiffs to show the value of the rock taken by defendant. A nonsuit was granted, and judgment rendered for defendant. From this judgment the plaintiffs appeal.

"The stipulated facts material to the determination of this appeal are those hereinafter stated. On April 12, 1876, the government of the United States issued its patent to James K. Byrne for what was known and designated in the patent as the 'Massachusetts Hill Quartz Mine,' situated in Grass Valley mining district, Nevada county, Cal. The patent describes certain surface ground containing about 50 acres as designated in the official survey, which accompanied the application for the patent of said mine; also '2,138.4 linear feet of the said Massachusetts Hill quartz mine, vein, lode, ledge, or deposit for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining'; and also any other veins, etc., throughout their entire depth, the tops or apexes of which lie within the exterior lines of the said survey within the end lines. The Massachusetts Hill quartz mine was a consolidation of several smaller claims which had been located before Congress had passed any statute concerning mining claims or patents. One of the consolidated claims was known as the 'Ford and Reilly' and another the 'Stockbridge.' On September 23, 1878, James K. Byrne, as party of the first part, conveyed by deed to James P. Pollard and others a part of the said Massachusetts Hill quartz mine. The descriptive words of the property conveyed are as follows: 'All and singular that certain portion of the Massachusetts Hill mine and mining claim conveyed by the government of the United States to the said party of the first part by the patent, dated April 12, 1876, and as shown by the survey and plat thereof contained and set out in said patent, which is contained and included within the following lines and boundaries, and which is described as follows, to wit: All that portion of said Massachusetts mining claim which lies east of the west bank of Wolf creek and west of the east line of said survey, being all that portion of said ground and mining claim embraced within said patent, and the survey upon which the same is founded, which lies outside of, or easterly from, that part of said Massachusetts Hill mine, known as the "Ford and Reilly location," as the same was located and claimed as "square claim," * * * it being distinctly understood that this conveyance embraces only that portion of the said Massachusetts Hill mine, as surveyed, applied for, and included in said patent, which was included in the "Ford and Reilly" survey outside of and easterly from the actual lines and boundaries of the "Ford and Reilly" square location, and shall not be so construed as to include any portion of the said Massachusetts Hill mine, so patented, which was heretofore known as the "Stockbridge location." * * * Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, also all the estate, right, title, interest, mining right, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, or in or to the said premises, and every part and parcel thereof, with the appurtenances.' The land conveyed was a small strip, less than an acre. The words 'mining right' were not part of the printed form of deed used, but were written there by the grantor Byrne. Plaintiff afterwards became the successor in interest of said Pollard and others to the property conveyed by said deed, and defendant became the successor of Byrne in all of the Massachusetts mine not conveyed by said deed; and while the ownership of the two pieces of property was thus respectively in said parties, the defendant, through underground works, followed the Massachusetts Hill mine vein under the surface of the ground described in the said deed from Byrne, and took rock therefrom under the surface of the ground, and for the rock so taken this action is brought. Defendant contends that it had the right to work the Massachusetts Hill vein where it lay beneath the surface of the land conveyed by Byrne to Pollard and others; and plaintiff contends that the deed from Byrne conveyed all of the rock beneath the surface of the conveyed land. In our opinion, the contention of plaintiffs must be sustained.

"A good deal of respondent's brief is devoted to the discussion and elucidation of the principle in mining law and property that the owner of a quartz lode which has its apex in the surface grant has the right to follow and take rock from such lode wherever it goes in its downward course, though it dips and extends beyond his side lines. This principle must, of course, be accepted as beyond controversy. There is also considerable argument in confutation of appellants' position that the Massachusetts Hill mine is a consolidation of a number of 'square' locations, without extralateral rights. We will assume for the purposes of this decision that this contention of appellants is not maintainable, and that, under the United States patent to Byrne, all ordinary extralateral rights attached to the Massachusetts mine, and that the Massachusetts Hill lode had its apex in the surface not conveyed by the deed, and dipped easterly to the east side line of the Massachusetts surface ground. But, in the first place, it can hardly be said that the question of extralateral rights arises in this case, because there is no question here as to any rights existing outside of the Massachusetts Hill side lines, all rights involved being within those lines. Respondent seems to assume that the deed to Byrne of a part of the mine created new extralateral rights between the land conveyed and that not conveyed; but, assuming this to be so, the question is not what is the mining law as to extralateral rights, but what part of the Massachusetts mine was conveyed by the deed? There is nothing about the ownership of that part of a quartz lode which lies at a considerable distance below the surface and departs from the perpendicular more sacred than the ownership of that part of it which lies near or at the surface. Neither is inalienable. Under the patent Byrne owned all the surface of the Massachusetts mine as surveyed, and all the Massachusetts Hill lode which was within the surface between the apex and the east line of the surface ground, and he could have conveyed any part of that property. He could have conveyed the deeper part of the lode without conveying any surface ground; he could have conveyed part of the surface ground reserving all of the lode which was under it; and if he had simply conveyed surface ground without either mentioning or reserving rights under it, then there might have been a debatable question as to what a mere conveyance of surface ground conveyed. The conveyance, however, which he did make, was different from any above supposed, and the rights of the parties to this action depend entirely upon the meaning and effect of that conveyance.

"What, then, did the deed from Byrne to Pollard and others convey? It is to be noticed that there is no reservation on the face of the deed itself of any part of or rights in the property described as conveyed. There passed therefore to the grantees all property included in the descriptive language of the conveyance. That language is hereinbefore given in full, and we need only here refer to the most material parts of it. It conveys 'all and singular that portion of the Massachusetts Hill mine and milling claim conveyed by the government of the United States to said party of the first part by the patent dated April 12, 1870,' and 'all that portion of said Massachusetts mining claim which lies east of the west bank of Wolf creek and west of the east line of said survey, being all that portion of said ground and mining claim embraced within said patent'; and it also contains this passage, 'it being distinctly understood that this conveyance embraces only that portion of the said Massachusetts Hill mine, as surveyed, applied for, and included in said patent, which was included in the "Ford and Reilly" survey outside of,' etc., together with all mining right, property, possession, claim, and demand whatsoever 'of the said party of the first part, of in or to the said premises, and every part and parcel thereof.' Now, what was the 'Massachusetts Hill mine and mining claim' conveyed by the government of the United States to the said party of the first part by the patent dated April 12, 1876? It included, as described in the patent, 'the Massachusetts Hill quartz mine' with certain described surface ground, and 2,138.4 linear feet of the said Massachusetts 'mine, vein, lode, ledge, or deposit.' Therefore, when Byrne conveyed to Pollard and others 'all that part of the Massachusetts Hill mining claim which lies east of the west line of Wolf creek, west of the east line of said survey,' etc., together with all 'the mining right, property, claim, and demand of the party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances;' he clearly conveyed to the grantees all the property and right of every kind which he had in that part of the mine lying between the west bank of Wolf creek and the east line of the surface ground. A part of that portion of the mine lying east of the west bank of Wolf creek was that part of the Massachusetts Hill quartz lode which was within that boundary, and it was conveyed as completely as a deed of the whole Massachusetts Hill lode mine would have conveyed all the said mine. There was no language of reservation; and the words employed included every kind of property and right which the grantor had in that part of the mine mentioned. We do not attach quite as much importance to the words 'mining right' as is given it by appellants, for the previous language of the deed would have been clearly sufficient to include all the grantor's mining right in the land conveyed without the subsequent express use of those words. However, those words are in entire accord with the previous language, and, although not necessary, may be considered as having some significance as 'further assurances' of the thing granted. After a conveyance of all that part of the Massachusetts mine lying east of the line mentioned, together with all of the grantor's 'mining right' therein, there was surely nothing left to the grantor of that part of said mine. Of course, the previous language in a deed might be such as to limit the subsequent use of the words 'mining right'; but there was no language used in the deed here in question suggesting such limitation.

"Respondent contends that the deed should be construed in the light of certain facts and a certain preliminary contract between Byrne and the said Pollard. Those facts and that contract were as folows: After Byrne had made his application for a United States patent for the Massachusetts Hill mine said Pollard asserted the ownership of a mining claim called the 'Norwich,' which conflicted with a part of the Massachusetts claim as surveyed. Thereafter, to avoid the necessity of an adverse suit, a written agreement was entered into between Byrne and Pollard, by which Pollard agreed not to file an adverse claim, and Byrne agreed that after he had received a patent for the Massachusetts Hill mine he would convey a certain part thereof to Pollard. Respondent contends that by this contract Byrne was to convey only a part of the surface of the Massachusetts Hill mine, and was not to convey any part of the Massachusetts Hill lode lying under such surface, and that, therefore, the subsequent deed, whatever its language, is to be construed as not conveying any part of the Massachusetts Hill mine except such surface. But, in the first place, the said contract is by no means certain as to the precise property Byrne was to convey. It clearly contains no reservation of any underground rights. By the contract Byrne agreed to convey to Pollard 'that portion of said ground embraced within lateral lines drawn easterly from the northeast corner of the "Ford and Reilly location" and the northeast corner of the "Stockbridge location," respectively; it being distinctly understood that this agreement embraces only that portion of the said Massachusetts Hill mine as surveyed and applied for, which was included in the "Ford and Reilly" survey, outside of and easterly from the actual lines and boundaries of the "Ford and Reilly square location."' It thus refers to a part of the Massachusetts Hill mine as well as to the surface ground. Moreover, it may have been understood at that time that as the Ford and Reilly was a 'square' claim a conveyance of surface ground included all beneath it. At all events there was no absolute inconsistency between the contract and the deed which was afterwards executed. Moreover, if there had been any such inconsistency, the deed would prevail. In construing a written instrument, it is permissible to consider preceding facts and surrounding circumstances only when the instrument is itself ambiguous and uncertain. Where, as in the case at bar, the language used in the instrument in question is clear and certain, such language must govern. When property is clearly granted by a deed, the title of the grantee cannot be disturbed by extrinsic evidence tending to show that the grantor did not intend to convey such property. Of course, in a proper case and by a proper proceeding, a deed may be reformed or declared void on account of mistake or fraud; but there is no such issue in the case at bar.

"Counsel on each side have cited a number of authorities, but we do not deem it necessary to notice them at length, for they are not determinative of the question here involved, and deal with facts different from those of the case at bar. However, the views hereinabove expressed were substantially declared in the case of Central Eureka Co. v. E. Central Eureka Co., 146 Cal. 156, 79 Pac. 834, 9 L. R. A. (N. S.) 940. The question there was whether a conveyance of ground by metes and bounds carried a part of the Summit quartz mining lode, which dipped under it, and the court held that it did not. But the court said: 'unquestionably it would have been conveyed by any instrument purporting to grant the Summit quartz mining claim, or the Summit quartz mining ground, for it was part and parcel thereof.' Our conclusion is that the court below erred in sustaining objections to evidence offered by appellants to show the value of the rock taken from the mining ground by respondent, and in granting a nonsuit and rendering judgment for respondent. Upon the agreed statement of facts, if the rock taken by respondent from appellants' land was of any pecuniary value as gold-bearing quartz, then appellants were entitled to judgment for such value.

"The judgment appealed from is reversed and the cause remanded, for further proceedings in accordance with this opinion."

Crittenden Thornton and John F. Riley, for appellants. Lindley & Eickhoff, for respondent.

PER CURIAM. After a reconsideration of this case in bank we are satisfied with the conclusion reached and the opinion delivered in department; and for the reasons given in said opinion the judgment appealed from is reversed, and the cause remanded, for further proceedings as directed in said opinion.

BEATTY, C. J. I dissent. The construction given to the conveyance under which the appellants claim can be upheld only by disregarding the radical difference between the relation of a mining claim to its surface description, and that which is included in the surface description of other lands. As to lands generally, a conveyance includes everything above and below the surface of the earth within vertical planes conforming to the surface lines, but this is not true of mining claims. The patent from the United States does not transfer to the patentee everything within the vertical planes extended downwardly through his end and side lines, and it does transfer things outside of such planes; viz., all parts of veins having their apices within his surface lines, though in their descent they are carried by their dip beyond the planes of his side lines. This is the effect of a patent for the entire claim; and when the patentee conveys a part of that claim described by surface lines, the necessary implication is that he reserves all that is embraced within the lines of that portion of the surface claim not conveyed, including the extralateral dip of all veins having their apices within the lines of the part so reserved. To give a deed for a part of a mining claim any other construction is to defeat the intention of the parties 99 times in 100, and the circumstances under which the deed in question here was given afford ample proof that in this case a construction is given to the deed which neither grantor nor grantee intended.

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6 Cal. App. 749

PEOPLE v. BOWMAN. (Cr. 62.)

(Court of Appeal, Second District, California. Nov. 9, 1907.)

1. Rape—Assault with Intent to Rape—Evidence.

Evidence of force and violence accompanying an assault *held* sufficient to sustain a conviction of assault with intent to rape.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 78-82.]

2. Same—Intent—Question for Jury.

Where an assault on prosecutrix was clearly proved, coupled with acts indicating a purpose to commit rape, whether such was defendant's intent was for the jury, though he abandoned his design and fled without accomplishing such purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 87.]

Appeal from Superior Court, San Bernardino County; F. E. Densmore, Judge.

Cornelius Bowman was convicted of assault with intent to rape, and he appeals. Affirmed.

Henry M. Willis, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. The defendant was convicted of the crime of assault with intent to commit rape, and appeals from the judgment and an order denying his motion for a new trial.

Appellant urges a reversal upon the ground that the verdict is not supported by the evidence. The only testimony disclosed by the record is that of the prosecuting witness and her husband, and the sole question presented for consideration is whether or not this uncontradicted evidence is sufficient to establish a prima facie case of the crime charged against the defendant. No good purpose can be subserved by any extended reference to the evidence. The prosecuting witness lived with her husband in a tenthouse consisting of two rooms. The defendant entered the same in the nighttime while both husband and wife were asleep. We may concede that he entered the room where the prosecuting witness was sleeping with her husband for the purpose of feloniously obtaining money. He was unable to obtain it, and it appears that he then formed the design to commit the crime with which he is charged. The uncontradicted evidence shows that in response to the defendant's demand for money the husband informed him that they had only 10 or 15 cents in the house, which was in a purse under his wife's pillow; that when she attempted to raise up to get it he placed his hand upon her throat, pushed her down upon the pillow, and said he didn't want it. He had a revolver which he thrust in the faces of both husband and wife, accompanying the exhibition with threats to kill them if they did not lie down and keep in place a blanket which he had thrown over their faces; that while thus intimidating them he clearly stated in the vilest language his purpose to have sexual intercourse with the wife, threw the bed covering from her body, and, notwithstanding her resistance, disarranged her nightdress, and repeatedly placed his hand upon her person; that the husband made his escape by jumping through a window, whereupon defendant abandoned his design and fled from the house. We cannot agree with counsel's contention that the evidence is wanting in proof that force and violence accompanied the attack. It would be difficult to conceive of an assault attended by force and violence of a greater degree than is disclosed by the evidence under consideration.

The assault being clearly proven, the intent with which it was committed becomes the vital element in ascertaining the nature of the offense, and the determination of this from all the circumstances and acts of the defendant is the peculiar province of the jury. "In such a case the intent is to be determined by and from the acts committed, and it is not for the judge, but for the jury, to say what particular intent follows from those acts." People v. Barker, 137 Cal. 557, 70 Pac. 617. And in People v. Johnson, 131 Cal. 511, 63 Pac. 842, the court in a similar case says: "As he did not have sexual intercourse with her, but did assault her, the question as to his intent was to be determined by all the circumstances and by the acts of defendant." To the same effect is People v. Webster, 111 Cal. 382, 43 Pac. 1114. Every act and circumstance surrounding the transaction is inconsistent with any inference other than an intent on the part of the defendant to use such force and violence as he might deem necessary to the accomplishment of his expressed purpose. The fact that he abandoned the undertaking when the husband escaped from his perilous position in no wise affects the case. People v. Stewart, 97 Cal. 240, 32 Pac. 8. We have carefully read and considered the cases cited in appellant's brief, all of which, however, are readily distinguished from the case at bar.

Judgment and order affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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6 Cal. App. 734

Ex parte JOHNSON. (Cr. 69.)

(Court of Appeal, Second District, California. Nov. 2, 1907.)

1. Information — Complaint — Construction—Duplicity.

A city ordinance made it unlawful for any person "to keep a saloon, bar," etc., "where any wine or intoxicating drinks were manufactured, sold, dispensed, or given away, or to manufacture, sell, dispense, or give away any such wine" etc., without first obtaining a license therefor. *Held*, that a complaint charging that defendant did "unlawfully keep a saloon, bar, etc., where liquors were then and there sold," and "did then and there sell, dispense, etc., malt beer, without first obtaining a license therefor," stated but a single offense, and was therefore not objectionable for duplicity, under the rule that where a statute enumerates a series of acts, either of which separately or all together may constitute an offense, all of such acts may be charged in a single count, because though each act may by itself constitute the offense, all of them together likewise constitute but one and the same offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 341.]

2. Habeas Corpus — Scope of Remedy — Questions Involved.

While the inquiry on habeas corpus may extend to the question whether the complaint or information charges an offense known to the law, the objection that it is duplicitous will only be considered on appeal, and is not a ground for habeas corpus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 25.]

3. Same.

Where the facts alleged in a criminal complaint state an offense, the writ of habeas corpus is unavailable regardless of how defectively or inartificially the facts are alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 25.]

4. Same—Criminal Sentence—Fine and Imprisonment—Void Portion of Judgment Separable.

A city ordinance prohibited the sale of liquors without a license, and provided a penalty of fine or imprisonment, or both. The minimum fine was $25, and the maximum $300. The maximum imprisonment was 150 days. A judgment directed that petitioner be imprisoned for 30 days in the county jail and pay a fine of $240, and if the fine be not paid on or before the termination of the 30 days, defendant should be imprisoned in the city jail until the fine should be satisfied, at the rate of one day's imprisonment for every $2 of fine, etc. *Held*, that the portion of the judgment imposing the imprisonment for nonpayment of the fine, if void, was separable, so that defendant was not entitled to his discharge on habeas corpus while the portion of the judgment prescribing imprisonment as a punishment was still in force.

5. Criminal Law—Imprisonment—Place.

Where a judgment directed that petitioner be imprisoned for 30 days in the city jail, a return showing that by arrangement between the city and county, the latter had leased certain cells of the misdemeanor room of the county jail to be used as a city jail, and that the prisoner was confined in one of such cells, sufficiently showed that he was confined in accordance with the sentence.

6. Municipal Corporations — Classification Act—Application.

The municipal corporations classification act (St. 1883, p. 24, c. 17, § 2) prescribes a general method for the classification of cities according to the United States census, and section 3 as amended (St. 1899, p. 141, c. 102) provides how municipalities may cause an enumeration of the inhabitants to be taken for the purpose of an immediate reorganization as a municipality of a higher or lower class, pursuant to an election to reorganize in such other class under the general municipal corporation act, declaring that thereupon such proceedings shall be had and an election held as provided in the general law for the reorganization, incorporation, and government of municipalities. *Held*, that the proceedings specified in section 3 were only to be employed in the particular instances therein specified, and that such classification act was not restricted in its application to cities and towns organized under the general law, but was applicable as well to those organized under freeholders' charters.

7. Justices of the Peace—Justices in Cities—Constitutional Provisions.

Const. art. 11, § 8½, providing that it shall be competent in all freeholders' charters to provide for the constitution, regulation, government, and jurisdiction of police courts, etc., did not indicate an intention to interfere with the legislative power to provide for a justice of the peace for cities and towns governed according to such charters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 2.]

8. Same—Classification.

Justices' courts may be properly established in cities operating under freeholders' charters in accordance with the classification specified by Code Civ. Proc. § 103.

[Ed. Note.—For cases in point, see Cent. Dig vol. 31, Justices of the Peace, § 2.]

Application of Peter Johnson for writ of habeas corpus. Writ denied.

L. E. Dadmun, for petitioner. J. W. Puterbaugh, for respondent.

TAGGART, J. This is an application for a writ of habeas corpus. Petitioner is detained in the county jail of San Diego county under a commitment issued in execution of a judgment of the city justice of the peace of the city of San Diego. Petitioner was found guilty of violating the liquor license ordinance of that city (No. 2,341), making it unlawful for any person "to keep a saloon, bar," etc., "where any wine * * * or any intoxicating drinks are manufactured, sold, dispensed, or given away, or to manufacture, sell, dispense, or give away any such wine," etc., "without first having obtained a license therefor, as provided in this ordinance," etc. The complaint upon which the conviction was had charges that the petitioner did "unlawfully, then and there, keep a saloon, bar," etc., "where * * * liquors were then and there sold," etc., "and did then and there sell, dispense," etc., "to wit, malt beer, without first obtaining a license therefor," etc. Petitioner contends that the complaint states two distinct offenses, and that a general verdict on such a complaint is void.

If the authorities from other jurisdictions cited by appellant to support his contention hold as claimed, they do not declare the rule in this state. Compare State v. Pierce, 136 Mo. 34, 37 S. W. 815, with People v. Ellenwood, 119 Cal. 166, 51 Pac. 553. The selling of malt beer was but incidental to the keeping of the saloon or bar; and the proof that petitioner did then and there sell, dispense, and give away liquors would be but one way of showing that liquors were then and there sold, dispensed, and given away. Section 1 of the ordinance, which is the section alleged to have been violated, makes it an offense to keep a saloon where liquors are sold. The showing that liquors were sold was necessary to establish the keeping of the saloon in the manner declared by that section to be unlawful. All the acts mentioned were charged in the conjunctive, and all preceded the charge that such acts were done without first obtaining a license therefor. But one offense, therefore, was charged, and the complaint was good even against a demurrer for duplicity or misjoinder. People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; People v. Eagan, 116 Cal. 287, 48 Pac. 120. Where a statute enumerates a series of acts, either of which separately or all together may constitute the offense, all of such acts may be charged in a single count; for the reason that, notwithstanding each act may, by itself, constitute the offense, all of them together do no more, and likewise constitute but one and the same offense. People v. Gusti, 113 Cal. 179, 45 Pac. 263; People v. Leyshon, 108 Cal. 440, 41 Pac. 480.

If the complaint were defective in the respect claimed, this would be a matter which could only be considered on appeal, and no relief could be afforded on this ground by habeas corpus. Ex parte Gibson, 31 Cal. 620, 91 Am. Dec. 546; Ex parte Long, 114 Cal. 159, 45 Pac. 1057. While the inquiry on habeas corpus may extend to the question whether the complaint or information charges an offense known to the law, since this objection goes to the question of jurisdiction (Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129), the proceeding may not be made to subserve the office of a demurrer or appeal; and if the facts alleged state an offense, no matter how defectively or inartificially they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie. Ex parte Williams, 121 Cal. 328, 53 Pac. 706; Ex parte Harlan, 1 Okl. 48, 27 Pac. 920. Misjoinder of offenses in a complaint or information will not warrant a discharge on habeas corpus. 15 Am. & Eng. Ency. of Law, p. 175 citing In re Green, 134 U. S. 377, 10 Sup. Ct. 586, 33 L. Ed. 951.

The ordinance violated provides a penalty of fine and imprisonment, or both. For the former a minimum of $25 and a maximum of $300 are prescribed, and the maximum imprisonment is fixed at 150 days. The judgment is that petitioner be imprisoned for thirty days in the "City Jail," and pay a fine of $240, and if the fine be not paid on or before the termination of the 30 days' imprisonment, that he be imprisoned in the city jail "until the fine be duly satisfied, in the proportion of one day's imprisonment for every $2 of fine, and on the payment of such portion of the fine that shall not have been satisfied by imprisonment, at the rate above prescribed, that the defendant be discharged from custody."

It is urged on the authority of Ex parte Wadleigh, 82 Cal. 520, 23 Pac. 190, and People v. Hamberg, 84 Cal. 475, 24 Pac. 298, that the judgment is void. The case at bar does not come within the reason or facts of either of those cases. If we were to hold that the portion of the judgment providing that petitioner be imprisoned for nonpayment of fine were void (which we do not), we could not release the prisoner on this ground, as that portion of the judgment is severable from the rest. The portion of the judgment prescribing imprisonment as a punishment is now in force, and the petitioner cannot now be discharged, whatever may hereafter be his rights regarding the portion relating to the fine. Ex parte Mitchell, 70 Cal. 1, 11 Pac. 488. The cases construing section 1205 of the Penal Code are to be distinguished from cases in which the law (whether statute or ordinance) violated provides for imprisonment in case of failure to pay the fine where both fine and imprisonment are imposed. The ordinance here in question provides that both fine and imprisonment may be imposed as a penalty for one violation, "and in the event that the fine imposed hereunder is not paid then (be punished) by imprisonment * * * at the rate of one day for every two dollars of fine so imposed," etc. Ex parte Green, 94 Cal. 387, 29 Pac. 783; Ex parte Rosenheim, 83 Cal. 388, 23 Pac. 372; People v. Brown, 113 Cal. 35, 45 Pac. 181. The commitment was to the city jail, while petitioner is imprisoned in the county jail. By the return to the writ made by the chief of police of the city of San Diego, it appears that by an arrangement between the city of San Diego and the county of San Diego the latter has leased to the former five cells of the "misdemeanor room" of the county jail, to be used as a city jail, and that petitioner was confined in one of these cells. This portion of the county jail, then, to all intents and purposes, is the city jail of the city of San Diego. There is nothing in the claim that petitioner is not imprisoned in accordance with the sentence of the court.

The principal reliance of petitioner, however, is upon the contention that the city justice court of the city of San Diego before which he was tried has no legal existence. The city of San Diego is organized under a freeholders' charter, ratified by the Legislature, March 2, 1889. St. 1889, p. 643, c. 20. It has never availed itself of the authority given it by the adoption of section 8½ of article 11 of the Constitution to create a police court. The city justice court under consideration depends upon section 103 of the Code of Civil Procedure for its existence, and the classification of cities used for the legislation in this section is that provided by the "Municipal Corporations Classification Act of 1883" (St. 1883, p. 24, c. 17), as amended in 1901 (St. 1901, p. 94, c. 80). Under this classification, if applicable to it, the city of San Diego is of the third class. Henning's General Laws, p. 743. This act, petitioner claims, has no application to cities organized under a freeholders' charter, but appertains only to those cities and towns organized and incorporated under the general municipal corporations act of 1883. Henning's Laws, p. 744. To sustain this view he relies chiefly upon the language of section 3 of the classification act, as amended in 1899 (St. 1899, p. 141, c. 102), which provides how municipalities may cause an enumeration of the inhabitants thereof to be taken for the purpose of an immediate reorganization as a municipality of a higher or lower class. By this section provision is made for an election to reorganize in such higher or lower class under the general municipal corporations act, "and thereupon such proceedings shall be had and election held as provided in the general law for the reorganization, incorporation, and government of municipal corporations," etc.

Section 3, however, does not contain the only method provided for ascertaining the number of inhabitants of a city or town for the purpose of determining the class to which such city or town belongs. Section 2 prescribes the general method, to wit, by United States census, and the proceeding under section 3 is only employed in the particular instances therein specified. The proceeding under the latter section, then, was not necessary to the determination of the class to which the city of San Diego belonged. There is nothing in the title or the language of the classification act which confines the application to cities and towns organized under the general municipal corporations act. As amended in 1901, it contains a class which does not appear among those provided by the municipal corporations act, to wit, those having more than 100,000 and not exceeding 200,000 population which constitute the "first and one-half class." It is apparent, therefore, that the Legislature did not intend to restrict the use of the classification act to those cities and towns organized under the general law. All city justices' courts in the state, whether in cities with freeholder charters, or in those organized under the general law, are dependent upon section 103 of the Code of Civil Procedure, and therefore upon the classification act for a valid existence.

The legislation in this regard is based upon sections 1 and 11, article 6, of the Constitution. The latter section provides that the Legislature shall determine the number of justices of the peace to be elected in townships, incorporated cities and towns, and shall fix by law their powers, duties, etc. Under these provisions, the Legislature has created a state system of courts of which the court here under consideration is a member or branch. In doing this it has used the municipal classification act to avoid the objections urged in the cases cited by petitioner—Miner v. Justice's Court, 121 Cal. 264, 53 Pac. 795, and Ex parte Giambonini, 117 Cal. 573, 49 Pac. 732. In the former, an attempt was made to create a justice's court, and in the latter a police court, by special act. This it was held could not be done.

The classification act, made the basis of the legislation here in question, for that purpose is recognized as proper in a number of recent decisions of the Supreme Court. In re Mitchell, 120 Cal. 384, 52 Pac. 799. See, also, concurring opinion of Justice Henshaw (page 394 of 120 Cal., page 802 of 52 Pac.). It was frequently held before the adoption of section 8½ of article 11 of the Constitution, that such laws as section 103 of the Code of Civil Procedure constituted a valid exercise of the legislative power, and subdivision 1 of section 8½ shows no intention to interfere with the power of the Legislature in the matter of provision for justices of the peace for cities and towns. It is limited in terms to police courts. Graham v. Mayor (Cal.) 91 Pac. 147. No reason has been suggested why the classification in this act may not be made the basis of any necessary general legislation for all the municipal corporations in the state. Justices' courts being a part of the constitutional judiciary of the state, there appears to be some question whether it is necessary to classify them for the purpose of creating and establishing them as distinguished from prescribing their duties and jurisdiction (In re Mitchell, 120 Cal. 390, 52 Pac. 802); but, assuming a classification to be necessary, a classification by population for this purpose is in accord with the whole spirit of the Constitution, and is the method prescribed by that instrument for the classification of cities and towns, as well as counties. There being nothing in the language of the classification act restricting its use to cities and towns organized under the general law, we see no objection to its use by the Legislature in creating city justices' courts for all cities and towns of the state, including those acting under a freeholders' charter. The court in question, therefore, is a valid court, properly established by a general law.

Writ denied, and prisoner remanded to the custody of the chief of police of the city of San Diego.

We concur: ALLEN, P. J.; SHAW, J.

6 Cal. App. 744

In re LANDER'S ESTATE. (Civ. 309.)

(Court of Appeal, Third District, California. Nov. 7, 1907.)

TAXATION—COLLATERAL INHERITANCE TAX—REPEAL OF STATUTE—DISTRIBUTION OF ESTATE WITHOUT PAYMENT OF TAX.

The right of the state to the tax, under the collateral inheritance tax act of March 23, 1893 (St. 1893, p. 193, c. 168), being, immediately on the death of a decedent, a vested right, which cannot be surrendered by the Legislature, the distribution of the estate which such act, as well as the repealing act of March 20, 1905 (St. 1905, p. 341, c. 314), the new collateral inheritance tax act, provides shall not be made till production of a receipt showing the tax has been paid, should be refused by the probate court, in the absence of such payment, whether or not a method for enforcing payment of the tax remains.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1676.]

Appeal from Superior Court, Plumas County; John E. Raker, Judge.

In the matter of the estate of H. J. Lander, deceased. From an order settling the final account and from the decree of distribution, appeal is taken. Reversed.

L. N. Peter and U. S. Webb, for appellant. Garroutte & Goodwin, for respondent estate.

CHIPMAN, P. J. Deceased died intestate in the county of Plumas on June 19, 1904, leaving him surviving two sisters, who were his sole heirs. On July 21, 1905, the administrator of his estate filed in the superior court of said county his final account and petition for distribution of said estate. On July 31, 1905, and prior to the hearing of said matter, the district attorney was notified by the county treasurer that the tax on collateral inheritance due from said estate had not been paid, and on the same day the district attorney filed in said matter and presented to the court his protest against the settlement of said account and the distribution of said estate until said tax was paid. No steps prior to said last-named date had been taken to collect said tax, and no part thereof had been paid. The court made its order settling the account and directing distribution of the whole estate without the payment of said tax. The appeal is from the order settling the final account, and also from the decree of distribution. The lower court held "that the act of March 23, 1893 (St. 1893, p. 193, c. 168), and the several acts amendatory thereof, had been repealed and there was no inheritance tax due or payable, and that there was no inheritance tax law in force by which any inheritance tax could be collected in said estate or ordered paid by the court." It would seem that the trial court held that the act of March 20, 1905 (St. 1905, p. 341, c. 314), which will be referred to as the repealing act, repealed the act of 1893 and destroyed the remedies provided in the latter act for the collection of taxes falling due thereunder prior to such repeal, applying the rule laid down in Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322. There is no brief filed by respondent, and we are without any assistance from him.

The facts here are substantially the same as in the recent case of Trippet v. State of California, 149 Cal. 521, 86 Pac. 1084, 8 L. R. A. (N. S.) 1210; i. e., the deceased died before the act of 1905 went into effect, and no steps had been taken by the state to collect the tax imposed by the law in force at the date of the death. It was held in the Trippet Case, supra, affirming the doctrine laid down in Estate of Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788, "that the right of the state to the tax under the law of 1893 is, immediately upon the death of the decedent, a vested right which cannot be surrendered by legislative act." The Trippet Case was an action to have determined that the property belonging to the estate of the decedent was not subject to any lien for taxes under the act of 1893, and acts amendatory thereof, imposing a tax on collateral inheritances. Such an action was authorized by the repealing act of March 20, 1905. In the Stanford Case it was held that to give retroactive effect to the amendatory act of 1897 (St. 1897, p. 77, c. 83) would be, in substance, if not in form, to turn over the fund in question belonging to the state to the appellants, and would be to make a gift or donation of the same which would conflict with the provisions of the Constitution prohibiting the Legislature from making any gift or donation of any public money or thing of value. The Attorney General makes the point that while the repealing act of 1905 purports to repeal the former act, it is but a re-enactment of the first, with certain amendments, and therefore only repeals so much of the original act as is inconsistent with it; that the provisions of the old act, which are carried into the later act without change, are to be considered, not as repealed, but as continued in force and to have been the law all along—citing Sutherland Stat. Con. (2d Ed.) §§ 237, 238, 273; Endlich on Int. of Stat. § 490 (Ed. of 1888), and cases supporting the text. And it is pointed out that section 8 of the act of 1893, which provides that the estate shall not be distributed until the administrator produces a receipt showing that the tax has been paid, is also found in section 11 (p. 345) of the repealing act of 1905. In reply to the anticipated contention that the repealing act contained no saving clause and repealed absolutely the original act, and therefore the state cannot recover the tax, it is claimed that the Legislature passed another act on the same day on the same subject (St. 1905, p. 374, c. 325), which furnishes the same protection that would follow from the insertion of a saving clause in the repealing act itself; that the two acts are in pari materia, and must be construed together as one act—citing People v. Jackson, 30 Cal. 428; Black on Int. of Laws, § 86; Smith v. People, 47 N. Y. 338, and other cases. The New York case above cited discusses at much length the doctrine contended for.

It is further contended by the Attorney General that the rule announced in Napa Hospital v. Flaherty, supra, does not apply to taxes—citing City of Oakland v. Whipple, 44 Cal. 303, where it was held that where taxes are levied under a law which is repealed by a subsequent act, unless it be made apparent by clear and unequivocal language that the repealing act was intended to have a retrospective operation, it will be inferred that the intent of the Legislature was that the taxes should be collected in accordance with the law in force at the time they were levied. To like effect are cited State v. Sloss, 83 Ala. 94, 3 South. 745; State v. Certain Lands, 40 Ark. 38, and other cases. And finally it is contended that if the Legislature contemplated by the two acts of 1905 to give to the heirs of decedent the 5 per cent. of the estate which had previously vested in the state of California, such legislation would be obnoxious to section 31, article 4, of the Constitution. Estate of Stanford, supra; Trippet v. State of Cal., supra.

There is much force in these contentions. We think, however, that it is not necessary to pass upon all of them. In the Trippet Case it was claimed, among other things, that the repealing act of 1905 left a bare right in the state without any constitutional means of enforcing it. The court said: "The plaintiff comes into court seeking, as against the state, a determination that it has no right to any tax. The state is not here seeking affirmative relief against the plaintiff. The judgment merely denies plaintiff the decree sought by him, declaring that the defendant has no right to any tax. Since, as we have seen, the defendant has a vested right to such tax, an adjudication that the estate is free from any claim for such tax would be manifestly improper. Whether or not there remains a legal method of collecting the tax will be a question for decision when the state seeks to enforce its right." The court then shows that the plaintiff cannot, in the action, quiet his title without paying the claim of the state; that the case is analogous to that of a mortgagor who seeks to quiet his title against a mortgagee, where the right to foreclose is barred by the lapse of time, which he may not do without paying the amount due on the mortgage. It seems to us that the principle of that case should apply here, though the question arises in another form of action or proceeding. If, as was held in the Trippet Case, the right of the state vested at the death of the decedent, the state had a property interest in the estate which could no more be taken and given to an heir than could the interest of one heir be taken without his consent and given to another. The decree of distribution was entered August 2, 1905. The repealing act went into effect July 1, 1905, so that when the petition for distribution was filed (July 21, 1905), and when the decree was entered, the statute (section 11 of the repealing act) provided that the estate shall not be distributed until the administrator has produced a receipt showing payment of the tax. The court, then, by its decree not only deprived the state of a vested right, but in doing so proceeded in disregard of the plain provisions of the existing statute. The action of the court was doubtless based upon the erroneous assumption that the repealing act took away or was a renunciation of the right of the state, and hence it was unnecessary for the administrator to exhibit a receipt showing payment of a claim that had no legal existence. But we have seen that the right of the state to 5 per cent. of the estate vested at the death of the decedent, and that the Legislature had no power, if it had intended to do so (which is by no means conceded), to make a donation of this interest in the estate to the heirs of the decedent, by the indirect means of repealing the act under which the right vested. It seems to us quite clear that if the administrator in this case or the heirs of the decedent could not have the title to the estate quieted, without first paying the tax, as was decided in the Trippet Case, it would be a reproach to the law that would allow them to accomplish this result by proceedings in probate. But the decision of the Trippet Case rests, not alone upon the equitable form of the action, but also upon the principle that it would be inequitable to allow recovery against the state at all.

It is not within our province to suggest the steps necessary for the state to take should it seek affirmatively to enforce payment. But that the entire estate cannot be distributed to the heirs without payment of the collateral inheritance tax being first made we have no doubt. The final account sets forth that the balance of the estate on hand is money, except a mortgage note of $200, and that the estate is in condition to be closed. We do not understand that any objection is here made to the allowance and approval of the final account except as it may be affected by the question disposed of in this opinion. Before, however, the final account can be said to show that the estate is in condition to be closed, it should appear therefrom that the collateral inheritance tax has been paid.

The order settling and allowing the final account and the decree of distribution are reversed.

We concur: HART, J.; BURNETT, J.

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6 Cal. App. 752

PEOPLE v. HO SING. (Cr. 101.)

(Court of Appeal, First District, California. Nov. 11, 1907.)

1. Robbery—Elements of Offense—Information.

Under Pen. Code, § 211, providing that robbery is the felonious taking of personal property in the possession of another from his person or immediate presence and against his will, accompanied by force or fear, an information charging that the property was taken from prosecutor's presence, but failing to charge that it was taken from prosecutor's possession, was fatally defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Robbery, § 22.]

2. Larceny—Information—Elements of Offense.

Under Pen. Code, § 484, defining larceny as the felonious stealing, taking, carrying away, of the property of another, an information charging that accused, from the immediate presence of prosecutor, by means of force and against prosecutor's will, did take, steal, and carry away certain property of the value of $1,026 of the personal property of prosecutor, was sufficient as an information for larceny.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 94, 95.]

3. Indictment—Conviction.

Where an information was sufficient to charge larceny, but was insufficient to charge robbery, and the court instructed exclusively on the theory that defendant was being prosecuted for robbery, for which offense he was convicted and sentenced, the judgment must be reversed.

4. Same—Former Jeopardy.

Accused was informed against for robbery. The information was insufficient to charge that offense, but did charge larceny. Defendant was tried, convicted, and sentenced for robbery. *Held*, that defendant having been once in jeopardy for the offense of larceny under such information could not be again tried therefor on reversal on the erroneous conviction of robbery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 396.]

Appeal from Superior Court, Contra Costa County; William S. Wells, Judge.

Ho Sing was convicted of robbery, and he appeals. Reversed. Defendant discharged.

Nathan C. Coghlan, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. The defendant was informed against, tried and convicted of the crime of robbery, and was sentenced to imprisonment in the state prison for the term of 20 years.

The charging part of the information is as follows: "The said Ho Sing * * * did then and there, * * * from the immediate presence of one Chung Kee, * * * by means of fear and against the will of the said Chung Kee, take, steal and carry away" certain property of the value of $1,026.00, "of the personal property of said Chung Kee." To this information a demurrer, general and special, was interposed, which was overruled. The argument by appellant on the demurrer is chiefly addressed to the point that the information does not state facts sufficient to charge the crime of robbery. We think the argument is sound. "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence and against his will, accomplished by means of force or fear." Pen. Code, § 211. It will be observed that the information fails to set forth one of the essential elements of the crime of robbery as defined in this section, in that it does not aver that the property was taken from the possession of Chung Kee. Had it been alleged in the information that the property was taken from his person, an allegation of possession, while expedient, would not be imperative, for, in that case, it would be apparent that the property was in his possession at the time it was taken. It does not necessarily follow, however, that because the property when taken was in the immediate presence of Chung Kee that it was in his possession. For example, it might have been in possession of lessee or pledgee. In the case of People v. Walbridge, 123 Cal. 274, 55 Pac. 902, the Supreme Court, speaking of an information for robbery, said: "The information alleges that the money was taken 'from the person and immediate presence of Victor Finster.' If it was taken from the person of Victor Finster, it must be assumed that it was in his possession at the time it was taken. It was so held in People v. Shuler, 28 Cal. 490. If the information had only alleged that the money was taken from the immediate presence of Victor Finster, then an additional allegation would have been necessary to the effect that it was at that time in the possession of Finster; but the allegation that it was taken from his person renders the allegation as to possession in him not absolutely necessary. It may be conceded that it would have been better pleading to have directly alleged the possession of the money to have been in Finster, but, under the circumstances here disclosed, we deem the information sufficient in the absence of such allegation."

While the information in the case at bar does not aver facts necessary to charge the crime of robbery, it does allege facts sufficient to charge the crime of larceny. "Larceny is the felonious stealing, taking, carrying away, * * * the property of another." Pen. Code, § 484. Upon comparing the information with this section it at once appears that the information has every element necessary to charge the crime of larceny.

The respondent objects to the consideration by this court of the ruling on the demurrer by the trial court, because to that ruling there is no exception presented by a bill of exceptions. Disregarding this technical point, and passing on the merits of the demurrer, it is our opinion that the information in substance and form is good as charging larceny, and that the trial court committed no error in overruling the demurrer thereto.

On this information the defendant could have been tried and convicted of larceny, but he was tried on the theory that the information properly charged robbery. The court instructed the jury exclusively on that theory, the jury found him guilty of robbery, and he was sentenced for that crime. The result is that the defendant was charged with the crime of larceny, and was convicted of the higher crime of robbery. It follows that the judgment must be reversed. It is so ordered. And it appearing that the defendant has been once in jeopardy (People v. Arnett, 129 Cal. 306, 61 Pac. 930), and that a new trial would be a useless proceeding, it is further ordered that the defendant be discharged from custody.

We concur: HALL, J.; COOPER, P. J.

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6 Cal. App. 741

In re CONROY'S ESTATE. (Civ. 332.)

(Court of Appeal, Third District, California. Nov. 7, 1907.)

1. Executors and Administrators — Accounting—Persons Entitled to Object.

A father who was administrator and sole heir of his daughter died after having conveyed his entire distributive share in his daughter's estate. On settlement of the account of the administrator de bonis non, a decree was entered directing distribution of the estate to the father's grantee. *Held*, that a brother of the daughter could not object to the decree on the ground that the father's deed was invalid, such a claim, if any, being as an heir of the father, and only enforceable in proceedings as to the father's estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 2157, 2158.]

2. Deeds — Execution — Relation of Parties.

A deed recited, "This indenture made the 21st day of April, 1903, between C. (administrator of the estate of L. C.) of D," etc., and acknowledged by C. individually, was C.'s deed as an individual and not as an administrator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 276, 277.]

3. Descent and Distribution—Grantee of Distributee.

Where a father, who was administrator and sole heir of his daughter's estate, conveyed certain property in controversy which descended to him as such heir to Q., and then died before having finally administered the estate, the father had no interest in the property which could pass to his heirs on his death, and the property was properly distributed to Q. under Code Civ. Proc. § 1678, authorizing distribution to a distributee's assigns.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, §§ 330–336.]

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Judicial settlement of the estate of Mary Elizabeth Conroy, deceased, by Frank M. O'Connell, administrator de bonis non. From a decree distributing the estate to John F. Quinn, Anthony Bernard Conroy appeals. Affirmed.

William Hoff Cook and Taylor & Tebbe, for appellant. James F. Farrahar, for respondent.

CHIPMAN, P. J. This is an appeal by Anthony Bernard Conroy from the decree of the superior court of Siskiyou county, made and entered November 10, 1906, making final distribution of said estate.

It appears that Frank M. O'Connell, respondent, as administrator of the estate of Mary Elizabeth Conroy, deceased, on October 20, 1906, filed his final account, together with a petition for the distribution of said estate. At the hearing it appeared, as shown by the decree of the court, that Bernard Conroy, to whom letters of administration were issued in said estate, died pending administration, and said Frank M. O'Connell was duly appointed administrator de bonis non; that the sole estate belonging to decedent consisted of a house and lot in the town of Dunsmuir, being lot 5 in block 10; that Bernard Conroy was the father of Mary Elizabeth Conroy, deceased; that the mother of Mary Elizabeth had died previous to the death of the latter; that Mary Elizabeth was a single woman and died intestate, and that Bernard Conroy was her sole heir; that due notice to creditors was given by said Bernard, as such administrator, before his death, and no claims were presented against the estate of Mary Elizabeth, and no property of any kind was received by said O'Connell, as administrator, other than $202.50 advanced by John F. Quinn to pay the costs of administration; that all taxes, state, county, and municipal, together with all costs and charges against said estate of Mary Elizabeth, deceased, have been fully paid, and the estate is in condition to be closed; that Bernard Conroy, on April 21, 1905, by deed, granted said lot to said John F. Quinn, by virtue of which said Quinn "succeeded to the distributive right thereto of said Bernard Conroy, deceased"; that said final account "be and the same is hereby settled, allowed, and approved as submitted; that the said real estate so comprising the estate of Mary Elizabeth Conroy, deceased, be and the same is hereby distributed to said John F. Quinn, as successor in interest of said Bernard Conroy, deceased."

It does not appear from anything in the record that appellant is the son and heir of Bernard Conroy, or the brother of Mary Elizabeth; there is nothing but his notice of ap peal to show any relationship of appellant to either of the above-named persons. It appears from the petition for distribution that Mary Elizabeth was the daughter of Bernard Conroy; that she was a single woman and died intestate; whose mother had died before her death, which would make Mary Elizabeth's father her natural heir. Appellant's kinship, if any, would be to Bernard, whose estate, so far as appears, was not administered upon. The issue is not presented by the record. If there is any imperfection in the deed to Quinn, the rights of appellant, Anthony Bernard Conroy, must be first asserted in proceedings to administer the estate of Bernard Conroy, deceased.

Upon the merits of the matter, however, appellant's contention cannot be maintained. He relies on the claim that the deed of Bernard Conroy to Quinn was as administrator. The deed reads: "This indenture, made the 21st day of April, 1903, between Bernard Conroy (administrator of the estate of Lizzie Conroy) of Dunsmuir," etc. The deed is signed "Bernard Conroy," and is acknowledged: "* * * Personally appeared Bernard Conroy, known to me to be the person described in and whose name is subscribed to the within instrument, and acknowledged to me that he executed the same." There are no recitals in the deed showing that it was intended to be a deed by Bernard in his official capacity, as administrator, except as above appearing. The words in parenthesis are surplusage, and must be disregarded. They are repugnant to the terms of the deed, which in all other respects show it to be the deed of Bernard Conroy individually. Wilcoxson v. Sprague, 51 Cal. 640. As Bernard's grantee, Quinn was entitled to have distribution made to him. Code Civ. Proc. § 1678.

It is claimed that distribution should have been to the heirs of Bernard Conroy, inasmuch as he was then deceased; "that his heirs (this appellant, as a son, being one) were entitled to have the estate distributed to them, and their title became vested on the death of their father"—citing Gutter v. Dallamore, 144 Cal. 665, 79 Pac. 383. But if appellant be an heir of Bernard, we have no proof of it in the record, and, besides, the only way to establish heirship would be by proceedings in probate. Furthermore, Barnard Conroy in his lifetime conveyed to Quinn, and at his death he had no interest in the property, and hence his heirs, if he had any, took no interest.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

152 Cal. 573

In re FRETWELL'S ESTATE. (S. F. 4,884.)

(Supreme Court of California. Dec. 26, 1907.
Rehearing Denied Jan. 23, 1908.)

1. Executors—Right to Appeal—Party Aggrieved—Creditor of Estate—Family Allowance.

A creditor of an insolvent estate is a "party aggrieved," by an erroneous order making a family allowance to the widow, and may therefore appeal, under Code Civ. Proc. § 963, subd. 3, and section 938, providing that an appeal may be taken from such order by a party aggrieved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 723.]

2. SAME—RIGHT OF ADMINISTRATOR—NOTICE.

It is not material to the right of a creditor of an insolvent estate to appeal from an erroneous order granting a family allowance to the widow that the executor or administrator is also authorized to appeal by Code Civ. Proc. § 963, subd. 3, and section 938, and that such order may be made without notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 723.]

In Bank. Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Proceeding for settlement of estate of Edwin Fretwell, deceased. From an order making a family allowance to the widow, a creditor of decedent appeals. On motion to dismiss. Denied.

John Flournoy, for appellant. Barclay Henley, Jos. K. Hawkins, and Crittenden Thornton, for respondent.

PER CURIAM. This is a motion to dismiss an appeal taken by a creditor of deceased from an order making a family allowance to the surviving wife.

The sole ground of the motion is that a creditor of the deceased may not maintain such an appeal. It appears from the record that appellant claimed in the court below that the estate is insolvent, and that the order making the allowance appears to have been made on that theory, for it limits the allowance to a period of 12 months, and provides that it is made without prejudice to application for a further allowance "in case hereafter said estate should turn out to be solvent." We can conceive of no ground upon which it can be held that a creditor of an insolvent estate, who must look to the general assets for the payment of his claim, is not a party aggrieved by an order of family allowance erroneously made, the necessary effect of such an order being to diminish the amount he would otherwise receive on account of his claim. The statute expressly provides that an appeal may be taken from such order (Code Civ. Proc. § 963, subd. 3), and that any party aggrieved may appeal (Code Civ. Proc. § 938). It has never been held that such a creditor may not maintain an appeal. On the other hand, this court has annulled on certiorari an order requiring an administrator to pay family allowance theretofore ordered during the pendency of an appeal taken by other claimants to the estate from the order granting the allowance. Pennie v. Superior Court, 89 Cal. 31, 26 Pac. 617. It does not assist respondent that this court has held that the executor or administrator may appeal from an order directing him to pay moneys as family allowance. Such ruling does not exclude an appeal by a creditor. While the executor or administrator may properly be held to be a party aggrieved by such an order, the creditor may also be such a party, and, as such, the statute gives him his own appeal. Nor is it material that an order for family allowance may be made without notice.

The motion to dismiss the appeal is denied.

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6 Cal. App. 755

ROSENBERG BROS. & CO. v. ROSS. (Civ. 372.)

(Court of Appeal, First District, California. Nov. 14, 1907.)

1. APPEAL — REVIEW — FINDINGS — CONCLUSIVENESS.

Where a finding of the court is not attacked on appeal for insufficiency of evidence to support it, it must be taken as true.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955–3969.]

2. FRAUDULENT CONVEYANCES — WHO MAY ATTACK—TRANSFER BY HUSBAND—VALIDITY AS AGAINST CREDITORS OF WIFE.

Where a person, under a parol agreement with his wife, was the owner of and in possession of a crop raised upon her land, and sold it for a valuable consideration, the transfer was not void as against his wife's judgment creditor, of whom he was not the debtor, and did not come within Civ. Code, §§ 3440, 3442, making certain transfers presumably fraudulent.

3. HOMESTEAD — ESTABLISHMENT — WIFE'S SEPARATE PROPERTY—JOINT HOMESTEAD.

Where a wife selects a homestead from her separate property, she and her husband become vested with a joint title therein to the extent of the homestead, and upon the death of either, the homestead will vest absolutely in the survivor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 245.]

4. FRAUDULENT CONVEYANCES — PERSONAL PROPERTY—DELIVERY AND CHANGE OF POSSESSION — NATURE OF PROPERTY — GROWING CROPS.

Growing crops are chattels not susceptible of manual delivery until harvested, and are not in the possession or under the control of the vendor, within the meaning of the statute requiring an immediate delivery and continued change of possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 459.]

5. SAME—IMMEDIATE POSSESSION—EVIDENCE.

Evidence *held* to show that a vendee of a growing crop took immediate possession of it as soon as it was severed from the land, as required by Civ. Code, § 3440, making certain transfers of chattels presumably fraudulent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 885.]

6. SAME.

What constitutes an immediate delivery and an actual and continued change of possession of chattels sold must be determined upon the evidence in each particular case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 462.]

7. SAME—SUFFICIENCY OF CONSIDERATION.

Labor and expense incurred by a husband in cultivating and caring for a joint homestead is a valuable consideration for the transfer to him of the wife's interest in a crop to be grown on the land, and hence, though the wife was insolvent, the transfer was not fraudulent and void as to her creditors.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action of claim and delivery by Rosenberg

Bros. & Co. against Frank H. Ross, Jr. Judgment for plaintiff, and from an order denying defendant a new trial, he appeals. Affirmed.

Will M. Beggs, for appellant. Rogers, Bloomingdale & Free, for respondent.

HALL, J. This action of claim and delivery was brought to recover the possession of a lot of prunes taken by the defendant, as sheriff of Santa Clara county, under a writ of execution upon a judgment against Grace M. B. Odell. Plaintiff recovered judgment for the possession of the prunes, and this appeal is from the order denying defendant's motion for a new trial. The complaint is in the ordinary form of an action for claim and delivery, and defendant justifies under a judgment and execution against Grace M. B. Emerson, otherwise Grace M. B. Odell, and in favor of one Mrs. J. M. Sweetzer, upon which levy was made upon the property sued for on the 30th day of August, 1905, as the property of Grace M. B. Odell. The evidence shows without conflict that the prunes were the crop grown during the year 1905 upon the homestead of Grace M. B. Odell and her husband, F. E. Odell, which homestead had theretofore been duly selected by Mrs. Odell for the benefit of herself and husband from her separate property. In the month of January, 1905, F. E. Odell and his wife, Grace M. B. Odell, entered into a parol agreement, by the terms of which he agreed to do all the work and bear all of the expenses of cultivating and caring for the premises, and in return the crop was to belong to him. He lived on the premises, performed all the work, and paid all the expenses of caring for the place, and cultivating and gathering the crop. On the 29th day of July, 1905, said F. E. Odell, by an instrument in writing, sold for a valuable consideration the crop of prunes then growing on the trees to Rosenberg Bros. & Co., a copartnership, and to whose business and contracts plaintiff succeeded. The prunes were taken possession of by the defendant under the writ issued on the Sweetzer judgment against Mrs. Odell August 30, 1905, at which time they were all on the homestead premises, part being in trays, part in the field, part in bins in a barn, and part in boxes bearing the name of F. E. Odell. Mrs. Odell at all times during the year 1905 was insolvent and unable to pay the Sweetzer judgment. The court found that plaintiff, on the 30th day of August, 1905, was, and ever since had been, the owner and entitled to the possession of the lot of prunes sued for, and gave judgment accordingly.

Appellant contends that the transfer of the fruit by Mrs. Odell to her husband F. E. Odell was void as against Mrs. Sweetzer, the judgment creditor of Mrs. Odell, under sections 3440, 3442, Civ. Code, and that for this reason the findings in favor of plaintiff were not sustained by the evidence, and a new trial should have been granted. We do not think that this contention can be sustained. In addition to the general finding above referred to, the court also found that F. E. Odell performed all the work and labor, and bore all the expenses in cultivating and raising said crop of prunes, and was the owner thereof and in the possession of the same at the time he sold them to Rosenberg Bros. & Co. This finding is not attacked in defendant's specifications of insufficiency of the evidence to support the findings, and must therefore be taken as true.

Starting with the premises, then, that F. E. Odell was on the 29th day of July, 1905, the owner and in possession of said crop of prunes, the evidence shows that on that day he sold the same to Rosenberg Bros. & Co. for a valuable consideration, and as F. E. Odell was not indebted to Mrs. Sweetzer or to anybody else, so far as the evidence discloses, the provisions of sections 3440 and 3442 of the Civil Code have no application to the sale of the prunes by F. E. Odell to Rosenberg Bros. & Co. The ownership and possession of F. E. Odell on the 29th day of July, 1905, being unchallenged, the ownership and right of possession of plaintiff at the beginning of the action follows from the evidence that plaintiff purchased from F. E. Odell, who was not the debtor of Mrs. Sweetzer. For this reason we think that the court did not err in denying the appellant's motion for a new trial. But if it be conceded that upon the record before us the appellant may attack the validity of the transaction between Grace M. B. Odell and her husband, F. E. Odell, concerning the prune crop in question, we still think the court did not err in refusing defendant's motion for a new trial.

At the foundation of appellant's claim to retain the prunes sued for must be the contention that the prunes were once the separate property of Mrs. Odell. This contention is of course predicated upon the fact that the homestead upon which they were grown was selected from the separate property of Mrs. Odell. But it was selected by her, and upon such selection she and her husband became vested with a joint title therein to the extent of the homestead. Burkett v. Burkett, 78 Cal. 310, 20 Pac. 715, 3 L. R. A. 781, 12 Am. St. Rep. 58; Porter v. Bucher, 98 Cal. 454, 33 Pac. 335. Upon the death of either spouse a homestead so selected will vest absolutely in the survivor. Section 1474, Code Civ. Proc.; Weinrich v. Hensley, 121 Cal. 647, 54 Pac. 254; Estate of Fath, 132 Cal. 609, 64 Pac. 995; Estate of Young, 123 Cal. 337, 55 Pac. 1011. Mr. Odell was in possession of the homestead upon which the prunes were subsequently grown as fully as was his wife, and he had the same right to such possession that she had, and the same right to the absolute fee thereto in case he survived her that she would have in case she survived him. Neither could alone sell, encumber, or relinquish the homestead. Under these conditions it may not be perfectly clear that a growing crop, or rather a crop with only a potential existence, was the separate property of Mrs. Odell.

But conceding that in January, when she made the agreement with her husband, Mrs. Odell had a separate interest in the crop, it is well established that growing crops are chattels not susceptible of manual delivery until harvested, and are not in the possession or under the control of the vendor within the meaning of the statute requiring an immediate delivery and continued change of possession. Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340; O'Brien v. Ballou, 116 Cal. 318, 48 Pac. 130. If it be said that it was the duty of Mr. Odell to take immediate possession of the prunes as soon as they were severed from the land (O'Brien v. Ballou, supra), we think the evidence in the record sufficient to show that he did take such possession. He was, in fact, in possession of the land, and lived thereon with his wife. Mrs. Odell never had any possession of the prunes except such as was incident to her possession and interest in the homestead. Mr. Odell had at all times the same possession of the land, and did all the work and bore all the expenses of cultivating and harvesting the crop of prunes. The evidence is that Mr. Odell "raised the crop," and that Mrs. Odell had nothing to do with the prunes except that they were grown on the homestead, which was as much in the possession of Mr. Odell as it was in her. "What constitutes an immediate delivery and an actual and continued change of possession is a fact to be determined upon the evidence in each particular case." Porter v. Bucher, 98 Cal. 454, 33 Pac. 335; Byrnes v. Moore, 93 Cal. 394, 29 Pac. 70; Claudius v. Aguirre, 89 Cal. 503, 26 Pac. 1077; Dubois v. Spinks, 114 Cal. 289, 46 Pac. 95. The facts of this case make as strong if not a stronger showing of an immediate and continued change of possession than was made in Porter v. Bucher, supra, which was held a proper case for the jury. In Porter v. Bucher a husband sold to his wife hay in the stack on the homestead raised by him on the homestead. Substantially the only possession taken by the wife in this latter case was to close and fasten the gate to the corral where the hay was, and to cause her stock to be fed therefrom. In the case at bar the husband (vendee) cultivated and harvested the prunes, and in so doing necessarily exercised acts of ownership and possession continually over the prunes.

The evidence is sufficient to show a change of possession sufficient to meet the requirements of section 3440, Civ. Code. The labor and expense incurred and to be incurred by Mr. Odell in cultivating and caring for the premises was a valuable consideration for the transfer to him of the interest of Mrs. Odell in the prunes to be grown. The transfer, therefore, was not as a matter of law fraudulent as one made by an insolvent without valuable consideration. Section 3442, Civ. Code.

No other reason is urged for a reversal of the order, which is therefore affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

6 Cal. App. 761

STECKTER v. EWING et al. (Civ. 371.)

(Court of Appeal, Third District, California. Nov. 15, 1907.)

1. ADVERSE POSSESSION—ELEMENTS.

Adverse possession sufficient to vest title must consist of actual, open, and notorious occupation, hostile to plaintiff's title, held under a claim of title exclusive of any other right as the holder's own property, continuous and uninterrupted for five years prior to the commencement of the action, and payment of taxes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 65.]

2. SAME—EVIDENCE.

Plaintiff and her husband mortgaged certain land to a bank, she believing that the mortgage contained the land in controversy, which was in the inclosure with the land mortgaged. The bank foreclosed the mortgage, and bought the land and deeded the same to R. in accordance with the description in the mortgage, which plaintiff still believed included all the land. Plaintiff attorned to R. as his tenant, and continued to occupy the land as such for more than 10 years without making any claim of title until after she had surrendered possession to R.'s grantees. *Held*, that plaintiff's possession of the land in such inclosure not included in R.'s deed was not adverse to him, and that she was not entitled to hold it as against his grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 682-690.]

Appeal from the Superior Court, Napa County; H. C. Gesford, Judge.

Action by M. E. Steckter against J. Z. Ewing and another. From a judgment for defendants, plaintiff appeals. Affirmed.

W. F. Henning, for appellant. F. E., H. L. & L. E. Johnston, for respondents.

HART, J. The plaintiff brought this suit to quiet title to certain real property situated in Napa county. The pleadings upon which the action was tried were the amended complaint and the amended answer thereto, and were verified. The issues tendered by the pleadings involve the claim by the plaintiff of the right to the possession of and title to the land in dispute, and the alleged ownership of the same in the defendant Ewing. The answer pleads the statute of limitations (section 318, Code Civ. Proc.) in bar of plaintiff's cause of action. The court, from the proofs, found in favor of the claim of the respondents that they held title to the property in controversy by adverse possession, and caused judgment to be entered dismissing plaintiff's complaint. It is from said judgment, accompanied by a bill of exceptions, that this appeal is taken.

The premises in dispute are a part of what is known as the Caymus grant, situated in

Napa county, and consists of a tract of land, with appurtenances and improvements, embracing, approximately, 47.42 acres, upon which the appellant and her husband, John Steckter, now deceased, filed a declaration of homestead on the 9th day of March, 1877. This land, so selected as a homestead, adjoins another tract of land, carved out of said grant, consisting of 367 acres, title to which was acquired by appellant and her husband by purchase from one S. C. Hastings on the 29th day of September, 1869, subsequently to the location by appellant and husband upon the land in controversy. The whole property—that acquired from Hastings and the premises in controversy—was enclosed by and within one general fence, sufficient to turn stock, "as early as the year 1864," and the two tracks thereupon became, to all practical intents and purposes, one body of land. When appellant and husband located on the land in dispute, one Yount was the owner of said Caymus grant, and Hastings later succeeded to the Yount title. There were two surveys of the grant made many years ago, by the first of which the westerly line of said grant was made to correspond substantially with the easterly line of the premises in dispute, and by the second of which the westerly boundary line of the grant corresponded with the westerly line of said premises. Under the last survey it will be seen the contested premises were brought within the exterior boundaries of said grant. Neither the appellant nor the respondents could, however, as to the premises described in the complaint, trace the source of title to or connect it with the Yount title. John Steckter died in the year 1902; but, prior to that event, to secure an indebtedness, he and the appellant executed to the Bank of Napa a mortgage, the date of which does not appear from the record, upon "the lands bounded on the west by the premises described in the complaint, including a portion of the land described in the declaration of homestead," but not including that portion of the homestead lands lying westerly of said line, and which constitute the subject of this litigation. On the 3d day of April, 1894, after due proceedings, said mortgage was foreclosed, and a sale of the mortgaged premises was decreed by the superior court, and a sale of the same under said decree made on the 5th day of May, 1894, the bank (mortgagee) becoming the purchaser thereof for the sum of $7,847. A deed to the mortgaged land was thereupon executed to the bank, and thereafter and on the 8th day of November, 1894, the bank sold and transferred said land to one Sumner Randall, son-in-law of the appellant, for the sum of $8,000. Randall executed a mortgage on the land to the bank to secure the payment of most of the purchase price of said property. During the period covered by the existence of the mortgage from appellant and her deceased husband to the bank, the appellant remained in possession of the mortgaged land and resided on the premises described in the complaint. After Randall bought the property he entered into a verbal agreement with appellant by which the latter was to continue in possession of the same in consideration of the payment to Randall of a yearly sum sufficient to meet the interest on his indebtedness to the bank. On the 30th of September, 1903, Randall and wife transferred the property to respondent Ewing, the deed of conveyance describing the land as it was described in the mortgage to the bank and in the deed from the latter to Randall, and within which description the particular premises in controversy were not included. On September 5, 1904, Randall executed to Ewing another deed for the same property, and included therein the premises described in the complaint.

From the evidence it is clear that Randall, as well as the appellant, when he purchased the property from the bank, believed that the premises over which this action arose were a part and included in the description of the property contained in the deed from said bank to said Randall; that the respondent Ewing, when he bought from Randall, believed that the land so purchased included said disputed premises. The appellant admitted that she had always thought the premises described in the complaint were comprehended in the land mortgaged to the bank, and that she did not discover the mistake until after she had given up possession of the whole property to Ewing. At the time Ewing purchased the property the appellant stated to both respondents that her lease from Randall would not expire until the 1st of November, 1903, but, as a matter of fact, she, so far as the record shows, of her own volition, quit the premises and delivered possession thereof to Ewing on the 11th day of October, 1903. She did not at that time, or at any other time, claim to own any of the property. Harris, the executor of the will of appellant's deceased husband, testified that he had always supposed the property mortgaged to the bank and later sold to Randall included the premises in dispute. Both Ewing and Evans testified that when negotiations for the purchase of the property by the first named from Randall were pending they visited the property and that the boundaries of the same as pointed out to them by appellant embraced the land in controversy. Plaintiff admitted that when the mortgage to the bank was executed she supposed the whole property, including the premises described in the complaint, was covered by that instrument, and that she labored under such belief, both as to said mortgage and the deed to Randall, as well as the deed from the latter to Ewing, up to and including the time she quit the premises and surrendered the possession thereof to said Ewing. She admitted paying rent—the sum necessary to pay the annual interest to the bank—to Randall for the occupation and use of the entire tract. The arrangement as to rent was, according to Randall, afterwards changed, and thereby she agreed to return in lieu of cash rent, one-third of the crops raised on the place during the year, and later again she agreed to pay the sum of $500 yearly as rent. Randall made some improvements upon the property during the period of his ownership thereof, said improvements being put upon that part of the land in controversy. In short, all the parties connected with the property from the time of the execution of the mortgage by the appellant and her husband to the bank to the time of the sale to Ewing believed the premises in litigation here were included in the property deeded by the Bank of Napa to Randall, and by the latter to Ewing, and a reasonable inference from such belief by appellant is that the supposition of all parties thereto must have been the same when the mortgage was executed to said bank.

It is to be noted from the foregoing statement of the facts established at the trial that Randall for a period substantially of 10 years had possession, through his tenant, of the premises in question, and openly and notoriously claimed to own the same during all that time, and that the appellant, while holding personal possession and using the premises during said period, admittedly held such possession as tenant of Randall, recognizing by acts and words his ownership, and never during said period of time setting up any claim of ownership in herself or in any manner denying Randall's ownership and right to possession at the termination of the lease under which she held them. It is admitted that Randall paid the taxes upon the entire property from the time the bank conveyed to him until he sold to Ewing.

The appellant contends that the findings of the court upon the important points in the case are either not sustained by sufficient evidence or altogether without support from the proofs. The findings of the court that the plaintiff "has not been the owner or in the possession or entitled to the possession of the premises in dispute," and that defendants "have title and right of, in and to the said premises and to the whole thereof as against plaintiff," are challenged upon the ground that the evidence is insufficient to sustain them; that the evidence is insufficient to support the finding that Randall was, on the 30th day of September, 1903, the owner in fee, in possession and entitled to the possession of said premises, and that he sold the same for a valuable consideration to respondent Ewing; that the evidence is not sufficient to support the finding of adverse possession by Randall, or that plaintiff's cause of action is barred by section 318 of the Code of Civil Procedure; that there is no evidence which supports the finding that the appellant was ever out of actual possession of said premises, etc. The exceptions to the findings are apparently founded mainly upon the theory that there could be no adverse possession of the land in dispute as against the appellant so long as she remained in actual physical possession of the same, notwithstanding the fact that for a period of 10 years she believed that the bank deeded all the land within the inclosure to Randall, and the further fact that she leased the land, including the homestead, from Randall and during all that time treated him as the owner of the whole thereof and as her landlord. In other words, the argument of appellant is that, inasmuch as the disputed land was not included within the description of the land mortgaged by herself and husband to the bank, nor included within the property conveyed by the latter to Randall, and because, furthermore, she never lost actual possession of the homestead, the statute could not run against her title. This contention, under the facts as established, cannot be maintained.

There are five elements essential to the establishment of an adverse possession sufficient to vest a perfect title: (1) The possession must be by actual occupation, open and notorious, not clandestine; (2) it must be hostile to the plaintiff's title; (3) it must be held under a claim of title, exclusive of any other right, as one's own; (4) it must be continuous and uninterrupted for a period of five years prior to the commencement of the action; (5) payment of taxes. Unger v. Mooney, 63 Cal. 595, 49 Am. Rep. 100, and authorities therein cited. The plaintiff herself, as we have seen, admitted that she always believed that the homestead or land in litigation was covered by the mortgage to the bank. She admitted that she believed that the entire tract of land, including the homestead, was conveyed by the bank to Randall. In fact, her belief that Randall bought all the land within the inclosure is best evidenced by the fact that upon the sale to Randall she immediately attorned to him by taking a lease of all the land from him, stipulating to pay, as rent, for the occupation and use thereof, such a sum annually as would pay the interest accruing upon the note from Randall to the bank, given for a large part of the purchase price of the land, and to secure which a mortgage was executed by Randall to the bank. She at all times, up to the day that she surrendered possession to Ewing, treated with Randall, with reference to all the land, as the owner thereof and as her landlord. For a few years she paid the rent as originally agreed upon, and then she and Randall entered into a new arrangement by which she was to return to the latter, by way of rent, one-third of the products raised upon the land. Subsequently the arrangement for cash rent was renewed. Randall himself declares that he supposed all the time that he had purchased the whole tract of land from the bank. In his negotiations with Ewing, he offered to sell the latter the whole body of land within the inclosure, and it was then not only understood by Randall and Ewing, but also by the plaintiff herself, that the land belonged to Randall. When Ewing visited the premises, having in contemplation the purchase of the place, the appellant pointed out to him the fence line as indicating the boundaries of the land purchased by Randall, and, after the sale to Ewing, surrendered possession voluntarily and without a murmur of protest before the expiration of the term of her lease. Randall, as we have shown, paid the taxes on all the land from the time that he received the deed from the bank to the time of the sale to Ewing. Thus it will be seen that Randall at all times not only claimed the land in dispute, but exercised all acts of ownership and dominion over it openly and notoriously. The possession of the land by the plaintiff was his possession, just as much so as if, when he first purchased the land, he had removed the plaintiff from possession, and put some other tenant in possession, or had taken actual physical possession himself. It does not answer the proposition to say that the plaintiff during the whole period of her tenancy under Randall labored under the mistake that the land in controversy was a part of that mortgaged to the bank and conveyed to Randall. In Woodward v. Faris, 109 Cal. 17, 41 Pac. 782, it is said: "Most cases of adverse possession which have ripened into title commenced, I doubt not, in mistake. It must be either by mistake or deliberate wrong. It is through mistake only that one can honestly claim to own that which really belongs to another. But this discussion need not be prolonged, for it is only necessary to set the statute running that the party should be in possession as owner." See, also, Silvarer v. Hansen, 77 Cal. 584, 20 Pac. 136; Grimm v. Curley, 43 Cal. 250.

All the elements of adverse possession are present in the case at bar. Randall, the grantor of Ewing, from the time he purchased from the bank, was, in contemplation of law, in the continuous, open, notorious, and adverse possession, claiming to hold and own the land in dispute adversely to all persons whomsoever. Counsel says that Ewing, before purchasing, should have inspected the records, and by such inquiry have first determined what portion of the land had been conveyed by deed to Randall and what portion not. The same suggestion has equal force applied to the appellant. In truth Ewing relied, no doubt, to some extent upon the representations of appellant herself as to the extent of the land owned by Randall. But for 10 years she remained in possession of the land as the admitted tenant of Randall, knowing that he claimed ownership of the entire tract, never doubting such ownership, but expressly conceding and recognizing it, and yet never taking the trouble to examine the public records for herself to ascertain whether her homestead had been mortgaged and sold. While the rule of equitable estoppel might not be invoked against her under the circumstances of the case (which we do not decide), it may well be suggested that she was guilty of inexcusable negligence in suffering with passive indifference an adverse title to ripen against her before her "very eyes," and that it would hardly be just, after an innocent third party has purchased the land, under the circumstances shown here, to declare that she should be upheld, to the prejudice of such innocent party, in asserting rights lost through her own fault.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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7 Cal. App. 14

NOBLES v. HUTTON. (Civ. 376.)

(Court of Appeal, Third District, California. Nov. 20, 1907. On Rehearing, Dec. 20, 1907; Denied by Supreme Court Jan. 16, 1908.)

1. DEEDS—VALIDITY—INCOMPETENCY OF GRANTOR.

In a suit to set aside a deed on the ground of mental incompetency of the grantor, evidence *held* to justify a finding of mental incompetency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 638, 639.]

2. SAME—CONFIDENTIAL RELATIONS—BURDEN OF PROOF.

Where a son acted under power of attorney executed by his mother, who was old and infirm, with authority to manage her business, a confidential relation existed between the parties, and the burden rested on the son, obtaining from her practically all her property without valuable consideration, to show that the conveyance was not obtained through fraud or undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 589.]

3. GIFTS — VALIDITY — CONFIDENTIAL RELATIONS—PRESUMPTION.

A gift by one person to another, occupying towards each other confidential relations, is constructively fraudulent, and is only upheld on a showing of special circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, § 86.]

4. PARENT AND CHILD—CONVEYANCE BY PARENT TO CHILD—VALIDITY.

Where a son, dealing with his parent with regard to the latter's property, obtains title thereto without adequate consideration, the transaction will, on principles of equity, be scanned with the strictest scrutiny, and such transaction will be examined circumspectly where the parent is aged and mentally infirm, but not altogether incompetent, and where there are other children for the exclusion of whom from the parent's estate no reasonable account is given or apparent.

5. DEEDS — VALIDITY — CONFIDENTIAL RELATIONS—UNDUE INFLUENCE.

Persons standing in a confidential relation toward others cannot entitle themselves to benefits which those others have conferred on them, unless they show that the person by whom the benefits were conferred had independent advice on the subject given in private, by some one of the latter's own selection, and when not surrounded with dominant influences favoring the transfer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 191-194.]

6. SAME—EVIDENCE.

In a suit to set aside a deed executed by a mother to her son, between whom a confidential relation existed, on the ground of undue influence, evidence examined and *held* to justify a finding of undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 641.]

7. SAME — COMPETENCY OF GRANTOR — EVIDENCE.

While, in a suit to set aside a deed on the ground of incompetency of the grantor, the test is the competency of the grantor at the time of the execution of the deed, testimony of the mental competency of the grantor before and after the execution of the instrument is admissible to show the probable condition of the mind of the grantor at the time of the transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 604–606.]

8. APPEAL — REVIEW — FINDINGS — CONCLUSIVENESS.

The weight of the evidence is for the trial judge, who may disregard the uncontradicted testimony of witnesses, and his findings supported by some evidence will not be disturbed on appeal, unless there is such inherent weakness in the proofs as to justify the appellate court in saying that as a matter of law they do not sustain the findings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979–3982.]

9. EVIDENCE—OPINION EVIDENCE—COMPETENCY OF GRANTOR.

Under Code Civ. Proc. § 1870, subd. 10, rendering the opinion of an intimate acquaintance respecting the mental sanity of a person competent, the objection that the husband of a grantor who had not lived with her for nearly a year, and that another person who had not seen the grantor very often for two years prior to the date of the deed, could not testify as to the mental competency of the grantor, was to the weight of the testimony rather than to its competency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2242.]

10. SAME.

On the issue whether a grantor in a deed possessed mental competency, the questions asked witnesses should relate to the grantor's mental competency, and not as to whether he was competent to make a transfer of property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2290.]

11. APPEAL—REVIEW—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, in a suit to set aside a deed on the ground of mental incompetency and undue influence, the evidence justified a finding of undue influence, error in rulings on evidence as to mental comptency was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4175, 4177.]

12. DEEDS — VALIDITY — UNDUE INFLUENCE — EVIDENCE.

In a suit to set aside a deed on the ground of undue influence, evidence that no actual consideration passed for the deed at the time of its execution was admissible to show that the deed was void because obtained by undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 603, 605.]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Elizabeth Nobles, formerly Elizabeth Hutton, by C. M. Curley, her guardian, against D. D. Hutton. From a judgment for plaintiff and an order denying defendant's motion for a new trial, defendant appeals. Affirmed.

Weldon & Held, for appellant. W. G. Poage and Thomas, Pemberton & Thomas, for respondent.

HART, J. The purpose of this action is to set aside a certain deed, purporting to convey the lands therein described to defendant, and to quiet title to said lands. The plaintiff, having been prior to the commencement of this action adjudged by the superior court to be an incompetent and a guardian of her estate and person thereupon appointed, brought the suit, and is a party hereto by her general guardian. Judgment was awarded to plaintiff, setting aside the deed, and quieting her title to the lands alleged to have been thereby conveyed. The appeal is from the judgment and the order denying defendant a new trial.

The defendant is a son of the plaintiff, and it is charged in the complaint that the latter, while in a state of mental incompetency, conveyed to the defendant, without a valuable consideration, the lands involved in this controversy. It is alleged that the plaintiff, by reason of the infirmities of old age, was without capacity to transact business, or to realize and understand the effect of her act in executing said deed to defendant; that she was illiterate and unable to read, and at the time of the transaction complained of had no opportunity to secure and receive the counsel and advice of any other relative, friend, or acquaintance; that the plaintiff was taken by the defendant and his wife to Ukiah, a distance of about 50 miles from her home, and, while among strangers, signed and acknowledged the deed; that defendant, taking advantage of the said infirmity of mind and illiteracy of plaintiff, and of his relationship to her, imposed upon said plaintiff, and unduly influenced her to transfer to him said property, which, it is alleged, is of the value of about $6,000. The court found that upon the 17th day of June, 1904, the day upon which the deed mentioned in the complaint was executed as alleged, the plaintiff was "old, infirm, of failing memory, and of unsound mind, and by reason thereof at the time incapacitated from attending to business," and that defendant took advantage of such incapacity, and procured her to sign and acknowledge said deed, conveying to him the property described in the complaint, without any consideration therefor; that the plaintiff in the transaction was without independent advice, and that defendant "by taking advantage of plaintiff's mental weakness and by the use of undue influence arising out of the relationship existing between the parties hereunto, to wit, the relation of mother and son, and of principal and agent, and further taking advantage of the circumstances above recited, procured and persuaded plaintiff to sign and acknowledge" the deed which is the cause of this controversy.

The principal contention of the appellant is that the evidence is insufficient to support the findings. The testimony upon behalf of plaintiff upon the question of her alleged mental incompetency was mostly from witnesses who saw very little of her during several months prior to the date of the execution of the deed. But the witness Avella, who was a lessee of the plaintiff of certain land, testified that he met and talked with her frequently, and that he noticed that her mind was failing, and that she appeared to have a poor memory, etc. Avella said that after he learned of the execution of the deed, by which she conveyed her property to the defendant, he mentioned the circumstance to her, and that she denied having transferred the land to defendant. This witness expressed the opinion that plaintiff was incapable of understandingly attending to business. There was other testimony upon this point by witnesses who, as stated, had not seen much of plaintiff for three or four months before the transfer was made. Neighbors of plaintiff, testifying for the defense, stated that, up to the time of the transaction out of which this suit arises, she appeared to be of sound mind and fully capable of conducting her business affairs. The attorneys who drew the deed, and who were present when plaintiff signed and acknowledged it, testified that she seemed on that occasion to be intelligent and thoroughly appreciative of the nature and effect of the transaction. It would accomplish no useful purpose to go into all the testimony upon the point under consideration. It is sufficient to say that, while it may be admitted that the testimony offered and received in support of the allegation in the complaint of the mental incapacity of the plaintiff, and her inability to understand and know the nature and result of the transaction involving the execution of the deed, is by no means strong, so far as we are able to judge from the bare record, there is, nevertheless, some testimony to sustain the finding upon that point, and we are not prepared to say that the court was not justified in making said finding. Besides, we do not think that the proposition of the alleged mental incompetency of plaintiff to the extent that she was incapacitated for the transaction of business is of paramount importance in view of other considerations presented by the record.

The evidence shows that, besides the defendant, there were living at the time of the execution of the deed and when the trial was had several children of plaintiff, and that between these children and plaintiff the most amicable filial relations existed. It further appears that the defendant had been, for some time prior to and up to the date of the conveyance to him of the property in dispute, the agent of plaintiff, acting as such under a power of attorney. It is also clear that while, as we have suggested, the evidence may not be strong as to her alleged incompetency, there can be no doubt that the plaintiff had to some extent grown mentally feeble and of poor memory, and was certainly in a condition of mind in which she could be easily influenced by one in whom she had confidence. The power of attorney to which we have referred clothed the defendant with authority to "sue for and collect all such sums of money, debts, rents, dues and accounts, and other demands whatsoever, which are or shall be due, owing and payable to me or detained from me in any manner whatsoever," etc. The authority thus conferred upon the defendant does not, it is true, at least by express language, relate to the property in controversy, but if, as appellant contends, said power of attorney does not establish confidential and fiduciary relations between the parties as to the property in dispute, there is still much significance in the circumstance of defendant's agency of plaintiff in the fact of the confidence thereby reposed in the defendant by the plaintiff. The evidence shows that the plaintiff was induced by the defendant, prior to the execution of the deed, to leave her farm and take up her residence with defendant and wife. And there is no reason shown why the plaintiff should have given the bulk, if not all, her estate to the defendant to the exclusion of her other children. The circumstances under which the transfer of the property was made to the defendant were, upon their face, such as to create suspicion as to the good faith of the transaction, so far as defendant's part in it was concerned. Indeed, the mere statement of the circumstances discloses, in our opinion, a strong case of constructive fraud. The judge of the court below, who saw and heard the witnesses, and who was in a position to determine the weight to which the testimony of the witnesses was entitled, upon the evidence through which the circumstances attending the transaction were developed, found that not only undue influence was practiced by defendant, but that the transaction was constructively fraudulent. With this finding we do not feel at liberty to interfere. There is no room for doubt, under the evidence as presented here, that the relations existing between plaintiff and defendant were confidential and therefore of a fiduciary character. The evidence clearly shows that the plaintiff reposed in the defendant especial confidence and trust, and the court found that "defendant was at the time of the execution of said written instrument and for many months prior thereto had been continuously the agent of plaintiff, and was by her intrusted with the management and conduct of all her business," etc. The conclusion of the trial court from this finding was that the conventional fiduciary relations between plaintiff and defendant extended to all transactions between them relating to plaintiff's business affairs, whatever of her property they might involve, so far as any dealings defendant might have with her in his own behalf were concerned. With this conclusion we are, as before indicated, perfectly satisfied.

A relation of trust and confidence being established between these parties through the authority as agent vested in defendant by plaintiff, it was the duty of the former to act in perfect good faith in his dealings in his own behalf with said plaintiff in a transaction relating to her property, independent of any consideration of his duty towards her as her son and in her enfeebled condition of mind. When, therefore, he obtained from her, under the circumstances disclosed by the evidence, valuable property—in fact, practically her entire estate—admittedly without a valuable consideration, the burden rested upon him to show that the fructification of the transaction was not attained through fraud or undue influence. This is only a statement in different form of the well-settled rule that a gift by one person to another occupying towards each other confidential relations is constructively fraudulent, and, as the Supreme Court says in Brison v. Brison, 75 Cal. 529, 17 Pac. 689, 7 Am. St. Rep. 189, "is only to be upheld upon a showing of special circumstances." By this it is not meant that it is impossible that such a gift may be valid, but that such a transaction, under such circumstances as are shown here, is by presumption of law tainted with fraud, and that the burden of showing the good faith of the same is on the donee. See Hays v. Gloster, 88 Cal. 566, 26 Pac. 367, and cases cited. This burden the defendant failed to sustain—that is, he failed to show that the deed was the result of the free agency of the grantor, or not "more the offspring of his own than of her own will."

In Paddock v. Pulsifer, 43 Kan. 718, 23 Pac. 1049, where a daughter obtained a deed from her aged and invalid father to a valuable piece of land without consideration and which conveyance was set aside, the Kansas Supreme Court lays down the rule in cases of the character of the present one as follows: "In such a case as this, the burden of establishing the perfect fairness and equity of the conveyance to Mrs. Paddock was thrown upon her, in view of her father's age, sickness, and feebleness of mind, and the close relation of the parties. Confidence was necessarily reposed in Mrs. Paddock. If that confidence was abused in procuring the deed, the trial court very justly set it aside. Added to the "close" natural relationship of the parties here is, it must always be remembered, the further relation of confidence and trust created by the authority as agent conferred upon the defendant by the plaintiff.

But the relation of parent and child, where business transactions are carried on between them, is the source of the very highest considerations of confidence and trust. Confidence in such a case originates in and proceeds from natural laws, and, generally speaking is innate and an essential part of the nature of both, for in whom could a parent repose a greater degree of confidence than in him to whom has been directly transmitted his own blood, and over whom he has exercised parental dominion and discipline from infancy to matured manhood. So, when a son dealing with his parent with regard to the latter's property, gains an advantage or obtains title to such property without adequate or any consideration, the transaction should, upon principles of equity and fair dealing, be scanned with the strictest scrutiny. And, a fortiori, should such transaction be examined circumspectly when the parent is, as here shown to be, aged and mentally infirm, even though not altogether incompetent, and where there are other children, for the exclusion of whom from the parent's estate no reasonable account is given or apparent. The books are full of cases illustrating the application of the principle as thus stated. In Comstock v. Comstock, 57 Barb. (N. Y.) 453, a case in which an aged parent conveyed property to her son with whom she was living and the deed set aside, it is said: "It is a well-settled rule of equity jurisprudence that all gifts, contracts, or benefits from a principal to one occupying a fiduciary or confidential relation to him are constructively fraudulent and void. The court, in such cases, acts upon the principle that if confidence is reposed it must be faithfully acted upon; if influence is acquired it must be kept free from the taint of selfish interest, and cunning and overreaching bargains. In this class of cases there is often found some intermixture of deceit, imposition, or overreaching advantage or other mark of positive or direct fraud. But the principle upon which courts of equity act in regard thereto stands independent of any such ingredient, upon a motive of general public policy. Among the relations subject to the foregoing rule are those of parent and child, attorney and client, and principal and agent."

We have examined with care all the authorities cited by appellant upon the point under discussion and find nothing therein inconsistent with the views here expressed. The case of Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910, was an appeal from the judgment upon the judgment roll alone. The court held that the findings could not be disturbed because, in the absence from the record of the evidence from which the findings were deduced, the evidence was presumptively sufficient to sustain them. It is, however, said in that case: "Transactions like the one under consideration are watched by courts of equity with the most scrutinizing jealousy, and are generally held to be presumptively void. They will be set aside upon the discovery of the least fraud, and every presumption ought to be indulged against them. The person who makes the donation and bestows the confidence is not bound to show that any imposition has been practiced upon him. It is sufficient for him to establish intimate and confidential relations with the donee. Some of the cases hold that undue influence is not to be inferred from the relation of parent and child, where the gift is from the parent to the child (citing Millican v. Millican, 24 Tex. 446); but where the parent is of great age, or is enfeebled by disease, and conveys his entire estate to one child, to the exclusion of other children dependent upon his bounty, the burden is unquestionably upon the donee to show that the gift was made freely and voluntarily, and with full knowledge of all the facts, and with perfect understanding of the effect of the transfer." Citing Todd v. Grove, 33 Md. 194, and Highberger v. Stiffler, 21 Md. 352, 83 Am. Dec. 593. The rule as it is declared in Smith v. Mason, 122 Cal. 426, 55 Pac. 143, while undoubtedly correct as applied to the circumstances under which the deed there was executed, seems to be rather broadly stated, and, as construed by appellant, is opposed to the whole current of authority upon the subject. But in that case it was not alleged or claimed that the grantor was incompetent in any respect to execute the deed to defendant, "nor that he at all mistook its contents, nor that defendant procured it by means of undue influence or fraudulent promises or, indeed, that she made any effort to obtain it."

Here, as seen, it is alleged, and the proven circumstances show, that a confidential relation existed between the parties, and a conveyance made without consideration by one who, if not totally incompetent, was at least enfeebled in mind. The evidence, as already appears, shows that for nearly a year before the deed was executed, the plaintiff resided with the defendant and his wife, and during that time was in constant association with, and the companion of, the latter. She had returned to her farm, but for the purpose of making the deed was brought by the defendant to Ukiah, and when the transaction was consummated she was attended only by the defendant, his wife and the attorneys who were employed by defendant to attend to the business. According to the evidence and findings, she was not given independent advice, nor opportunity to secure it, and was compelled to rely solely for information and advice concerning the transaction upon the defendant and his wife.

It is a well-established principle that persons standing in a confidential relation toward others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had independent advice in conferring them. Yordi v. Yordi (Cal. App.) 91 Pac. 348; Rhodes v. Bate, L. R. 1st Ch. 257; section 958, 2 Pom. Eq.; Slack v. Rees (N. J.) 59 Atl. 466, 69 L. R. A. 393; Coffey v. Sullivan, 63 N. J. Eq. 296, 49 Atl. 520; Haydock v. Haydock's Executors, 34 N. J. Eq. 570, 38 Am. Rep. 385; White v. Daly (N. J. Ch.) 58 Atl. 929. And the advice should be given in private by some one of her own selection, and when the grantor is not surrounded with dominant influences favoring the transfer. Slack v. Rees, supra; Yordi v. Yordi, supra; Coffey v. Sullivan, supra; Haydock v. Haydock's Executors, supra; Pironi v. Corrigan (N. J.) 20 Atl. 227. In the last-mentioned case, the language used is peculiarly appropriate here: "It seems to me that the complainant, laboring, as she did, under the continued disadvantages of great age and of dense ignorance and inexperience, and dealing with a person in whom she had the utmost confidence, had especial need of, and was especially entitled to, and should have had the benefit of, a full, free, and private preliminary conference with a competent lawyer or business man, who was employed and paid by her, and in whom she had confidence, and who would be devoted to her interests, and hers only." There are innumerable other cases than those cited upon all the points involved in this case, sustaining the conclusions we have reached; but it would be useless to multiply authorities upon principles so well established and understood in their application to such circumstances as are found here. We may, however, state the sum of the case here in the language of White v. Daly, supra, particularly pertinent to the facts in the case at bar: "The situation is obvious—a relation of trust and confidence on the one side; an improvident deed, the product of that trust and confidence, on the other. That the influence was a constantly operating influence is undeniable; that it was an undue influence is demonstrated by the fact that the transaction was improvident, and that the only gainer by it was the person under whose influence the grantor was."

As stated in the beginning of this opinion, the principal claim of the appellant why a reversal should be ordered is that the evidence does not support the findings. In their elaborate and able brief the learned counsel discuss at length and in detail the evidence to show that the findings are barren of sufficient support. It is declared that the evidence shows that some of the witnesses for plaintiff are interested in the result of the action—a fact which we are asked to consider—and that most of the testimony upon the mental condition of the plaintiff is worthy of but little weight, because it relates to a time anterior and subsequent to the date of the execution of the deed, and that, consequently, she failed to make out a case of incompetency at the very time the deed was signed and acknowledged. It is true that the test in a case of this character, where mental incompetency is relied upon to set aside an instrument transferring property, is the condition of the party whose act is challenged upon that ground at the time said act was performed; but it is also true that testimony as to the mental condition of the party before and after the time of the making of the instrument is admissible for the purpose of disclosing circumstances tending to show her probable condition of mind at the time of the transaction. As before stated, however, the evidence and its weight are matters for the trial judge, trying the facts, to pass upon and determine, and his conclusions thereon, where, as here, there is some evidence to show plaintiff's incompetency when she made the deed, could not be interfered with by a reviewing court, unless there appeared from the record such inherent weakness in the proofs as to justify an appellate court in saying that, as a matter of law, they do not sustain the findings. A trial judge, to whom is submitted the decision of questions of fact, may disbelieve the uncontradicted testimony of certain witnesses and ignore it altogether. This, under our system, is his right and within his province as a trier of the facts. But, as we have attempted to show, even if it may be said that, as a matter of law, the evidence upon mental incompetency is, upon its face, too weak to support the finding upon that point, there are other considerations presented by the record, which, being fully supported by proof, positive and presumptive, justify the judgment.

Certain rulings of the court to which exceptions were reserved at the trial are assigned here as prejudicial errors. The witness Nobles, husband of plaintiff, from whom he had been separated for about a year, and who had not seen her for nearly a year, was permitted, over an objection to give his opinion, as an intimate acquaintance (section 1870, subd. 10, Code Civ. Proc.), of the mental competency of the plaintiff. The objection was upon the ground that the witness had not been shown to have seen the plaintiff on the day of the transaction, etc., and also as to the form of the question. The witness Hayward, asked the same question, was allowed, over objection, to give his opinion as to plaintiff's mental condition. He had not seen her very often for two years prior to the date of the deed, and the objection was that he was not competent to give his opinion within the meaning of the section of the Code admitting such an opinion from an intimate acquaintance. These objections, except as to the form of the questions, were, as we have already suggested, rather to the weight than the competency of the testimony. The form of the questions may not have been strictly within the language of the section, yet the purpose of them was to elicit opinions as to plaintiff's mental sanity. The questions were not as to whether plaintiff was competent to make a transfer of her property (Estate of Taylor, 92 Cal. 564, 28 Pac. 603), but as to her "mental competency." But under the views we have expressed concerning the issue as to mental incompetency the rulings, even if erroneous, are harmless.

It is also contended that the court erred in permitting the witnesses McNab and Hirsch to testify that no actual consideration passed for the deed at the time it was executed. In support of this contention the cases of Hendrick v. Crowley, 31 Cal. 472, and Arnold v. Arnold, 137 Cal. 296, 70 Pac. 23, are cited. These cases do not sustain the contention. In the last-mentioned case, the court after declaring the very elementary proposition that the terms of a written contract cannot be varied and defeated by parol testimony, says: "No fraud, no undue influence, no mistake was averred or sought to be proved." The testimony here was not offered to vary the terms of a valid written contract, but for the purpose of showing that the instrument was void because obtained by fraud and undue influence.

We find no prejudicial errors in the record. The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

HART, J. We have carefully examined the petition for a rehearing herein, and observe nothing therein persuading a different conclusion from that arrived at in the main opinion. The petition involves practically only a repetition of an argument based upon the evidence and the facts thereby established. We are unable now, as we were upon the original investigation of the record, to see our way clear to hold that the evidence, as a matter of law, is insufficient to sustain the findings of the trial court.

Our attention has, however, been called to two immaterial inaccuracies in the statement of the facts in the original opinion. We therein stated that prior to the commencement of the action the plaintiff, Mrs. Hutton, had been declared an incompetent, and a guardian of her estate and person thereupon appointed by the superior court. The fact is, as we find upon re-examination of the record, she began the action before she was adjudged an incompetent, and the proceeding in which she was so declared was consequently had after the suit was instituted.

We also stated that Mrs. Hutton, prior to the execution of the deed, was induced to leave her farm and take up her residence with defendant and wife; whereas the record discloses that she was living in town at the time she was separated from her husband, and that thereafter she went to the home of the defendant.

It is too clear to justify the time in making the suggestion that these immaterial inaccuracies cannot, in the remotest degree, affect the conclusion at which we arrived in the original opinion. It must be plainly manifest that whether Mrs. Hutton was declared an incompetent before or after the commencement of the suit could have very slight material bearing upon the question of her competency at the time of the transaction from which the suit arises. And whatever weight the circumstance, happening as it really did, might carry, was for the jury to determine. Still less could the fact of her having been taken from her home in Ukiah to the residence of the defendant, before the deed was signed and acknowledged, influence the determination of the ultimate facts in the case.

The petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J

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6 Cal. App. 774

In re CLAVO'S ESTATE. (Civ. 331.)

(Court of Appeal, Third District, California. Nov. 16, 1907.)

1. HOMESTEAD—ABANDONMENT.

The removal of a party from premises on which he has declared a homestead after a void execution sale thereof, and his surrender of the possession to the execution purchaser, do not constitute an abandonment of the homestead within Civ. Code, § 1243, providing that a homestead can be abandoned only by a declaration of abandonment, etc., and he cannot declare a second homestead on other land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 320–326.]

2. SAME—DECLARATION OF HOMESTEAD.

Where a wife after executing jointly with her husband a declaration of homestead on his separate property died, the surviving husband held the homestead protected against forced sale, but by the death of the wife the property vested absolutely in him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 259.]

3. SAME.

Civ. Code, § 1265, provides that on the death of a person whose property has been selected as a homestead it shall go to his heirs, etc. Code Civ. Proc. § 1474, as amended in 1880, provides that, where the homestead selected by the husband and wife was selected from the separate property of the person selecting or joining in the selection, it vests on the death of the husband or wife absolutely in the survivor. A wife, after executing jointly with her husband a declaration of homestead on his separate property, died, leaving her husband surviving, who after his second marriage executed a declaration of homestead. *Held*, that on the death of the husband the property did not vest in his heirs, but in the second wife surviving; the husband, though incompetent to select a different homestead, having the right to file a second declaration of homestead on the same property.

4. DESCENT AND DISTRIBUTION—APPLICABILITY OF STATUTES.

The descent of property is governed by the law in force at the death of the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, § 16.]

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

In the matter of the estate of Nicholas Charles Clavo, deceased. From an order setting aside certain property for a homestead to Ann Clavo, widow of the deceased, his heirs appeal. Affirmed.

O. B. Gentry and Bell & York, for appellant. Kierce & Gillogley, for petitioner. Sullivan & Sullivan, for petitioner A. Clavo.

BURNETT, J. The appeal is from an order setting aside absolutely to Ann Clavo, widow of the deceased, certain property as and for a homestead.

Two declarations of homestead upon the same property appear in the transcript; one executed jointly by Clavo and a former wife in 1877 upon the property as his separate estate, and the other executed by Clavo alone in 1880 after the death of his said former wife and his marriage to Ann Clavo, respondent herein.

Four propositions are submitted by appellant to which brief consideration will be given.

1. It is clear that we are not concerned about the construction of sections 1243 and 1244 of the Civil Code as the question of abandonment of the homestead is not involved.

2. It is urged that a party cannot have two homesteads, and if he attempts to acquire a second while the first is in force, the second is void. This is announced in Waggle v. Worthy, 74 Cal. 268, 15 Pac. 831, 5 Am. St. Rep. 440, and it is undoubtedly sound as applied to the facts of that case. It was there correctly held that "the removal of a party from premises on which he has declared a homestead after a void execution sale thereof, and his surrender of the possession to the execution purchaser, do not constitute an abandonment of the homestead, within the meaning of section 1243 of the Civil Code, so as to enable him to declare a second homestead on other land." But as will be seen hereafter the proposition has no material bearing upon the determination of the question at issue here.

3. We think appellant is not entirely accurate in the statement that "the death of Petronella Clavo, the first wife, did not in any manner alter the state or character of the homestead declared August 21, 1877," although admittedly after her death the property continued to retain certain characteristics of a homestead. In Tyrrell v. Baldwin, 78 Cal. 470, 21 Pac. 116, it was held that "a homestead selected from community property vests absolutely in the survivor on the death of either spouse, and is not subject to forced sale for the subsequent debts of the survivor." The question involved in the matter of the Estate of Ackerman, 80 Cal. 208, 22 Pac. 141, 13 Am. St. Rep. 116, was whether the surviving husband was entitled to have a homestead set apart to him out of the separate property of the estate of his deceased wife, when at the time of her death they were occupying other and community property which was impressed with the character of a homestead. Although not necessary to the decision it was stated broadly that "the death of one of the spouses did not alter in any way the estate or character of the homestead." The same statement is made in Sanders v. Russell, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26. In Dickey v. Gibson, 113 Cal. 30, 45 Pac. 16, 54 Am. St. Rep. 321, the rule seems to be more accurately declared as follows: "In the hands of the survivor the homestead is protected against enforced sale precisely as before it had been protected to

the community by its homestead character. * * * By the death of the first wife the homestead property vested absolutely in the surviving husband. As far as the legal title is concerned, it vested in him as fully and perfectly as though no homestead had ever been carved out of it. The limitations and immunities which accompanied the enjoyment of the property under such title modified not the title but its enjoyment, and were only such as the statute imposed. Save as to these limitations and immunities, the homestead ceased to exist." In Payne v. Cummings, 146 Cal. 432, 80 Pac. 622, 106 Am. St. Rep. 47, it is said: "The interest of plaintiff in the property after his wife's death became something different and greater than it was in her lifetime. He had then not only the absolute title, but also the absolute right of exemption in the property from all former debts, as well as the right to dispose of it in any way he saw fit." But the result must be the same, as we shall presently see, whether we regard the first or the second declaration as the decisive factor in determining the status of the property at the time of Clavo's death.

4. The vital question is that presented by the fourth proposition of appellant that "upon the death of Clavo the property vested in his heirs and devisees." This contention is diametrically opposed to the provisions of the statute and the decisions of the Supreme Court. It is based upon the language of section 1265 of the Civil Code, which is as follows: "From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor; * * * in other cases upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent." If the foregoing were the only provision on the subject, we could not escape the conclusion reached by appellant; but section 1474 of the Code of Civil Procedure was amended in 1880 so as to read: "If the homestead selected by the husband and wife or either of them, during their coverture, and recorded while both were living was selected from the community property or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife absolutely in the survivor." If the sanction of judicial interpretation of said provisions be needed, we find it in the case of In re Croghan, 92 Cal. 371, 28 Pac. 570, wherein it is said: "But the contention of appellants is that it should have been set apart to the widow only for a limited period, after which it should go by operation of law to the appellants as heirs. The facts upon which this contention rests are these: (1) The said homestead was the separate property of the deceased; and (2) the declaration of homestead was made by the deceased himself. Upon these facts we are clear that the homestead vested absolutely in the widow as survivor." In Weinreich v. Hensley, 121 Cal. 653, 54 Pac. 256, it is said: "The devolution of the title to the homestead premises in case of the death of one of the spouses is provided for in section 1265 of the Civil Code, and also in section 1474 of the Code of Civil Procedure. The latter section was amended 10 days later than the section of the Civil Code, and is to be regarded as the latest expression of the legislative will." It is true that both declarations here were filed prior to the time when said amendment went into effect, but this is of no importance, as "the descent of the property is governed by the law in force at the death of the husband." Tyrrell v. Baldwin, supra; Estate of Fath, 132 Cal. 612, 64 Pac. 995.

If appellant is right in his contention that the property remained impressed with the character of a homestead by virtue of the first declaration, and its status in that regard was not altered or affected in any manner by the death of the former wife, then, of course, it is clear that the second declaration was ineffective for any purpose, and the conclusion also follows that said homestead would inure to the benefit of the members of the second community, and on the death of the husband would vest absolutely in the widow. But the correct view seems to be as follows: The declaration of homestead under the circumstances shown here is for the joint benefit of the spouses. The obvious intent, indeed, of the homestead act, is to secure to every householder or head of a family a home where the family may be sheltered and live beyond the result of those financial misfortunes which even the most prudent and sagacious cannot always avoid. Thus the word itself ordinarily indicates that there must be a family. McCanna v. Anderson, 6 N. D. 482, 71 N. W. 769. To constitute a homestead with all its attributes as contemplated by the statute, it must be occupied as a home by the family, except in the single instance provided by the statute for a declaration by one who is not the head of a family.

Upon the death of the first wife the title to the property became vested absolutely in the husband, and he was clothed with complete dominion over it, but by virtue of the statute it still retained some characteristics of a homestead, among them being exemption from execution. While that exemption continued, he could not select another and different homestead. But the title having vested completely in the husband upon the death of his wife, the property could not in the very nature of the case continue as a homestead for the benefit of the second community. The unqualified title of one of the spouses to the property is inconsistent with the existence of a homestead for the benefit of both. After his second marriage, in order to clothe the property with all the attributes of a community homestead, it was necessary for the husband to file another declaration. This he did, as he had a right to do, and the effect of it was that upon his death the property vested absolutely in his widow as it would have vested in the former wife under the first declaration if she had survived him.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 1

DAVEY v. SCHUERMAN et al. (Civ. 333.)

(Court of Appeal, Third District, California. Nov. 16, 1907.)

1. Appeal—To What Court Taken—Notice.
The test determinative of the court to which an appeal is taken is not the title of the court on the printed back of the transcript or of the briefs, but is the language of the notice of appeal itself.

2. Same—Calendars—Striking Off Cause.
Where an appeal has been taken to the Supreme Court, but by mistake the cause was placed on the Court of Appeal calendar, the cause may be removed from that calendar either by striking it therefrom, or transferring it to the Supreme Court.

3. Same—Right of Review—Representative Competency—Special Administrator.
An order appointing a special administrator to "preserve and protect" the estate of intestate was sufficiently specific within Code Civ. Proc. § 1412, requiring an appointment to be made by entry on the minutes of the court "specifying the powers to be exercised by the administrator," to authorize the special administrator to appeal from a judgment against intestate, in an action wherein affirmative relief was sought on the ground that intestate had been the owner of the property in dispute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 911.]

4. Same — Transfer of Cause — Service of Notice of Appeal.
Under Code Civ. Proc. § 940, providing that an appeal is taken by filing with the clerk a notice thereof, and serving a similar notice on the adverse party, the provision as to service is equally as mandatory as that as to filing, and failure to serve a notice within the required time is fatal to an appeal, though such notice may have been filed within the required time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2173.]

Appeal from Superior Court, Nevada County; F. T. Nilon, Judge.

Action by Samson Davey against V. J. Schuerman. Subsequent to judgment against him, defendant having died, John Mulroy was appointed special administrator, and from an order denying a new trial, he appeals. Appeal dismissed.

Chas. W. Kitts, for appellant. Thos. S. Ford, for respondent.

HART, J. This is an appeal by the defendant from an order denying his motion for a new trial upon a statement of the case.

The action was brought to quiet title to certain land situated in Nevada county. The plaintiff claims title through a homestead patent issued to him by the government of the United States in the month of August, 1893. The defendant's claim of title is based upon an alleged purchase of the land from the Central Pacific Railroad Company on the 1st day of June, 1891, it being contended that said land was embraced within the grant to said railroad company from the general government by virtue of an act of Congress of the United States, approved July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean and to secure to the government the use of the same for postal, military and other purposes" (Act July 1, 1862, c. 120, 12 Stat. 489), and an act amendatory thereof, approved July 2, 1864, by which the United States granted to said railroad company "each odd-numbered section on each side of the line of its railroad to be located as provided by said acts and which was within twenty miles of said line" (Act July 2, 1864, c. 216, 13 Stat. 356). At the time the homestead patent was issued by the government to the plaintiff the defendant had possession of and was living upon a portion of the disputed land; but subsequently to the issuance of said patent to plaintiff the defendant took a lease of the premises from plaintiff, the same being in writing, at the nominal rental consideration of $1 per year.

The defendant, after answering by denial the averments of the complaint, sets out, by way of cross-complaint, a history of his title to the land, and upon the facts thus alleged asks for affirmative relief, viz.: That the plaintiff be declared the holder of "said patent and title of said premises in trust for this defendant; that he be directed and obliged to reconvey the same to this defendant," etc. The court found from the evidence all the allegations of the complaint to be true, and accordingly entered a decree quieting plaintiff's title to the demanded premises.

Respondent presents a motion to dismiss the appeal upon three grounds: (1) Because the appellant "had not legal capacity to sue or be sued or take this appeal"; (2) because "this court never obtained jurisdiction of the case"; (3) because the appeal was not taken within the time prescribed by law.

We will first dispose of the second ground of the motion to dismiss in the order in which the several grounds are thus presented. The appellant served upon respondent, on the 7th day of February, 1907, a notice that he appealed from the order "to the Supreme Court of the state of California." According to the clerk's certificate, an undertaking on appeal was filed by appellant on the 6th day of February, 1907. The notice was dated on the 6th day of February, but it does not affirmatively appear when the notice was filed. But for the purpose of the present discussion the date of filing may be passed without further consideration at this time. If the appeal was perfected or properly taken, it was undoubtedly to the supreme and not to this court. On the back of the fly leaf of the transcript (and the same is true as to the briefs of the respective counsel) the title of the court is as follows: "In District Court of Appeal, Third Appellate District, State of California." The suit is one in equity, and of that class of causes of which, therefore, by the terms of section 4 of article 6 of the Constitution, this court is not vested with appellate jurisdiction, except where, as here, the Supreme Court orders the transfer of the same to a District Court of Appeal for decision. It is apparent from the record that the appellant sought to take his appeal to the proper tribunal, and did do so, if he filed and served his notice within the time prescribed by law, and took such other timely steps as are essential to the perfection of an appeal. But, through a mistake, due perhaps to a misapprehension of the county clerk, such misapprehension being occasioned, no doubt, by the misleading manner of the printed backing on the transcript and briefs, the cause was placed on the September calendar of this court. Counsel for appellant appeared personally in court, and moved for an order transferring the case to the Supreme Court, on the ground that the appeal had in fact been taken directly to that court. The respondent insisted upon his motion to dismiss upon the ground, among others, already enumerated, that this court had no jurisdiction of the appeal. A statement of the nature of the action at once disclosed that the relief sought by both parties was one solely cognizable in a court of equity, and hence it was quite manifest that this court could not acquire jurisdiction of the case by direct appeal. Upon taking up the record after the submission of the cause we conceived it to be our duty, in view of the status of the cause before us, to order the same transferred to the Supreme Court, and accordingly we made such order, and thereafter the case was transferred to this court for decision. Among the papers we find with the record of the case is a document which was filed on the 1st day of November, 1907, a few days subsequently to the order of the Supreme Court transferring the cause here for decision. This document is signed by the attorneys for the respondent, and appears to bristle with indignation because this court transferred the case to the Supreme Court under the authority of rule 32 of this court (78 Pac. xiii), and with considerable warmth the learned counsel declare that it was our duty to have ordered a dismissal of the appeal, and that rule 32 has no application to the circumstances of the case as it appeared on the calendar of this court. It may be that within the ordinarily untrodden range of the recondite learning of the gentlemen representing the respondent, and therefore esoterically hidden from the common view, there is to be found some sound reason for the exercise by this court of the remarkable power of ordering a dismissal of an appeal taken to the Supreme Court; but, from our point of view, it seems to be a proposition readily obvious to the average intelligence that this court has no more right to dismiss an appeal to the Supreme Court, merely because the cause has by mistake or through inadvertence found its way to our calendar, than it would have to dismiss any other appeal to that court upon the motion of counsel. It ought not to be necessary to remark that we have no conceivable authority to interfere with the jurisdiction of the Supreme Court. And it ought to be equally as unnecessary to observe that the test determinative of the court to which an appeal is taken is not the title of the court on the printed back of the transcript or of the briefs, but is the language of the notice of appeal itself. The case could have been removed from our calendar by either of two proper methods, viz., by striking it from the calendar, or by the course adopted and pursued by us. By the latter course the cause was certain to go where it properly belonged, without further action. By the former, it is probable that an application to the Supreme Court would have been necessary, in order to get it upon the calendar of that court, for an order, requiring the clerk of this court to transmit the record to the former court, thus causing extra trouble and expense. But in either case it is manifest the cause must have finally gone where it belonged.

We will now proceed to a consideration of the other grounds upon which a dismissal of the appeal is asked. The defendant Schuerman, it seems, died after judgment was had and entered against him by the court below. In order, therefore to prosecute an appeal in this case, Mulroy was, upon petition, appointed special administrator. The order of appointment recited that Schuerman died intestate in Nevada county on December 1, 1906, leaving estate in said county, etc., and that it appears to be necessary that a "special administrator of the estate of said decedent be forthwith appointed to preserve and protect the same." It is contended that neither the order appointing nor the special letters gave Mulroy authority to maintain this appeal, because his powers as such special administrator are not therein specifically pointed out, or, in other words, because he is not so expressly authorized to prosecute the appeal. This contention is based on the language of section 1412 of the Code of Civil Procedure, so much of which as is pertinent to the question here reads as follows: "The appointment may be made at any time, and without notice, and must be made by entry upon the minutes of the court specifying the powers to be exercised by the administrator." We think the language of the order is broad enough and sufficiently specific to bring the matter of maintaining this appeal within the authority and powers conferred upon him as special administrator by the special letters.

granted to him, construed by the light of said order of appointment. We can conceive of no more appropriate steps which could be taken by an administrator to "protect and preserve" the property of the estate of his intestate than by prosecuting an appeal from a judgment or order involving the property rights of the estate, and which he may be advised has been erroneously entered against the intestate. The authorities cited by counsel upon this point have no application to the question here. Nor do we think that the case of Collins v. O'Laverty, 136 Cal. 35, 68 Pac. 327, and other cases cited to the same point, are open to the interpretation which counsel seem to give them. It is true that the action here is not one for the specific recovery of the possession of the premises; but the issue tendered by the complaint and cross-complaint and consequently to be determined is the title to or ownership of the land, and, if the issue is decided adversely to the claim of the appellant, then at least a potential right of possession would vest eo instanti in the respondent, who, when the same ripened into the right of possession, would be entitled to reduce such right to actual possession. If the parties were reversed in the character in which they appear here as litigants, of course the same would be true. In his cross-complaint the defendant, who was in possession at his death, declares that he is the owner of the land, and alleges that the respondent obtained a pretended title from the government by unlawful means, and asks that respondent be decreed to hold his evidence of title (the homestead patent) in trust for him. The special administrator, in prosecuting this appeal in an action, which, upon a cross-complaint, as we have seen, seeks affirmative relief upon behalf of his intestate upon the ground that the latter was the owner of the disputed property, is, we doubt not, clearly acting within the powers as such administrator granted to him by the court—to preserve and protect the estate of the decedent.

But we are of the opinion that the appeal must be dismissed upon the third ground upon which a dismissal is asked. The statute (section 940 of the Code of Civil Procedure), as it existed at the time the appeal herein was sought to be taken, required that the notice of appeal should be filed and served on the adverse party within 60 days after the order was made and entered in the minutes of the court. Here the order was made and entered on the 8th day of December, 1906, and the notice was apparently filed on February, 6, 1907 (although it is not clear from the record that it was so filed), but not served on the "adverse party" until the 7th day of February, 1907. Thus it appears that service was made on the sixty-first day after the order was made and entered. The statute reads: "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney." It is thus to be observed that two initiatory steps must be taken in order to consummate the appeal—filing of a notice of appeal, and serving a similar notice upon the adverse party or his attorney. A failure to do either of these two things within the time within which a party has the right to appeal is fatal to the taking of the appeal. The statute is the sole source from which the right of appeal flows, and every step which is thereby required to be taken in order to perfect an appeal is jurisdictional, and without observance of which there can be no appeal effected. If the service upon the adverse party or his attorney of the notice one day after the time limited within which an appeal may be taken would be effective, then such service 10 or 20 days thereafter would be equally as effective, and the language of the statute would thus be rendered meaningless. The provision as to the service of the notice is equally as mandatory as that with reference to the filing, and it would not for a moment be contended that a filing of the notice after the time limited by the statute would have any force. To give the section any other construction would amount to an elimination by judicial legislation of the provision as to the time of service of the notice. The Legislature of 1907 (St. 1907, p. 753, c. 410), added a new section to the Code of Civil Procedure, No. 941a, which seems to repeal that part of section 940, supra, requiring the service of the notice upon the adverse party or his attorney. But, as seen, the appeal in the case at bar was attempted to be perfected under said section 940 prior to the approval of section 941a.

The appeal is dismissed.

We concur: CHIPMAN, P. J.; BURNETT, J.

152 Cal. 574

HOUGHTON v. LOMA PRIETA LUMBER CO. (S. F. 4,241.)

(Supreme Court of California. Dec. 30, 1907. Rehearing Denied Jan. 27, 1908.)

1. Master and Servant—Independent Contractor—Employer's Liability.

A company, calling for bids for the construction of a road, accepted a bid, and a contract, fixing a price for the work and providing for payment of employés by the company's check, was executed. The contractor had formerly been the company's foreman on other roads, and a third person, as foreman of the company, visited the road while the work was being done, and made suggestions, without attempting to control any of the contractor's employés. Held, that the contractor was as a matter of law an independent contractor and the company was not liable for any negligence of which he might be guilty in the course of his employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1241–1243.]

2. Appeal—Verdict—Conclusiveness.

The rule that a verdict on conflicting evidence will not be disturbed applies only where there is a real conflict, and a verdict against the preponderance of the evidence can be maintained only where the conflict arises on evidence so materially contradicting the testimony on the other side as to leave room in a reasonable mind to find the fact either way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935–3937.]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Harriet E. Houghton against the Loma Prieta Lumber Company. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Bishop, Wheeler & Hoefler (William Rix and Alfred J. Harwood, of counsel), for appellant. Sullivan & Sullivan, Theo. J. Roche, and Chas. M. Cassin, for respondent.

McFARLAND, J. This action was brought by plaintiff against defendant to recover damages for personal injuries, alleged to have been sustained by her through negligence of defendant in exploding a blast. The verdict and judgment were for plaintiff, and from the judgment and from an order denying its motion for a new trial, defendant appeals.

Plaintiff, at the time she received the injuries complained of, was walking with her husband, Herbert E. Houghton, since deceased, along the course of an unfinished wagon road, which was being constructed, and when they had reached a certain point a blast nearby, which was intended to remove a stump on the course of the road, was exploded, and from the consequences of the explosion the plaintiff sustained personal injuries for which this action is brought. At the same time, from the same explosion, her husband received injuries which caused his death. An action was brought by this present plaintiff, and certain minor heirs of said Herbert E. Houghton, to recover damages for his death. In that action there was a verdict and judgment for the plaintiffs therein; but on appeal by defendant from the judgment, and from an order denying a new trial, the judgment and order appealed from were by this court reversed. The decision reversing the judgment and order was filed December 6, 1907, and is published in 93 Pac. 82. There were two transcripts on that appeal, one numbered S. F. No. 3,920, which presented the appeal from the judgment, and the other, S. F. 3,837, which presented the appeal from the order denying the motion for a new trial. For brevity we will refer only to S. F. 3,920. The evidence in that case was substantially the same as that in the case at bar. It was contended there, as in the present case, among other things, that the work of constructing the road was being done by A. W. Wyman as an independent contractor with appellant; and the case was reversed because the court erroneously gave certain instructions to the jury to the effect that, although Wyman was an independent contractor, still the jury might find a verdict against appellant upon the theory that the work of building the road was so intrinsically and necessarily dangerous as to be per se a nuisance, and that, therefore, the rule of respondeat superior might apply to appellant, notwithstanding the independent contract. The opinion of this court shows the facts to be that the road was being built in a wild, uninhabited, and almost untraveled mountain region, where there was very little danger or chance of injury from the blasting of a stump on the line of the road, and that the work was not intrinsically and necessarily dangerous, and held that, if the work was being done under an independent contract, the appellant was not liable. The evidence as to the condition of the country where the road was being built was the same in the case at bar as in S. F. No. 3,920, and we adopt the statement as to that matter in the opinion in the latter case, without repeating it here, and we hold, as was there held, that, if the work was being done by an independent contractor, the appellant was not liable.

The instructions upon which the case was reversed in S. F. No. 3,920 do not appear in the case at bar; but, if it appears in this case at bar that the work was done by Wyman as an independent contractor, then appellant was not liable, and the judgment and order should be reversed. And it appears to us quite clearly that the work was being done by Wyman as an independent contractor. Appellant called for bids for the construction of the road by contract, and several different persons, among them Wyman, submitted bids in response to the call. The bid of Wyman was accepted, and the transcript shows a written contract between appellant and Wyman for the construction of the road for a certain specified price. The direct evidence was all to the point that the work was done by Wyman under and in accordance with this contract, he employed the hands who did the work, and had full control over it. There is no direct evidence to the contrary; and we see nothing in the record which substantially conflicts with appellant's evidence on the point, under the rule as to "conflict" of evidence. Respondent relies on certain circumstances, which she contends should induce this court to hold that there was such a conflict as to warrant the jury in finding that the work was not done under an independent contract; but this contention is not maintainable. The circumstance mostly relied on is that while the work was progressing Wyman's employés were paid by checks of appellant. But the manner in which the contract price was paid is a matter of no consequence. Indeed, this manner of payment was provided for in the contract itself. A similar contention was made in Smith v. Belshaw, 89 Cal. 427, 26 Pac. 834, where the question was whether certain work was done by an independent contractor, but the court said: "The principle of law is so well settled that, where one carries on an independent employment in pursuance of a contract by which he has entire control of the work and the manner of its performance, his employer is not liable for any negligence of which he may be guilty in the course of his employment, the citation of authorities is unnecessary labor. Indeed respondent's counsel concedes the law but insists that the evidence is sufficient to sustain the verdict. As already stated, we are unable to find it in the record. The fact that the miners were paid their wages at defendant Belshaw's store, where they had been paid prior to the contract with Dickenson, and the further fact that some of the miners thought they were working for Belshaw, are circumstances too slight to defeat the express and uncontradicted testimony as to the terms of the contract, and the labor performed under it." Another circumstance relied on is that Wyman was formerly in the employ of appellant as its foreman, and as such foreman did work for appellant on other roads; but surely that fact could in no way affect the contractual relations between said parties as to the building of the road in question. Another circumstance is that the foreman of the appellant occasionally visited the road while the work was being done and made some suggestions as to certain features of the work; but he did not attempt to control any of Wyman's employés, and did nothing more than he had a right to do in seeing that the work was being done according to the contract. There were also a few other trifling circumstances of less importance than those above referred to. These circumstances are, in our opinion, clearly insufficient to raise such a conflict of evidence on the point as would justify a jury in finding against the independent contract.

The rule that the finding of a jury on an issue of fact will not be disturbed where there is a conflict of evidence as to such fact applies only to cases where there is a real and not a mere pretense of conflict—where, as bearing on the issue, there is some body and substance to the asserted conflicting evidence. A finding against the great weight and preponderance of the evidence can be maintained on the doctrine of "conflict" only where the alleged conflict rests upon evidence, either direct or circumstantial, which so materially contradicts the testimony on the other side, or is so radically inconsistent with it, as to leave room in a fair and reasonable mind to find the fact either way. This feature of the rule upon the "conflict" of evidence has been heretofore declared by this court. In Smith v. Belshaw, supra, the court said: "While we will not disturb the verdict of a jury where the evidence is conflicting upon substantial matters, yet in all cases the verdict must have some meritorious support from the evidence, or be set aside and disregarded." In Hedge v. Williams, 131 Cal. 459, 63 Pac. 721, 64 Pac. 106, 82 Am. St. Rep. 366, the court say: "Upon the part of respondent it is insisted that the verdict of the jury is conclusive as to the capacity in which Fontain was acting in repairing the tank. This contention can only be sound if there was *a substantial conflict of the evidence.*" The italics are ours. In Driscoll v. Cable Ry. Co., 97 Cal. 533, 32 Pac. 591, 33 Am. St. Rep. 203, it is said: "The rule is well established that this court will not disturb a verdict where there is a conflict of evidence on material points, and when there is evidence to support the verdict; but such conflict and such evidence must be real and substantial." There are other cases to the same effect. And within the rule so declared there was in the case at bar no evidence which was in substantial conflict with the evidence introduced by appellant which clearly established the fact that the road was built by Wyman as an independent contractor.

For the reasons above stated, the judgment and order appealed from are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

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6 Cal. App. 769

PEOPLE v. EBEY. (Cr. 1,444.)

(Supreme Court of California. Jan. 14, 1908.)

1. JUDGES—DISQUALIFICATION—ACTS WITHIN DISQUALIFICATION STATUTE.

Code Civ. Proc. § 170, subd. 2, disqualifies a judge for relationship with an attorney for either party. Subdivision 4 provides that the judge shall forthwith secure the services of another judge to preside at the trial, but that that section shall not apply to the arrangement of the calendar, nor to the regulation of the order of business. Const. art. 6, § 8, provides that the judge of any superior court may hold the superior court in any county at the request of the judge thereof. and that, on request of the Governor, it shall be his duty to do so; and Code Civ. Proc. § 71, adds that in either case the judge holding the court shall have the same power as a judge thereof. *Held*, that the disqualification declared prevented a judge from presiding at an arraignment, the hearing of a plea, or other preliminary steps, beyond those necessary to regulate the order of business and arrange the calendar.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, §§ 235–245.]

2. SAME—CALLING OTHER JUDGE.

Under Const. art. 6, § 8, providing that a judge of any superior court may hold the superior court in any county at the request of the judge thereof, and that, on request of the Governor, it shall be his duty to do so, a disqualified judge on a criminal trial may request, notwithstanding his disqualification, another judge to preside, and a request to so preside is not limited to a request by the Governor.

In Bank. Appeal from Superior Court, Riverside County; Z. B. West, Judge.

Edward J. Ebey was convicted of burglary, and he appeals. Reversed and remanded.

The following is the opinion of the Court of Appeal, Second District, by TAGGART, J., concurred in by ALLEN, P. J., and SHAW, J.:

Defendant appeals from a judgment of the superior court of the county of Riverside, after a conviction upon a charge of burglary, alleged to have been committed in that county. He was arraigned before the superior judge for Riverside county, Hon. F. E. Densmore, and upon his refusal to plead to the information the clerk was ordered to enter a plea of "not guilty" for him. The judge of said court then ordered said cause to be set for trial, and a jury to be drawn to try the issues raised therein, and said judge presided during said drawing. All of these acts and rulings of the court in relation thereto were objected to by defendant on the ground that said judge was related to the attorney for the defendant by consanguinity within the third degree, and therefore disqualified to act in said cause. This was made to appear by affidavit of the attorney for defendant that he and the judge were half-brothers, born of the same mother. On the day set for the trial of said cause Hon. Z. B. West, the superior judge for Orange county, attended upon the court in Riverside county at the request of Judge Densmore, and against the objection of defendant presided at the trial of said cause, which resulted in defendant's conviction. Defendant objected to Judge West sitting at said trial because he did so at the request of Judge Densmore, who, it is claimed, was disqualified to select a judge to try said cause.

These acts of Judge Densmore are the only matters presented in the transcript on appeal as errors of law justifying a reversal of the judgment. The preliminary steps taken are not especially urged, the appeal being rested upon the one question of the power of a judge who is disqualified by relation to counsel for one of the parties to a criminal action to request the judge of another county to sit at the trial of said action. The disqualification relied upon is that created by section 170 of the Code of Civil Procedure, to wit: "No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding: (1) * * * (2) Where he is related to either party, * * * or to an attorney, counsel or agent of either party, by consanguinity, or affinity, within the third degree, computed according to the rules of law." Subdivision 4 of the section provides that when bias or prejudice of the judge is shown he shall forthwith secure the services of another judge to preside "at the trial of the action or proceeding. * * * But the provisions of this section shall not apply to the arrangement of the calendar, or to the regulation of the order of business, nor the power of transferring the action or proceeding to some other court, or the hearing upon [such] affidavits and counter affidavits [upon the showing made upon an application for such transfer]." The Penal Code contains no provision relating especially to disqualification of judges to sit or act in criminal cases, and the only ground for the removal of a criminal action from the court in which it is pending appears to be "that a fair and impartial trial cannot be had in the county," and this removal can only be had upon the application of the defendant. Pen. Code, § 1033. Section 7 of the Bill of Rights in the state Constitution of 1879 provides that "the right of trial by jury shall be secured to all, and remain inviolate." This means the right as it existed at common law, and includes the right to be tried in the county where the crime is charged to have been committed, as well as to having a jury of the vicinage. People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75. The provisions of part I of the Code of Civil Procedure (sections 33 to 304) relate to courts of justice and their organization and jurisdiction generally, civil and criminal, but section 397 et seq., as well as the other sections found in the chapter headed "Of the Place of Trial of Civil Actions" (Code Civ. Proc. pt. 2, tit. 4), cannot be applied to criminal causes and affect civil actions and proceedings only. People v. McGarvey, 56 Cal. 327. Section 71 of the Code of Civil Procedure re-enacts a portion of section 8 of article 6 of the Constitution of 1879, which reads as follows: "A judge of any superior court may hold the superior court in any county, at the request of the judge (or judges) of the supeior court thereof, and upon request of the Governor it shall be his duty to do so." To this constitutional provision section 71 adds, "and in either case, the judge holding the court shall have the same power as a judge thereof."

The disqualification declared by section 170 (Code Civ. Proc.) being shown, we must look to the above constitutional provision for authority for the action of the disqualified judge in procuring a substitute to act in his place. There is but one remedy provided, the calling in of another superior judge. For the selection of this judge two methods are provided—a direct request made to such other judge by the one disqualified, and a request to some other judge by the Governor upon notice of the disqualification. No distinction is made as to the circumstances under which the one or the other shall act. The rule of construction that excludes one branch of the government from interference with another makes for a limitation upon the action of the Governor in a matter pertaining entirely to the judiciary. And so considered, the constitutional provision would be operative as to him, if action upon his part were limited to cases of death, physical disability, or mental incompetency of the judge in whose court the cause was pending; but we are not satisfied that this is or should be the controlling rule in such cases as the one at bar. In civil cases, in addition to the above-quoted constitutional and statutory provisions being applicable, section 397 of the Code of Civil Procedure provides that the place of trial of an action may, on motion, be changed, "(4) when from any cause the judge is disqualified from acting." In the determination of a number of civil cases the rule of disqualification provided in section 170 is said to be based upon an ancient maxim, founded in the most obvious principles of natural right, that no man ought to be a judge in his own cause. Mining Co. v. Keyser, 58 Cal. 315, 322. For the purpose here being considered the law treats counsel and client as one. Remy v. Olds (Cal.) 42 Pac. 239. If the judge is disqualified for interest, consanguinity, or other cause in a civil cause, either party may move for a change of venue, and the motion must be granted without hesitation or delay (Krumdick v. Crump, 98 Cal. 117, 32 Pac. 800; Anaheim, etc., v. Jurupa, etc., 128 Cal. 568, 61 Pac. 80). He can neither try his own case nor select his judge. Santa Cruz Bank v. Taylor, 125 Cal. 249, 57 Pac. 987; Oakland v. Hart, 129 Cal. 105, 61 Pac. 779.

A sound policy seems to demand that, independent of the rights of the parties to the action, the judicial tribunals appointed by law to administer justice should be preserved from discredit by a broad and liberal construction of the statute to the end of securing a judgment untainted with bias or interest. Courts should be slow to discover subtle and refined distinctions for indulging a doubtful jurisdiction where the liberty of a citizen is at stake. If the law be not satisfied in a civil case, involving the rights of property only, with the calling in of another judge by the disqualified one, where the right to a transfer is claimed under section 398, of the Code of Civil Procedure, it is difficult to see upon what principle the disqualified judge in a criminal action can be permitted to select the judge to try the cause when both the statute and Constitution furnish a method not open to criticism. Had the suggestion that the Governor be requested to act been made at the time, no doubt the honorable superior judge of Riverside county would have acted upon it, and it is quite probable that the same learned judge from Orange county would have been selected to preside at the trial of the cause. Recognizing that both of the learned judges were actuated by the sincerest desire to keep within the law, and to serve the substantial convenience of both counsel and client, we are still of the opinion that under such circumstances the proper method was to notify the Governor of the disqualification of Judge Densmore, and let him make the request.

While the matter of arraignment and hearing of the plea by Judge Densmore have not been expressly urged by the appellant, we are not prepared to say that these are included within the exceptions covered by the last clause of section 170—"arrangement of the calendar," "regulation of the order of business," "power of transferring," or "the hearing upon affidavits and counter affidavits." The section provides that the disqualified judge shall not "sit or act as such." Section 71 of the Code of Civil Procedure and section 8 of article 6 of the Constitution do not limit the request that may be made to a superior judge to the trial of the cause, but provide that, when requested, he "may hold the superior court in any county." The arraignment must be made and the plea entered in open court, and the time that may be allowed for either rests in the legal discretion of the court, that is, the judge. In the case at bar there was a qualified refusal to enter the plea, and the disqualified judge passed upon the question whether or not the circumstances set forth in the record justified the defendant in his refusal to plead. In all these matters the judge clearly "acted as such," and no reasonable construction can include the acts complained of within the terms, "arrangement of the calendar," or "regulation of the order of business." In our opinion, Judge Densmore was not only disqualified to select the judge to try the cause, but should not have presided at the arraignment, the hearing of the plea, or other preliminary steps of the prosecution of the case, beyond those necessary to regulate the order of business and arrange the calendar.

Judgment reversed, and cause remanded for further proceedings in accordance with the foregoing opinion.

Lafayette Gill, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Dep. Atty. Gen., for the People.

PER CURIAM. The application for a hearing in this court, after decision by the district court of appeal for the second district, is denied. In denying the application we desire to say that we do not give our assent to the view of the learned district court of appeal that the judgment should be reversed because the judge who tried the case was the judge of the superior court of another county requested to preside in the superior court of the county in which the case was pending by the judge thereof, who was himself disqualified to try the case. Under the plain and unambiguous language of our constitutional provision (section 8, art. 6), a judge of any superior court may preside in the superior court of any county at the request of the judge of the superior court thereof, and, while so presiding, may act in any matter in which he is not disqualified. But it appears that the disqualified judge presided at the arraignment of defendant, and ordered the entry of a plea therein. We agree with the district court of appeal that he was disqualified to act in this matter, and the portion of the opinion that relates thereto is approved. It follows that the judgment of that court is correct and that there is no necessity for a further hearing in this court.

7 Cal. App. 34

PEOPLE v. HORTON. (Cr. 67.)

(Court of Appeal, Second District, California. Nov. 21, 1907.)

1. Larceny — Instructions — Possession of Property Stolen.

In a prosecution for larceny, an instruction that the unexplained possession of stolen property, however soon after the taking, is not sufficient to justify a conviction; that it is a circumstance which, with other testimony, is to determine the question of guilt; yet if defendant was found in possession of the property, this was a circumstance tending to show guilt, but not sufficient, standing alone, to warrant a conviction; that there must be in addition, proof of corroborating circumstances tending of themselves to establish guilt—was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 199–204.]

2. Criminal Law — Appeal — Harmless Error.

In a trial for larceny, it appeared that a claim of ownership of the stolen property was made by defendant when in actual possession, or shortly after a sale of the property by him. The court instructed that unexplained possession of stolen property was not sufficient to justify a conviction without corroborating testimony; but that, if defendant was found in possession, claiming ownership, it tended to show guilt. *Held* that, while the language employed was too broad, and there are conditions under which a mere claim of ownership should not in any degree tend to establish guilt, yet under the rule that convictions will be reversed for alleged errors in instructions only when, from the testimony, it appears that the jury may have been misled, to defendant's prejudice, there was no ground for reversing a conviction.

3. Larceny—Possession of Stolen Property —Evidence.

The rule that, in order to be a circumstance tending to show the guilt of one accused of larceny, the possession of property after the taking must be personal and exclusive, is satisfied, if the possession be exclusive as to all not particeps criminis. As to the latter class, the possession of one is the possession of all.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 170–178.]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Gerdine Horton was convicted of larceny, and appeals. Affirmed.

H. H. Appel, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Appeal by defendant from a judgment and an order denying a new trial upon a conviction of grand larceny.

That the verdict was warranted is most apparent. The evidence in the record is convincing as establishing that defendant and his nephew took the horse in question from the ranch where it was being pastured, brought it to the city of Los Angeles, and sold it for $115; that the negotiations leading up to the sale were carried on by both uncle and nephew, they claiming to be partners, and when the same were concluded the nephew went into an office and signed a bill of sale, using a fictitious name; that the money was paid to the nephew, who went back to the buggy in which defendant was seated, and drove off with him; that shortly afterward the defendant, who had before that time been without money, was seen with gold coin in his possession, and told an acquaintance that the horse in question belonged to him, and that he had sold it for $115. Defendant had, during an earlier hour of the day, sought to sell the horse to others, and represented to a witness that the horse was one of the large band owned by him and his nephew.

Upon the trial the court charged the jury by instruction 6: "You are instructed that the mere possession of stolen property, unexplained by the defendant, however soon after the taking, is not sufficient to justify a conviction. It is a circumstance, which, taken in connection with other testimony, is to determine the question of guilt. Yet, if you believe from the evidence, that the defendant was found in the possession of the property described in the information, or claiming to be the owner thereof, after the alleged taking, this is a circumstance tending in some degree to show guilt, but not sufficient, standing alone and unsupported by other evidence, to warrant you in finding him guilty. There must be, in addition to proof of possession of stolen property, proof of corroborating circumstances tending of themselves to establish guilt. These corroborating circumstances may consist of acts or conduct or declarations of the defendant, or any other circumstances tending to show the guilt of the accused. If the jury believe the property was stolen, and was seen in the possession of defendant shortly after being stolen, the failure of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such." By instruction 4: "Before you can convict the defendant of larceny you must believe beyond a reasonable doubt that he is guilty of or in complicity with the original fraudulent taking, and any subsequent connection after the taking would not be larceny." By instruction 7: "The possession must be personal, involving a distinct and conscious assertion of possession by the accused."

The contention of counsel for appellant is that instruction 6 is erroneous. This instruction, omitting therefrom the words, "or claiming to be the owner thereof after the alleged taking," has so often been approved by our Supreme Court that it may be said to have become settled law in this state (People v. Fagan, 66 Cal. 534, 6 Pac. 394; People v. Etting, 99 Cal. 577, 34 Pac. 237; People v. Abbott, 101 Cal. 646, 36 Pac. 129), and such instruction, as given with these words included, is approved in People v. Velarde, 59 Cal. 463. We think it unnecessary to a decision of this case to support the same by the authority last cited. The rule is well settled "that judgments will be reversed for alleged errors in instructions only when, looking at the testimony, we can see that the jury may have been misled by them to the prejudice of the defendant." People v. Strong, 46 Cal. 304. Applying this rule, we find that the claim of ownership was made by defendant when in actual possession, or shortly after the sale in which he participated. While it may be true, as insisted by appellant, that the language employed is too broad, and that there are conditions and circumstances under which a mere claim of ownership should not in any degree tend to establish guilt, yet we are confronted with nothing in this case which would bring defendant under such an exception.

It is urged further that the possession of property after the taking, that it may be a circumstance tending in some degree to show guilt, must be personal and exclusive possession. The jury was instructed that the possession must be personal, but it does not follow that such personal possession must be exclusive in a strict sense. The rule is satisfied, if it be exclusive as to all not particeps criminis. As to the latter class, the possession of one is the possession of each and all.

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

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7 Cal. App. 39

SCARBOROUGH v. WOODILL. (Civ. 386.)

(Court of Appeal, Second District, California. Nov. 22, 1907.)

1. Adjoining Landowners—"Line Trees"—Ownership.

Under the express provisions of Civ. Code, § 834, "line trees" are those whose trunks stand partly on the land of two or more coterminus owners, and belong to them in common.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Adjoining Landowners, § 46.

For other definitions, see Words and Phrases, vol. 5, p. 4171; vol. 8, p. 7708.]

2. Same—Right to Cut.

Where adjoining owners were co-tenants of certain line trees, neither was at liberty to cut the trees without the consent of the other, if he thereby injured the common property in the trees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adjoining Landowners, § 46.]

3. Same—Partition.

Where a row of cypress trees was growing on the line between adjoining owners, each being a tenant in common of the trees, neither was entitled to make his own partition of the trees by cutting every alternate two trees, and if he did so, he was subject to an action for waste under Code Civ. Proc. § 732, authorizing the maintenance of such action by one tenant in common against another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adjoining Landowners, § 46.]

4. Evidence—Judicial Notice.

The Court of Appeal will take judicial notice of the flora and climatic conditions of the country, and from these determine whether certain line trees between coterminus owners were natural timber growing on the land, or trees of an ornamental nature, planted for a special purpose.

5. Adjoining Landowners — Waste — Cutting Line Trees—Injunction.

Where plaintiff and defendant owned adjoining orange orchards in Southern California, separated by a row of cypress trees growing on the boundary line, the cutting of every alternate two trees in the entire row for firewood was not a legitimate enjoyment of defendant's estate in common with complainant in the trees, and hence complainant was entitled to an injunction restraining further cutting of the trees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adjoining Landowners, § 46.]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by E. J. Scarborough against A. L. Woodill. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Collier & Carnahan, for appellant. Purington & Adair, for respondent.

TAGGART, J. Appeal from judgment and order denying motion for a new trial. Plaintiff and defendant own adjoining orange orchards in the county of Riverside, which are separated by a row of cypress trees growing on the boundary line between them. The trees vary in diameter from 13 to 23 inches, and in height from 70 to 75 feet, and the trunks thereof stand partly on one side and partly on the other side of said line. Defendant cut down eight of these trees (every alternate two), and threatened to continue to cut every alternate two trees until he had cut one-half of the entire row. The eight were taken to defendant's home, and used for firewood. The trial court rendered judgment in favor of plaintiff for $1 damages, and perpetually enjoining defendant from cutting down, injuring, or destroying any of the remaining trees growing on said line.

Line trees are "trees whose trunks stand partly on the land of two or more coterminous owners," and "belong to them in common." Civ. Code, § 834; 28 Am. & Eng. Ency. of Law (2d Ed.) p. 538. While at common law there appears to have existed two views as to the character of the estate created in the adjacent owners of real property by reason of the roots of trees growing near the boundary line extending into and deriving nourishment from the other property, the rule as to trees growing in a hedge that divided the lands of two proprietors was the same as that of our Civil Code. The ownership of the soil was several, in the proprietors of the two estates, while the tree, standing and growing partly on the soil of each, not capable as an entire thing of several ownership by the two, was the property of the two in common, and as tenants in common. Dubois v. Beaver, 25 N. Y. 123, 82 Am. Dec. 329. If the tree stand so nearly upon the dividing line between the lands that portions of its body extend into each, the same is the property, in common, of the landowners. And neither of them is at liberty to cut the tree without the consent of the other, nor to cut away the part which extends into his land, if he thereby injures the common property in the tree. Washburn on Real Property (3d Ed.) § 7a. The tenancy in common in a "line tree" appears to be of a peculiar nature, and may be stated to be "that each of the landowners upon whose land any part of a trunk of a tree stands has an interest in that tree, a property in it, equal, in the first instance, to, or perhaps rather identical with, the part which is upon his land; and, in the next place, embracing the right to demand that the owner of the other portion shall so use his part as not unreasonably to injure or destroy the whole." Robinson v. Clapp, 65 Conn. 365, 32 Atl. 942, 29 L. R. A. 582.

Defendant's estate in the row of cypress trees must be considered merely as that of a tenant in common in the trees themselves, as described by the Connecticut court, with an easement upon plaintiff's lands for the sustenance of such trees. Whatever the character of his holding, it cannot be contended that he is empowered to make his own partition of the trees in his own way. The Code of Civil Procedure expressly provides for an action for waste against a tenant in common. Section 732. Waste is not defined by the Code, so we must look to the common law for this. McCord v. Oakland, etc., Co., 64 Cal. 140, 27 Pac. 863, 49 Am. Rep. 686.

This leads to a consideration of the propriety of the equitable remedy which was awarded by the trial court. Defendant contends that as the parties were tenants in common of the trees no injunction will issue against one at the suit of the other. In neither of the cases relied upon by the appellant was the court dealing with similar facts to those before us upon this appeal. In Hihn v. Peck, 18 Cal. 644, it was held that an injunction was not proper pending an action in partition of a large tract of timber land, where neither the insolvency of the tenant in common cutting the timber, "nor any other facts entitling him to an injunction," were averred in the bill. The general rule as to restraint for waste against one tenant in common at the suit of another at common law is stated in McCord v. Oakland, Q. M. Co., 64 Cal. 143, 27 Pac. 863, 49 Am. Rep. 686. But, says the court, he "might be restrained in equity from felling ornamental trees, or from doing other things amounting to wanton and destructive waste, which were called 'equitable waste,' because allowable at law." In the McCord Case an injunction was refused because the court would not restrict a tenant in common from the legitimate enjoyment of the estate, and to interfere with the legitimate exercise of that right would be to deny an essential quality of the title, that is, an undivided occupation. In the same opinion a New York case is referred to, in which an injunction was granted pending the hearing of a bill for partition, because the cutting of the timber in that case was not within the usual and legitimate exercise of the enjoyment of defendant's estate. Hawley v. Clowes, 2 Johns. Ch. (N. Y.) 122. As to the issuance of an injunction, Chancellor Kent saying: "The remedy is peculiarly appropriate and proper."

In other jurisdictions the use of the injunction in a proper case seems to be generally approved, and the text writers usually state the rule that a tenant in common will not be granted an injunction against his cotenant, with an exception. In special cases one tenant in common may, on the application of the other, be enjoined from committing waste (cutting timber), but the injunction is sparingly exercised. Obert v. Obert, 5 N. J. Eq. 397. Injunctions are but rarely granted to restrain a co-tenant from exercising control over the joint property. To authorize an injunction, it must appear either that the defendant is insolvent, or that the act sought to be enjoined will effect a partial or entire destruction of the estate. Freeman on Co-Tenancy and Partition, § 323; Leatherbury v. McInnis, 85 Miss. 160, 37 South. 1018, 107 Am. St. Rep. 274. An injunction will be granted to restrain one of the owners of adjoining tracts of land (tenants in common) from cutting down trees growing on the boundary line, where they serve to shelter and protect the buildings of the other, even though their presence be a damage to his land, and notwithstanding the complainant has himself cut down some of the trees. Musch v. Burkhart, 83 Iowa, 301, 48 N. W. 1025, 12 L. R. A. 484, 32 Am. St. Rep. 305; Harndon v. Stultz, 124 Iowa, 440, 100 N. W. 329; Robinson v. Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582.

It is argued by appellant in the case at bar that neither the complaint nor the findings show any peculiar conditions or circumstances justifying the issuance of an injunction under the authorities cited. This court will take judicial notice of the flora and climatic conditions of the country. It may from these and the character of the trees in question determine whether they are natural timber growing upon the land, or trees of an ornamental nature, planted for a special purpose. From these premises it will be presumed that the cutting of cypress trees for firewood on the boundary line of an orange orchard in Southern California was not a "legitimate enjoyment of the estate" in such trees. We do not think any more specific allegation or finding is necessary to sustain the judgment.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 37

PEOPLE v. MONREAL. (Cr. 64.)

(Court of Appeal, Second District, California. Nov. 21, 1907.)

1. Criminal Law — Harmless Error — Instructions.

Where, in a prosecution for perjury, certain statements contained in the information were material under the issues in the action in which the perjury was alleged to have been committed, and the court charged that, unless the jury found such statements were testified to by defendant and were false, it should acquit, a subsequent charge that if it found all the statements in the information false it should convict was not prejudicial to defendant, though some of them may have been immaterial, since a finding that the immaterial matters were false could not convict defendant, unless the falsity of the material statements was also established.

2. Same.

In a prosecution for perjury, the admission of evidence to prove the falsity of an immaterial statement contained in the information is not prejudicial error.

3. Witnesses — Impeachment — Evidence — Relevancy Under Statute.

Under Code Civ. Proc. § 2051, prohibiting the impeachment of a witness by evidence of particular wrongful acts, except a conviction for a felony, evidence that a witness shortly prior to the giving of her testimony had been guilty of adultery, and that her husband had punished a man found in her room, introduced to impeach the witness, was properly rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1121, 1126–1128.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Leo Monreal was convicted of perjury, and he appeals. Affirmed.

F. W. Allender and A. A. Sturges, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. The defendant, convicted of the crime of perjury, appeals from the judgment and an order denying a new trial.

The perjury charge was false testimony in a certain divorce proceeding. This testimony, which is claimed to be false, is set out at great length in the information, and its falsity in every particular was averred and clearly established. Certain statements appearing in the information were material under the issues presented by the pleadings. The court charged the jury that, unless it found such statements were testified to by defendant, and that they were false, that it should acquit. The effect of such charge could only be in the nature of an instruction that such statements only were material. The other charge, that if it found all of the statements contained in the information to have been false it should convict, could not prejudice the defendant, even were some of them immaterial; for, if the material matters were false, the charge is established, and the finding by the jury that other matters not material were also false could work no injury. For the same reason the action of the court in admitting evidence of the brand of beer used, and the price paid therefor, was not prejudicial error, even were it not admissible as tending to discredit the evidence of the defendant in other material matters, which we are not prepared to affirm.

The court refused to admit testimony tending to show that a witness had been guilty of adultery shortly before offering herself as a witness, and, further, that her husband administered punishment to a man found in her room. There was no error in this (section 2051, Code Civ. Proc.; Estate of James, 124 Cal. 656, 57 Pac. 578, 1008), the acts not bearing upon the matter in issue (Barkly v. Copeland, 86 Cal. 487, 25 Pac. 1).

The trial court refused a charge requested by defendant in relation to the credibility of the defendant as a witness. We find no error in refusing such instruction. People v. Winters, 125 Cal. 329, 57 Pac. 1067; People v. Ross, 134 Cal. 256, 66 Pac. 229.

The judgment and order should be affirmed, and it is so ordered.

We concur: SHAW, J.; TAGGART, J.

CLEMENTS v. WATSON et al. (Civ. 416.)

(Court of Appeal, Second District, California. Nov. 23, 1907.)

1. Attorney and Client—Attorney's Compensation.

In estimating the value of an attorney's services, it is proper to include in the consideration a reasonable retaining fee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 294.]

2. Same—Action for Services—Issues.

Where, in an action for services rendered by an attorney, a bill of particulars contained the item "retainer, seven months at $100 per month," and no demand was made for a further bill, it was proper to permit plaintiff to prove certain services rendered which were included in such item.

3. Trial—Remarks of Counsel.

In an action for an attorney's services, there was no prejudicial error in plaintiff's counsel's statement to the jury that it had been called at defendant's request and in his expression of his opinion as to the propriety of a jury passing on the value of an attorney's fee and questioning their ability to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 303–307.]

4. Same.

Misstatements or improper ones made by counsel to the jury are not grounds for reversal, unless they relate to material matters of fact as distinguished from mere opinion, and are such as to have prejudiced the adverse party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 275–284.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by James I. Clements against John W. Watson and others. Appeal by defendants from a judgment in favor of plaintiff, and from an order denying a motion for a new trial. Affirmed.

H. S. Rollins and J. W. McKinley, for appellants. Frank G. Finlayson, for respondent.

ALLEN, P. J. Appeal by defendants from a judgment and order denying a new trial.

The action was on account of an attorney's fee for services rendered by plaintiff's assignor to defendants. The case was tried by a jury, which rendered a verdict in plaintiff's favor. Several months before the trial defendants demanded a bill of particulars, which was furnished by plaintiff, and contained, among other items, the item: "Retainer, seven months at $100 per month, $700." No demand was made for a further bill, and upon the trial the court permitted plaintiff to prove certain services rendered defendants, which were included in said item. This is assigned as error. "In estimating the value of an attorney's services it is proper to include in the consideration a reasonable retaining fee." Roche v. Baldwin, 143 Cal. 192, 76 Pac. 956. While the performance of actual services may not be essential in order that a retaining fee may be recovered (Knight v. Russ, 77 Cal. 413, 19 Pac. 698), it certainly cannot prejudice defendant to show that upon the faith of such retainer certain specific services were rendered for which he was not otherwise paid, and for which he made no other charge. And, in addition, the value of the retainer may be shown (Knight v. Russ, supra), in which case, the bill of items not being objected to, services rendered as affecting such value would not be improper, especially in this case, where the item of retainer at so much per month would indicate that the term employed involved something more than is usually covered by the expression.

The only other error complained of in appellants' brief relates to the action of the court in permitting counsel for plaintiff to state to the jury that it had been called at defendants' request, and then, at length, to express an opinion as to the propriety of a jury passing upon the question of the value of an attorney's fee; and, further, questioning their ability so to do as intelligently as a court might be able to do under like circumstances. Applying the rule that misstatements or improper statements made to the jury during argument as affording ground for reversal must relate to matters of fact material, as distinguished from matters of mere opinion, and, in any event, "must be such as in a material matter to have prejudiced the defendant" (People v. McMahon, 124 Cal. 436, 57 Pac. 224). we are unable to see just how defendants were prejudiced by the statements complained of. If the opinion of counsel for plaintiff, as expressed to the jury, in which its ability to intelligently determine the issues was questioned, had any effect, it certainly would not operate against the defendants, who had impliedly expressed confidence in the jury when they called it to pass upon the questions of fact involved.

We find no error prejudicial or otherwise in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

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7 Cal. App. 71

CHENEY v. McGARVIN. (Civ. 406.)

(Court of Appeal, Second District, California. Nov. 23, 1907. Rehearing Denied by Supreme Court Jan. 20, 1908.)

EXECUTORS AND ADMINISTRATORS — ACTIONS AGAINST—VARIANCE.

There is no variance between a claim presented for services as a clerk for a certain period at $20 per week, with a credit amounting to $7 per week for such period, and proof of employment of plaintiff by deceased at $20 per week, plaintiff to draw $7 per week, and leave the balance with deceased with which to furnish a house which was to have been built for plaintiff; the money not being held under a trust, but still being owed for services.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Florence H. Cheney against D. C. McGarvin, administrator of Charles H. Bush, deceased. From an order granting defendant a new trial, plaintiff appeals. Reversed.

F. B. Guthrie and Louis Luckel, for appellant. J. W. McKinley and Oscar Lawler, for respondent.

TAGGART, J. Appeal from an order granting a new trial. Plaintiff presented a properly verified claim against the estate of Charles H. Bush, deceased, of which defendant is administrator, itemized and stated as follows:

To services as general clerk in jewelry store of deceased from July 1, 1903, to May 1, 1904, $43^{3}/_{7}$ weeks at $20..................	$ 860 57
To services as general clerk in jewelry store of deceased from Dec. 20, 1904, to July 23, 1905, $32^{1}/_{7}$ weeks at $20..................	642 85
	$1,503 42
By cash received at divers times between July 1, 1903, and July 23, 1905	560 42
Balance due	$ 943 00

This claim was rejected by defendant, and action commenced thereon by plaintiff within the statutory time. The complaint states the cause of action in two counts, one of which declares on an express promise to pay by the deceased, and the other upon the reasonable value of the services rendered. The evidence introduced by plaintiff to establish the character of her employment, and amount and manner in which she was to be paid for her services, consisted of the testimony of her daughter to an oral agreement between plaintiff and the deceased. This testimony, so far as material to the question here being considered, was: "He (Bush) asked her (plaintiff) to come to work at a salary of $20 a week." "She was to come there as clerk to sell jewelry and attend to his store. She also collected rents and attended him when he was sick." "Mr. Bush said my mother was to draw $7 a week, and leave the $13 a week remaining with him that she might furnish a home." "My mother lived with me, and Mr. Bush visited us very often. The contract between Mr. Bush and my mother was often spoken about. It was that he was to build a home, and that he was to furnish a home for us." "Mr. Bush said that she was to receive $20 per week, $13 of which was retained to be devoted to the purchase of furniture for a residence which was to be constructed by him, and he was to arrange matters by his will so that at his death it should go to my mother. This money was to be held by him and devoted to the purchase of furniture for that place. That was the agreement entered into between himself and my mother." This is the entire evidence relating to the employment of plaintiff. The case was tried by a jury, and a verdict rendered for $943 in favor of plaintiff, and judgment for that amount, with costs, entered on the verdict.

Defendant moved for a new trial, and his motion was granted, on the ground, as stated in the order, "that a material variance is shown between the proof made and the claim alleged in plaintiff's complaint and as presented to the defendant administrator, and upon no other ground." The theory upon which this ruling is sustained by respondent, and presumably that upon which the court acted, is that by the terms of the agreement proven the money sued for was retained by Bush either in trust, or under some other form of obligation to repay money held in deposit, and no longer due to plaintiff on account of the original services.

The evidence supports the claim presented in respect to there being an original indebtedness of $20 per week for plaintiff's services as therein set forth. It also shows that the credit given corresponds in amount to the $7 per week, which plaintiff was to draw under the agreement to which the daughter testified. This, of course, left the $13 per week in the hands of Bush. He owed this to her as part of her wages for services rendered, if the contract testified to does not show that the character of the indebtedness was changed by agreement or the acts of the parties. The witness says that plaintiff was to leave the $13 a week with him that she might use it to purchase furniture for a home. He was going to furnish a house for the plaintiff and her daughter, and the plaintiff was to purchase the furniture for it. There was no consideration for the leaving of this money with Bush. There is no question about it belonging to plaintiff by virtue of her having earned it as wages. She might have designated some other person to hold it for her, but like most clerks and employés she chose to leave it with her employer because she had plans which would enable her to use it better after it had been accumulating for some time. We are not aware of any authority holding that because an employé arranges with his employer to pay him but a portion of his wages, assigning as a reason for not drawing the balance that he desired to leave it in the employer's hands until such time as he could buy the furniture necessary for a home, that any trust relation was thereby created, or that the employer ceased to owe the money to the employé for services rendered. That this purchase of furniture by the plaintiff is connected with the additional offer of the deceased to furnish a home does not alter the matter or change the character of the obligation.

We do not think it necessary to distinguish those cases in which the presentation of a claim based upon a trust is considered. The order granting the new trial is expressly limited as to the grounds upon which it is based, and our consideration thereof is confined to this. Ben Lomond Wine Co. v. Sladky, 141 Cal. 621, 75 Pac. 332. In our opinion, there was no variance between the claim presented and the proof adduced to justify the trial court in granting a new trial.

Order appealed from is reversed.

We concur: ALLEN, P. J.; SHAW, J.

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7 Cal. App. 27

PEOPLE v. LONG. (Cr. 66.)

(Court of Appeal, Second District, California. Nov. 20, 1907.)

1. CRIMINAL LAW — APPEAL — RECORD—CONCLUSIVENESS.

On appeal in a criminal case from a denial of a motion to direct the clerk to indorse on a written motion for a new trial a certificate of its filing on a certain prior date, and to make the other proper entries on the records of such filing, where the evidence was conflicting as to whether the motion was actually made or presented for filing, the implied finding of the court, necessary to sustain its ruling, that no such motion was made or tendered for filing, is binding upon appeal.

2. SAME — MOTION FOR NEW TRIAL — HOW TO BE MADE.

While under Pen. Code, § 1182, providing that an application for a new trial must be made before judgment, and the order granting or denying it must be immediately entered by the clerk in the minutes, the motion may be filed and thus relieve the mover from stating his grounds at length, and the filed paper may be referred to for the grounds of the motion in detail, the motion must nevertheless be made orally, and the court's attention called to it, and the court moved to grant it.

3. SAME—AMENDMENT OF MOTION.

A motion after judgment to direct the clerk to indorse upon a written motion for a new trial the certificate of its filing on a date prior to judgment, in so far as it attempts to add to what actually occurred is in the nature of an amendment of the motion for a new trial, and is incompetent.

4. SAME—TRIAL—EXCEPTIONS TO ADMISSION OF EVIDENCE—TIME FOR PRESENTING BILL OF EXCEPTIONS.

While exceptions to the granting or refusal of a motion for a new trial, expressly allowed by Pen. Code, § 1172, must be made before judgment, and the order granting or denying it must be immediately entered by the clerk under the express provisions of Pen. Code, § 1182, and must be prepared and presented in a bill of exceptions to the trial court within 10 days after the ruling complained of, under Pen. Code, § 1174, relating to the settlement of exceptions, exceptions to erroneous rulings in admitting or rejecting testimony may also be embodied in a bill of exceptions, which may be presented within 10 days after judgment, and may be used upon appeal therefrom.

5. SAME—OBJECTIONS TO ADMISSION OF EVIDENCE—TIME.

If a question indicates upon its face that the answer will be inadmissible, a party cannot take the chance of a favorable reply, and then, if the answer be unfavorable, object to the question, or move to strike out the answer, if the latter be responsive; but, if the question calls for an incompetent answer, it must be objected to, or the right to have it stricken out is waived, though when the question is unobjectionable, and the answer is incompetent or irrelevant, the answer may be stricken out without previous objection to the question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1630, 1640.]

6. SAME—EVIDENCE—HEARSAY.

On a robbery trial, the complaining witness, in answer to the question if he had said anything to the arresting officer in the presence and hearing of accused, stated over objection that he had told the arresting officer that accused was the man who had robbed him, and that thereupon accused denied it. *Held*, that the answer was hearsay and incompetent, since while an accused must deny an accusation or have his silence construed as an admission of its truth, even where he is in custody, if he does deny it in whole or in part, the accusation or statement is an admission and evidence only to the extent that it is admitted to be correct by accused, the admission and not the accusation being evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 950–983.]

7. SAME—SUFFICIENCY OF OBJECTION.

On a robbery trial, accused objected on valid grounds to a statement of the complaining witness as to what he had told the arresting officer in the presence and hearing of accused, but did not move to strike out the statement. Before the ruling was made the district attorney suggested that the foundation which he expected to lay to make the otherwise improper statement of the witness competent was a reply by accused. The objection was overruled, and the witness testified to accused's reply. *Held*, that the objection being addressed to a line of incompetent evidence being introduced by the district attorney upon an improper theory, and its incompetency being pointed out by accused, and the court and district attorney having considered the objection on its merits, it should have been sustained, independent of any motion to strike out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1633–1640.]

8. SAME—APPEAL—HARMLESS ERROR.

As accused, in the absence of a motion to strike out the witness' statement to the arresting officer, would have obtained no material benefit from a ruling in his favor, the overruling of accused's objection was not reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137–3143.]

9. SAME—SUFFICIENCY OF OBJECTION.

A specific objection was made to incompetent testimony, the testimony was admitted over the objection, and subsequently, when another witness was testifying to the same matter, it was objected to as incompetent and irrelevant, but was admitted over the objection without a ruling. *Held*, that the error in admitting the prior testimony was not cured by the admission of the latter "without objection," since the grounds of the objection, stated on the admission of the prior testimony, should have been considered when the same evidence was again offered, where the attention of the court was called to the whole line of evidence as incompetent.

10. CONSPIRACY—NATURE AND ELEMENTS—EVIDENCE TO ESTABLISH.

Conspiracies cannot be established by suspicions, nor does mere association make a conspiracy, but there must be evidence of some participation or interest in the commission of the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 105–107.]

11. CRIMINAL LAW—DECLARATION OF CO-CONSPIRATOR—COMPETENCY.

Just after a robbery had been committed a woman, who was not shown to have been a party to a conspiracy with accused, had crossed the street from where the robbery had occurred, and in answer to a witness who asked her "what was the matter over there" replied that she guessed "a friend of hers was scaring somebody over there." *Held*, that the evidence of her statement was pure hearsay, and was not admissible as an admission of an associate in the commission of the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 973–983.]

12. SAME—RES GESTÆ.

The witness' statement was not a part of the res gestæ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 815, 821.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Irving Long was convicted of robbery, and appeals. Reversed and remanded.

F. H. Thompson, Clarence Meily, and Goldberg & Meily, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for respondent.

TAGGART, J. Appellant was informed against jointly with two other defendants upon a charge of robbery. He was given a separate trial, and convicted, and on May 8, 1905, the day set for pronouncing judgment, placed on a conditional probation for the term of two years. Imposition of sentence was suspended, as provided by subdivision 1 of section 1203 of the Penal Code, in accordance with the terms of the order admitting him to probation. On August 25, 1906, he was accused of violating his parole, brought before the court, and, after a hearing, adjudged to have violated the conditions of his probation and engaged in criminal practices, and his probation was thereupon revoked and terminated, and he was arraigned for sentence, and judgment of imprisonment in the state prison pronounced. Notice of appeal from this judgment was given August 29, 1906. On June 18, 1907, pursuant to notice, appellant moved the court for an order directing the clerk to indorse upon a written motion for a new trial presented a certificate of its filing on the 8th day of May, 1905, and to make appropriate entries upon the register of criminal actions and other records of said court showing that said motion for a new trial had been filed as of the date named. The motion was made upon the records in the case, and affidavits filed. The district attorney filed counter affidavits at the hearing of the motion, and on said 18th day of June, 1907, the motion was denied, and on June 24, 1907, defendant appealed from the order of the court denying his motion.

Two bills of exception appear in the record, as filed July 9, 1907, one relating to the ruling of the court upon the motion last mentioned and settled July 9, 1907, and the other embodying exceptions to the admission of evidence upon the trial of said cause, which bill is dated August 29, 1906.

Disposing first of the appeal from the ruling on appellant's motion, we find that the counter affidavit of the deputy district attorney states that at the time the motion for a new trial is claimed to have been presented for filing, according to the affidavits of counsel for defendant, the attorney for defendant "did not present his motion for a new trial to the court, and did not state the grounds of said motion or any of them." All he did was to state that he desired to present such a motion, but upon the court's stating that he intended to put the defendant on probation, no further action was taken by defendant or his counsel in this connection. This, then, became a question of fact as to which the evidence was conflicting, and the implied finding of the court, necessary to sustain its ruling that no motion for a new trial was made or tendered for filing, is binding upon this court. If the showing made by appellant had not been contradicted, and his motion granted, it would have availed him nothing. The application for a new trial must be made before judgment, and the order granting or denying the same must be immediately entered by the clerk in the minutes. Section 1182, Pen. Code. While the motion may be filed, and thus relieve the mover from stating his grounds at length and the filed paper referred to for the grounds of the motion in detail, the motion must nevertheless be made orally. The attention of the court must be called to it, and the court moved to grant it. Williams v. Hawley, 144 Cal. 100, 77 Pac. 762; Spencer v. Branham, 109 Cal. 340, 41 Pac. 1095; People v. Ah Sam, 41 Cal. 650. To the extent that it attempted to add to what had been actually done, it would have been in the nature of an amendment of the motion for a new trial, and this was incompetent. People v. Wessel, 98 Cal. 352, 33 Pac. 216.

For the purpose of considering the assignments of error relating to the admission or rejection of testimony, it is of no practical consequence that a motion for a new trial was not made and ruled upon in this case. While exceptions to the granting or refusal of a motion for a new trial (sections 1172, 1182) must be prepared and presented in a bill to the trial court within 10 days after the ruling complained of is made (section 1174), exceptions to erroneous rulings of the court in admitting or rejecting testimony may also be embodied in a bill which may be presented within 10 days after judgment. This bill of exceptions may be used upon an appeal from the judgment. People v. Craig (Cal.) 91 Pac. 997; People v. Walker, 142 Cal. 92, 75 Pac. 658; Walker v. Superior Court, 135 Cal. 372, 67 Pac. 336; People v. Keyser, 53 Cal. 184.

The Attorney General objects to the consideration of the first error assigned, which relates to the admission of testimony, on the ground that the objection of defendant to the testimony came too late. He contends that the objection being to the answer, as distinguished from the question, should have been presented in form of a motion to strike out. The rules relied upon by the Attorney General have often been declared by the courts, and are said to be so simple and well settled that no difficulty should arise in their application and no departure from them should be tolerated. As declared by the authorities cited, they cover in substance the following: If a question indicates upon its face that the response to it will be inadmissible, a party cannot take the chance of a favorable reply, and then, if the answer be unfavorable, object to the question, or move to strike out the answer, if the latter be responsive. If the question calls for an incompetent answer, it must be objected to, or the right to have the answer stricken out is waived. But when the question is unobjectionable, and the answer is incompetent or irrelevant, the answer may be stricken out without previous objection to the question. People v. Williams, 127 Cal. 216, 59 Pac. 581; People v. Lawrence, 143 Cal. 155, 76 Pac. 893; People v. Scalamiero, 143 Cal. 346, 76 Pac. 1098; Johnston v. Beadle (Cal. App.) 91 Pac. 1012; People v. Smith (Cal.) 91 Pac. 513. The objection here under consideration was not to the question, and the question did not indicate on its face that the response to it would be inadmissible. It was not unseasonable, because by its very terms it was addressed to a statement contained in the answer. Instead of being made in the form of a motion to strike out, it was in the form of an objection to the answer. On the direct examination of the complaining witness he was asked: "Q. Now there in the presence of Long, this defendant here, and in hearing of Long, did you say anything to Tyler? [Tyler was the arresting officer.] A. The only thing I said to Tyler was: 'That is the man that went through my pockets'—pointing to Long." To this appellant objected: "Object to that as being hearsay. No sufficient foundation laid for the statement. Has not been shown this defendant was within hearing of that statement." The district attorney thereupon stated: "We are going to show that he replied to it." The objection was overruled, and an exception preserved. The witness then continued: "When I said, 'That is the man that went through my pockets' in the presence of Long, he said: 'No; he was not the man that done it.' He said he was not the man that took the money off of me." Thus we see it was the statement in the answer which was objected to upon the ground that the proper foundation had not been laid for its introduction. Before the ruling was made by the court the district attorney suggested to the court the foundation which he expected to lay to make the statement competent, and thereupon the objection of defendant was overruled, and the witness testified to the reply upon which the district attorney relied as establishing a foundation for the introduction of the statement which he, in effect, admitted to be improper testimony without it.

Whether we consider the objection and ruling as made after the statement of the district attorney or after the witness had testified, the evidence was hearsay and inadmissible. While the rule in this state compels a defendant to deny an accusation or have his silence construed as an admission of its truth, even where he is in the custody of the arresting officers (People v. Dole, 122 Cal. 490, 55 Pac. 581, 68 Am. St. Rep. 50), if he does so deny it, either in whole or in part, the accusation or statement is an admission and evidence only to the extent that it is admitted to be correct by the defendant. In other words, it is the admission and not the accusation which is evidence. People v. Ah Yute, 54 Cal. 91; People v. Estrado, 49 Cal. 171. The rule is clearly illustrated in the companion cases of People v. Amaya, 134 Cal. 536, 66 Pac. 794, and People v. Teshara, 134 Cal. 544, 66 Pac. 798. The objection to the admission of this line of evidence was seasonable, and should have been sustained upon the district attorney's offer, since this did not include a "reply" which would render the accusation admissible. This objection should have been followed, however, by a motion on defendant's part to strike out the accusation, as that was the prejudicial testimony which was improperly admitted. The objection was addressed to a line of incompetent evidence being introduced by the district attorney upon an improper theory, and its incompetency was pointed out by the objection of defendant. Both the court and the district attorney considered this objection on its merits, and it should have been sustained, independent of any motion to strike out. To refuse to consider it now as unseasonable because of its form would be to approve of the setting of a trap for the unwary attorney, a practice which would be scarcely less reprehensible than the practice of this kind toward the trial court, which appellate courts are sometimes called upon to rebuke. There was no element of surprise upon the part of the court involved, and the defendant is entitled to the benefit of his exception preserved to the ruling of the court. Blum v. Manhattan Ry. Co., 1 Misc. Rep. 119, 20 N. Y. S. 722; Sneed v. Marysville Gas Co., 149 Cal. 709, 87 Pac. 376. Without the motion to strike out the accusation he would have obtained little benefit from a ruling in his favor, and so considered we would not regard this error alone sufficient to justify a reversal of the judgment.

The evidence of the officer Tyler in relation to this matter is substantially the same as that of Friary. The testimony of this witness is in a narrative form, and when the matter mentioned was reached, defendant's attorney interjected: "Object to that as being incompetent and irrelevant." No ruling of the court upon this objection appears in the record. This is a repetition of the objection of defendant to the same improper line of testimony, made in the same irregular way, without even being given a consideration by the trial court. Under such conditions, we are called upon to say that this testimony so "admitted without objection" cures any error complained of in the ruling admitting the testimony of the witness Friary. We cannot agree with this contention. The grounds of the objection, stated in connection with the same matter in the testimony of Friary, should have been considered when the same testimony was sought to be introduced through another witness, the attention of the court being called to the whole line of evidence as incompetent.

The admission of the statement made by the Boland woman to the witness Fletcher was error. There was no evidence of any conspiracy between defendant and the woman. Conspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense. Neither was her statement a part of the res gestæ. She had come across the street from where the trouble was going on between defendant and the complaining witness, and in response to a question from a stranger as to "what was the matter over there" replied that she guessed "a friend of hers was scaring somebody over there." This was pure hearsay. It is difficult to see how it could have been given much weight by the jury; but when it is treated as the admission of an associate in the commission of the offense, the theory upon which it was admitted as expressed in the ruling of the court, we are not prepared to say it was not prejudicial.

Judgment reversed, and cause remanded for new trial.

We concur: ALLEN, P. J.; SHAW, J.

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KING v. SAMUEL et al. (Civ. 381.)

(Court of Appeal, Third District, California. Nov. 22, 1907. On Rehearing, Dec. 23, 1907.)

1. DEEDS — CONSTRUCTION — REPUGNANT CLAUSES.

A deed described land as "all the swamp and overflowed land in survey No. 593 embraced in sections 27 and 28, township 15 south, range 23 east M. D. B. & M., and more particularly described as follows" (setting out the land by metes and bounds), and closed with the words: "This conveyance intends to convey all the S. and O. land in sections 27 and 28 lying west of the K. river." The description by metes and bounds covered swamp and overflowed lands on both sides of the K. river, but the acreage stated in the deed was much less than that included within the boundaries given. *Held*, that the description and the closing clause are not so repugnant as to justify the rejection of the closing clause under Civ. Code, § 1070, providing that, "if several parts of a grant are irregular, the former part prevails.

2. SAME—EVIDENCE OF AID—CONSTRUCTION.

Where the description in a deed is uncertain, extrinsic evidence may be introduced to prove the intention of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 343.]

3. SAME—PROPERTY CONVEYED—EVIDENCE.

In an action to quiet title, where defendants' deed described the lands as "all the swamp and overflowed land in survey No. 593 embraced in sections 27 and 28, township 15 south, range 23 east M. D. B. & M., and more particularly described as follows" (setting out the land by metes and bounds), and closes with the words, "this conveyance intends to convey all the S. and O. land in sections 27 and 28 lying west of the river," evidence *held* to show that defendant did not take by the deed the land on the east side of the river.

4. TAXATION—REDEMPTION FROM TAX SALE—NOTICE TO REDEEM.

Pol. Code, § 3785, as amended by St. 1891, p. 133, c. 121, provides that the purchaser of property sold for delinquent taxes, or his assigns, must, 30 days previous to the expiration of the time for redemption, or 30 days before he applies for a deed, serve the owner of the property purchased, or the occupant of such property, a written notice that the property has been sold, the amount thereof, and the time when the right of redemption will expire, or when the purchaser will apply for a deed. *Held* that, where property was sold for taxes June 30, 1893, a conveyance to the purchaser, without such notice being given, is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1407–1409.]

5. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE.

Conceding that evidence offered by plaintiff to rebut recitals in a tax deed introduced by defendant was inadmissible, the error was harmless, where the deed itself was void for want of notice to the owner of the expiration of the time for redemption.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 605–637.]

6. EVIDENCE—SECONDARY EVIDENCE — PROOF OF LOSS OF AND SEARCH FOR PRIMARY EVIDENCE.

Under Code Civ. Proc. §§ 1855, 1937, providing that if a written instrument is lost, its contents may be proved by other evidence, an instrument will be regarded as lost for all practical purposes of the trial when it cannot be found after diligent search, and reasonable diligence in making the search does not require the exploration of all possible places where the instrument might be.

7. SAME.

Evidence *held* sufficient to show the loss of a deed justifying admission of secondary evidence of its contents.

On Rehearing.

8. DEEDS — CONSTRUCTION — REPUGNANT CLAUSES.

Civ. Code, § 1069, providing that a grant between private parties is to be interpreted in favor of the grantee, must be read in connection with Civ. Code, § 1654, providing that, where there is uncertainty, the language of the instrument must be interpreted most strongly against the party who caused the uncertainty to exist, and hence, where the grantee draws a deed describing land as "all the swamp and overflowed land in survey No. 593 embraced in sections 27 and 28, township 15 south, range 23 east M. D. B. & M., and more particularly described as follows" (setting out the land by metes and bounds, which covers land on both sides of the river, though the acreage stated is much less than would be included by those bounds), and closes with the words "this conveyance intends to convey all the S. and O. land in sections 27 and 28 lying west of the K. river," the latter clause cannot be ignored.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 267–273.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by W. R. King against Moses Samuel and others. From a judgment for plaintiff, Moses Samuel appeals. Affirmed.

Stanton L. Carter, for appellant. George Cosgrove and W. D. Foot, for respondent.

CHIPMAN, P. J. Action to quiet title. The controversy concerns the title to certain swamp and overflowed land in sections 27 and 28, township 15 south, range 23 east, Mt. Diablo base and meridian, situated in Fresno county. The land in question is that portion of said sections embraced in survey No. 593 lying on the east side of Kings river. The survey is particularly described in the complaint by metes and bounds, "as described in patent of the state of California to W. T. Cole, recorded May 1, 1888, in Book of Patents, at page 41, records of Fresno county." Plaintiff alleged ownership in fee on and ever since April 13, 1901. A general demurrer to the complaint was overruled, and defendant Samuel alone answered. He denied plaintiff's alleged ownership, and alleged on his own behalf upon information and belief "that he is, and long prior to the commencement of this action (complaint filed May 25, 1904) was, and ever since has been, the owner in fee of all that portion of swamp and overflowed land survey numbered 593 lying east of the center of the channel of Kings river * * * and within sections 27 and 28, * * * which said land, as defendant is informed and believes, is the land attempted to be described in plaintiff's complaint." The court made the general findings: "(1) That all the allegations of plaintiff's complaint are true, and that the denials contained in the answer of defendant, Moses Samuel, are, and each of them is, untrue;" and (2) that on

April 13, 1901, plaintiff was and ever since has been and now is the owner in fee of all the land in said sections situated on the east side of Kings river, being a portion of the survey 593 as particularly described in the complaint and as set out in the finding, and that defendant Samuel's claim is without right. Judgment went accordingly, from which and from the order denying his motion for a new trial defendant Samuel appeals.

The evidence shows that survey 593 embraced parts of sections 21, 22, 27, and 28 of said township on both sides of Kings river, and was approved June 24, 1871, and recorded June 29, 1871. Patent issued to W. T. Cole April 18, 1888, and describes the land as in the survey "containing 189.20 acres, more or less." There was admitted in evidence a deed from Cole to S. M. King, C. W. King, and W. R. King (plaintiff), dated April 5, 1901, duly recorded, to that portion of sections 27 and 28, in survey 593, "which lies and is situated on the east side of Kings river," refers to the patent, and concludes: "This conveyance intends to convey, and does convey, to the grantees herein mentioned all of the swamp and overflowed land in sections 27 and 28, township 15 S., range 23 E. M. D. B. & M., which now lies, and is situated, on the east side of Kings river, in said section." A quitclaim deed from Bank of Selma to S. M., C. W., and W. R. King, dated March 20, 1901, duly recorded, was introduced in evidence, and it appeared from the judgment roll in an action by said bank against said Cole that a judgment of foreclosure was entered against him authorizing the sale of "all the right, title, and interest of said mortgagor (W. T. Cole) in and to overflowed land in said sections 27 and 28, in said township fifteen (15), (omitting north or south), of said range twenty-three (23) east of Mt. Diablo base and meridian." The judgment roll shows the decree of foreclosure and order of sale dated the 22d day of January, 1896, directing the sale of the mortgaged premises; also that a sale of said premises was made under said order to the plaintiff in the action, the said bank, and the commissioner's deed dated February 29, 1896. There was evidence also that S. M. and C. W. King, in May or June, 1894, conveyed their interest to plaintiff. At this point plaintiff rested his case, and there was a motion for a nonsuit, on the ground that the evidence does not show a conveyance of the property by Cole to the Kings, nor by S. M. and C. W. King to W. R. King, and that the conveyance from the bank under foreclosure proceedings is not sufficient to convey any title that Cole may have had, and that it does not appear that at the time he executed the mortgage to the bank, or at the time of the conveyance by Cole, he had any title to the property. This motion was overruled, and defendant Samuel excepted. The foregoing presents plaintiff's chain of title.

Defendant Samuel introduced in evidence a deed from Cole to Margaret R. Ross, executrix of the estate of Henry Ross, deceased, dated October 1, 1891, and duly recorded, by which Cole granted to said Margaret R. Ross the following land, to wit: "All the swamp and overflowed land in survey No. 593 embraced in sections 27 and 28, township 15 S., range 23 E. M. D. B. & M., and more particularly described as follows, to wit." (Then follows the description of the land by metes and bounds.) At the close of this description is the following clause: "This conveyance intends to convey all the S. and O. land in sections 27 and 28 lying west of the river." By mesne conveyances defendant deraigns title through the above grantee. On June 30, 1893, the property in controversy was sold to the state by the tax collector of Fresno couny for delinquent state and county taxes for the year 1892. A deed was made to the state November 1, 1898, under said sale. On July 5, 1901, the state by the tax collector sold and conveyed the land to one Meyer, and defendant deraigns title through him. It was admitted that Margaret R. Ross intermarried with one Baird, and is the same person as Margaret R. Baird mentioned in the transcript. Two questions arise under the deed from Cole to Mrs. Ross as executrix of the will of Henry Ross, deceased: First, did it in absolute and uncertain terms convey the land in controversy? second, if not, was extrinsic evidence admissible to explain the intention of the parties? The deed first described all the land in sections 27 and 28 by metes and bounds, including by the description the land in question. The acreage is set down as 69.53, which is considerably less than the acreage in said sections embraced on both sides of the river. Following the description is this clause: "This conveyance intends to convey all the S. and O. lands in sections 27 and 28 lying west of the river."

Appellant contends: That if there is any conflict between the two parts of the description, the former must prevail, and the clause quoted must be ignored—citing section 1070 of the Civil Code. And that a general description in a deed of conveyance, which is certain, must prevail, if the particular description is uncertain—citing Martin v. Lloyd, 94 Cal. 195, 203, 29 Pac. 491, 493. The Code section cited reads as follows: "If several parts of a grant are absolutely irreconcilable, the former part prevails." There is no such repugnancy between the description given in the deed and the subsequent clause as would justify the rejection entirely of this clause. In speaking of a conflict between the granting clause of a deed and its habendum, the court said in Barnett v. Barnett, 104 Cal. 298, 300, 37 Pac. 1049, 1050: "The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein; but for the purpose of ascertaining this intention the entire instrument, the habendum as well as the premises, is to be considered, and, if it appear from such consideration that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause, the habendum will prevail over the granting clause."

Appellant says the intention was to make more certain that the description included the land on the west side of the river. But why introduce it at all when a complete description preceded it, including that land? It is quite as reasonable to suppose that it was introduced to make clear the intention not to embrace the land on the east side of the river. The case cited in 94 Cal. is not in point, because we cannot say that the clause in dispute is uncertain. It is as certain and definite in its meaning as any part of the deed; for it has the river as a controlling monument. It seems to us that we must either give effect to this clause, and limit the grant accordingly, or we must sustain the lower court in its ruling that there was sufficient doubt and uncertainty as to the intention of the grantor to warrant the introduction of extrinsic evidence to ascertain that intention by considering the situation of the parties, the subject-matter at the time of contracting, and the attendant and surrounding circumstances leading to the execution of the instrument. That such inquiry may be made where such doubt exists is well settled. Martin v. Lloyd, supra; Walsh v. Abbott, 145 Cal. 285, 289, 78 Pac. 715, 104 Am. St. Rep. 38, where the rule is spoken of as a familiar principle of construction.

It appeared from the evidence that on September 19, 1887, Cole sold to Henry Ross (Mrs. Ross' testator) "69.25 acres embraced by the land on the west side of Kings river in sections 27 and 28" for $1,731.25, or $25 per acre. Having lost his certificate of purchase, and having applied for a duplicate, he entered into a bond with Ross to convey the land upon obtaining a patent, agreeing to repay the money upon failure to obtain the patent. Ross was given "immediate possession of said land, and to use the same in such manner as he may see proper, and to cut and remove wood therefrom in such quantities as he may see fit." Before Ross died Cole made a deed to him, and received back his notes and bond given as security; but the deed was not satisfactory to Ross, and was not recorded, and after his death Mrs. Ross was unwilling to accept it. On October 1, 1891, after the death of Ross, Cole made the deed in question to her as executrix of her husband's will. This was at her request, and the deed was prepared by one McKenzie acting for her. In doing so McKenzie described the land on both sides of the river; but he gave the acreage as originally sold to Ross, and then inserted the clause, which has given rise to this controversy. No new consideration passed, and the purpose was to complete the sale of Cole to Ross in the latter's lifetime. Cole testified: "After I made the deed to Mrs. Ross, I told her: 'Why don't you buy the balance of this land, and have it all?' and she says: 'If William Shafer will advise me to buy this land, I will pay you your price for it and take it.' 'All right,' says I, 'you see him.' Mr. Shafer being a son-in-law of mine, I wouldn't approach him. By the balance of this land I meant the swamp land in 27 and 28 on the east side of the river. I can't remember how many acres there were. This old deed that was returned to me had been tampered with, and there was 80 acres down on that in a different handwrite altogether." He also testified: "Mrs. Baird (formerly Mrs. Ross) never did anything with the land on the east side of the river. She didn't claim it." Another witness, familiar with the land since 1884, testified: "I never knew her to do anything with the land on the east side of the river. Q. She did have possession of the land on the west side? A. Oh, yes; we all understand that she owned the land on the west side; used to go there often for picnics and the like; never knew her to have anything to do with the land there." Similar testimony was given by other witnesses. There is evidence in some degree conflicting with some of the above testimony, but the trial court alone is charged with the responsibility of reconciling the evidence adduced before it. There is evidence warranting the trial court in holding that the land originally sold by Cole to Ross did not include the land on the east side of the river, that in the subsequent transactions with Mrs. Ross she so understood it and acted upon that construction of her deed. In the light thrown upon the instrument by these extrinsic facts, which were admissible and relevant, we are clearly of the opinion that Mrs. Ross did not take by the deed in question the land on the east side of the river, and hence conveyed no title to her grantee through whom defendant claims. These extrinsic facts all relate to a time when Mrs. Ross held the title from Cole. Code Civ. Proc. § 1849; Williams v. Harter, 121 Cal. 47, 53 Pac. 405.

Respondent contends that the tax collector had no power to make the tax deed to Meyer, for the reason that there was no notice given by the purchaser, and also for the further reason that the deed contains no description of the land attempted to be conveyed. The law in force at the time was the act of March 19, 1891. St. 1891, p. 133. Section 2, which amended section 3785 of the Political Code, reads in part: "Provided, however, that the purchaser of property sold for delinquent taxes, or his assigns, must, thirty (30) days previous to the expiration of the time for the redemption, or thirty days before he applies for a deed, serve the owner of the property purchased, or upon the person occupying the property, if said property is occupied, a written notice." (Then follow certain things which must be embraced in the notice.) The act requires a duplicate of this notice to be filed with the county recorder. It also provides for posting the notice upon the property, if unoccupied, and the owner cannot be found; "and no deed of property sold at a delinquent tax sale shall be issued by the tax collector, or any officer, to the purchaser of said property, until the notice herein provided for shall have been given, and each purchaser shall have filed with such tax collector, or other officer, an affidavit showing that the notice hereinbefore required to be given has been given as required," etc. This was the law in force when the deed was made, and must govern the sale. Reed v. Lyon, 96 Cal. 501, 31 Pac. 619; Teralta v. Shaffer, 116 Cal. 518, 48 Pac. 613, 58 Am. St. Rep. 194; Walsh v. Burke, 134 Cal. 594, 66 Pac. 866; Collier v. Shaffer, 137 Cal. 319, 70 Pac. 177. In the recent case of Johnson v. Taylor (Cal.) 88 Pac. 903, 10 L. R. A. (N. S.) 818, Mr. Justice Sloss deals at some length with a case similar to this and holds that, where property was sold for delinquent taxes in 1894, a conveyance to the purchaser, without any notice of the expiration of the period of redemption having been given, is void. Referring to the statute of 1891, supra, the learned justice said: "As the law then stood, a deed could not be issued to the purchaser without the giving of the notice required by section 3785 (Hughes v. Cannedy, 92 Cal. 382, 28 Pac. 573), and one relying on a tax deed was bound to establish the giving of such notice as a part of his proof of title (Miller v. Miller, 96 Cal. 576, 31 Pac. 247, 31 Am. St. Rep. 229; Reed v. Lyon, 96 Cal. 501, 31 Pac. 619; Walsh v. Burke, 134 Cal. 594, 66 Pac. 866). The opinion then proceeds to discuss the effect of subsequent statutes, and concludes: "Under the law as it existed at the time of the sale, the plaintiff's right of redemption was not limited by any fixed time. It lasted at least one year, and would last indefinitely thereafter until 30 days after the purchaser should give the notice required by the statute." It was also held that "the requirement of giving notice applied as well to the state as to a private purchaser." In the case at bar, as in Johnson v. Taylor, there was no proof of any such notice having been given, and as the law in force when the sale was made must govern, it follows that defendant has failed to establish that any title ever passed from Cole to him. The same view is expressed by this court in Guptill v. Kelsey, 5 Cal. App. 27, 91 Pac. 409. These cases were decided since appellant's brief was filed, and would seem to answer his contention. Conceding that the evidence offered by plaintiff in rebuttal of recitals in the deed of the state to Meyer was immaterial and irrelevant, it was without prejudice.

It remains to determine whether plaintiff proved title. Plaintiff offered in evidence a deed by Cole to S. M. King, C. W. King, and W. R. King of date April 15, 1901 (and, as we have seen, Cole was then the owner), which accurately and definitely described the property in dispute. There was also admitted in evidence over defendant's objection a quitclaim deed of the Bank of Selma to the same persons, dated March 20, 1901. The bank assumed to convey by virtue of purchase at foreclosure sale under a mortgage executed to it by Cole. Plaintiff was permitted also to introduce, against the defendant's objection, parol testimony to prove that S. M. and C. W. King conveyed the land to plaintiff by deed dated March 20, 1901. The objection to the Bank of Selma deed is that it conveyed nothing, because the mortgage to the bank failed to state whether the township was north or south of the Mt. Diablo meridian. The title of plaintiff is established independently of this deed, as we think, and hence we need not consider the deed from the bank to the Kings.

S. M. King was plaintiff's father and C. W. King was plaintiff's brother. Plaintiff testified that he received a conveyance of the land in dispute, and left it in the care of his attorney, Mr. Cosgrove, and has not seen it since, but did not remember the date. Mr. Cosgrove testified that he himself prepared a deed from S. M. and C. W. King to plaintiff, that it was signed and acknowledged by C. W. King in his office, that it was sent to Selma to be executed by S. M. King, that it was returned to his office "signed by S. M. King and properly acknowledged." He testified: "Now that deed has been misplaced in my office with the original deed from Cole to King. I have evidently wrapped it up in some papers, and I have not been able to find them, although I have made diligent search at different times within the last three months. * * * I know, as a matter of fact, however, that the conveyance was actually made. It covered the swamp and overflowed land. I remember the contents of the document, and the names of the parties contained in it (naming them). There was a description of the land contained in the deed. I know what that description was (describing the land in controversy). The document contained a habendum clause. It contained the usual common clauses of printed forms of deeds. It was a grant deed (giving other particulars). * * * When it came back from Selma or somewhere S. M. King's name was appended, together with a certificate of acknowledgment by him. The certificate of acknowledgment was in due form, taken before a notary or a justice of the peace. I wouldn't be certain which. It was in due form." On cross-examination he testified that he could not state whether it came back through the mail, but thought it did; that he discovered he had lost it while he was preparing for the trial within the last three months; that he did not look among all the papers in his office, but did look among all of them that he "thought by any possibility it might become confused with"; that he would not state positively it was not in his office, but that he had not destroyed it or intentionally given it away to any one; that he knows he has searched among all the papers that he thought by any possibility it could be among; that he did not look in all his books to see if it had not been folded in some one of them, but looked where it ought to be or might be, "but not in every place where it was possible for it to be"; that he had recently made a careful search in every place where he thought it likely was.

It is claimed by appellant that no sufficient foundation was laid for the admission of testimony as to the loss of the deed or its contents; that the testimony of the alleged grantors of the deed should have been taken, or the notary's, or its absence accounted for; that Mr. Cosgrove did not exhaust the search of all places in his office where by some possibility the deed might have been discovered; that plaintiff did not testify that he had not possession of the deed, and did not then know its whereabouts. But plaintiff did testify that he left it in care of Mr. Cosgrove, his attorney, and since that time he had not seen it. He could not truthfully say that he had not seen it if he had it in his possession. It would have strengthened plaintiff's case had he shown by the grantors that they signed the deed, or by the notary that he had taken their acknowledgment of its execution, but we cannot say that such proof was indispensable. The Code provides that the original writing must be produced and proved, except where it is lost or destroyed, in which case proof of loss or destruction must be first made. If it has been lost and proof of that fact made, evidence of its contents may be taken by the recollection of witnesses. Code Civ. Proc. §§ 1855, 1937. We think the term "loss" as used in the statute means something different from destruction, for in the latter case loss would necessarily follow, but not so in case of loss. The instrument may be lost for all practical purposes of the trial when it cannot be found after diligent search and yet it may exist. We do not think that reasonable diligence in making the search should require the exploration of all possible places where the instrument might be.

Whether a sufficient foundation was laid to justify secondary evidence is a question of law, and the evidence may be examined by the appellate court to determine its sufficiency. Still no arbitrary or hard and fast rule can be laid down by which to judge the evidence. The rule stated by Mr. Greenleaf is as follows: "If the instrument is lost, the party is required to give some evidence that such a paper once existed, though slight evidence is sufficient for this purpose, and that a bona fide and diligent search has been unsuccessfully made for it in the place where it is most likely to be found, if the nature of the case admits such proof; after which his own affidavit is admissible to the fact of its loss. * * * What degree of diligence in the search is necessary, it is not easy to define, as each case depends much upon its peculiar circumstances; and the question whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined by the court, and not by the jury. But it seems that in general the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. It should be recollected that the subject of the proof is merely to establish a reasonable presumption of the loss of the instrument, and that this is a preliminary inquiry addressed to the discretion of the judge. If the paper was supposed to be of little value, or is ancient, a less degree of diligence will be demanded, as it will be aided by the presumption of loss which these circumstances afford." 1 Greenleaf on Evidence (16th Ed.) § 5636. The surrounding circumstances and facts are to be taken into consideration; the presence or absence of pecuniary interest or other improper motive in seeking to substitute secondary for the best evidence; the probability that the instrument was materially different from that sought to be established by the oral proof; the effect such proof would have upon the rights of the person seeking to exclude it; the character of the witnesses, and their relation to the transaction as interested parties or otherwise. These and other matters that might be suggested are fair subjects for consideration, and the weight to be given them is largely within the discretion of the trial judge.

In the case here the title to the property passed to the Kings—father and his two sons—by Cole's deed. Plaintiff has a third interest by virtue of that deed. Proof that the father and the other son conveyed to plaintiff could not affect the title of defendant, for he has none, and as they are not parties to the action a judgment resting on such proof could not affect their interest. At most it would only meet the technical rule of law that plaintiff in the action must rely upon the strength of his own title and not upon the weakness or failure of his adversary's. No motive of self-interest can be imputed to Mr. Cosgrove, nor can a reasonable belief be entertained that he would falsify the contents of the deed drawn by him, or that he could have had any possible interest in concealing it; his testimony being that its sole purpose was to pass to plaintiff the interest held by his father and brother. Besides, his testimony was that the brother in fact executed and acknowledged the deed in his office, and, while this fact does not bear directly upon the fact that the deed was afterwards lost, it is a fact not to be ignored in considering the weight to be given Mr. Cosgrove's testimony as to the loss or disappearance of the deed. Most of the cases cited by appellant were cases where the secondary evidence was vital in determining in whom the title was vested—plaintiff or defendant. But here the result must be to quiet plaintiff's title to one-third interest in the property, leaving the other two-thirds to be determined possibly in another action, but in no event to belong to defendant. In our opinion there was a sufficient foundation laid to admit the secondary evidence offered.

Most of the rulings upon the evidence complained of depend upon the view of the law taken by defendant as to which we have expressed our disagreement with him and have thus disposed of them. Some of these rulings have been noticed in the course of the opinion, and others will at once be seen to be either free from error or not prejudicial from our standpoint of the main question to which the rulings related. We have examined the other rulings to which exception was taken, and fail to discover such prejudicial error as would, under the view we have taken of the case, warrant a reversal. This view also makes it unnecessary to consider the motion for a nonsuit.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

On Rehearing.

CHIPMAN, P. J. We do not feel called upon to write opinions in all cases where rehearings are denied or granted, and where we fail to do so it is through no indifference to the views of counsel, but because our attention is invited to no question, necessary to the decision, which has not in our judgment been sufficiently noticed. Where some more or less vital question has been overlooked or insufficiently treated, it would seem but just that further consideration to it should be given. The court invites careful scrutiny of its decisions, and deems it a favor to be given an opportunity to correct errors which it may have committed. Our attention is now invited to two points which counsel urges were either overlooked or not given due consideration. It is said that we "overlooked, as did the court below, the provisions of section 1069 of the Civil Code, which provides that a grant between private parties is to be interpreted in favor of the grantee"; and it is urged that, if the several parts of a grant are absolutely irreconcilable, the former prevails. Section 1070, Civ. Code. Where the question is simply one of construction, the Code rule should be followed. But the general rule that the earlier clause prevails is not imperative where the inconsistency or irreconcilability is so great as to justify extrinsic evidence to explain it. The Code rule that a grant is to be interpreted in favor of the grantee must be read in connection with another Code rule (section 1654, Civ. Code), which provides that, where there is uncertainty, the language of the instrument must be interpreted most strongly against the party who caused the uncertainty to exist. In the present case the deed under examination was prepared by McKenzie, the attorney or agent of Mrs. Ross, and was executed at her request as thus prepared. We still think that the latter clause of the deed cannot be wholly ignored, but that extrinsic evidence was admissible to aid the court in arriving at the intention of the parties.

Upon the evidence it may be admitted that the trial court would have been justified in reaching a different conclusion as to the intention of the parties. Mrs. Ross testified that her intention in having the disputed clause inserted in the deed was to make sure that she would get the land west of the river. Her testimony is, in some respects, corroborated. On the other hand, the testimony of Cole leads to a different conclusion, certainly as to his intention in executing the deed, and what he understood to be its purpose, and the conduct of Mrs. Ross in some degree weakened her statement. The testimony and also the documentary evidence on the point are in open conflict. It was the province of the trial judge to reconcile conflicting evidence and inferences derivable therefrom. If we are correct in our view that resort to extrinsic evidence was justified, the rule that, where there is a substantial conflict, this court will not interfere with the conclusions of the trial court, leaves us without power to look farther. The manifestly firm and honest conviction of counsel for appellant that we are in error in holding that extrinsic evidence was admissible has led us to re-examine the question; but, with our present lights, we are still of the opinion that such evidence was properly taken. Indeed, this to our minds is the principal question in the case, and, fortunately for appellant, if we are wrong, he has an adequate and speedy method to correct our error.

Rehearing is denied.

We concur: HART, J.; BURNETT, J.

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7 Cal. App. 43

KNIGHT v. COHEN et al. (Civ. 421.)

(Court of Appeal, Second District, California. Nov. 22, 1907. Rehearing Denied by Supreme Court Jan. 21, 1908.)

1. TRIAL — AGREED STATEMENT OF FACTS — FINDINGS OF FACT—NECESSITY.

Where a case is submitted on an agreed statement of facts, the only question for consideration is the law applicable thereto, and no findings of fact need be made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 908–911.]

2. ADVERSE POSSESSION—HOSTILE CHARACTER —CLAIM OF RIGHT.

The occupancy of land, to constitute adverse user, must be based on a claim of right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 387–389.]

3. SAME—NATURE AND GROUNDS.

Possession and user as owners usually hold and use land, without recognizing title in another, or disavowing title in himself, will, if unexplained, establish a claim of title by the occupant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 394, 395.]

4. WATERS AND WATER COURSES—IRRIGATION LINES—EASEMENT IN LAND—ADVERSE POSSESSION—BURDEN OF PROOF.

Where plaintiff's grantors entered upon land under an invalid deed, and maintained a water course over a part thereof openly, continuously, and with defendant's knowledge for more than five years, the burden is on defendant, in order to establish her exclusive title thereto, to show that plaintiff's user was by permission, or otherwise explain it.

5. ADVERSE POSSESSION—HOSTILE CHARACTER—PURCHASER UNDER INVALID DEED.

Where plaintiff's grantors entered under an invalid deed upon land, which defendant subsequently purchased upon foreclosure of a deed of trust executed before such entry, they did not become tenants by sufferance of defendant upon the execution of the trust and purchase by her, and their subsequent possession, in the absence of agreement, was as owner and claimant, which might ripen into a prescriptive title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 415–417.]

6. SAME—COLOR OF TITLE.

Code Civ. Proc. § 322, provides that the possession of property under exclusive claim of title under a written instrument for five years is deemed to be held adversely. Plaintiff's grantors entered upon land under a deed conveying no title, and maintained a water course thereon openly and continuously for five years, using the land as their own, and expressly claiming title thereto by virtue of the deed, and defending suits by defendant to oust them. *Held*, that the possession of plaintiff and his grantors was under color of title and adverse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 394, 409, 415–417.]

7. SAME—EXTENT OF POSSESSION.

The extent of the right obtained by an adverse holding under an invalid deed is not determined by the terms of the grant therein, but by actual occupation and use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 547–594.]

8. WATERS AND WATER COURSES—IRRIGATION LINES — RIGHTS OF WAY — ESTOPPEL TO CLAIM.

Condemnation proceedings brought by plaintiff to secure a right of way for an enlarged pipe line, and for several tunnels, would not estop him from asserting a prescriptive right to the land upon which the original line was maintained, since the proceedings were not to acquire the right then in use, but to enlarge it.

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Jesse Knight, trustee, against Emily G. Cohen and William Cohen. From a judgment in plaintiff's favor, defendants appeal. Affirmed.

See 90 Pac. 145.

J. J. Scrivner, Alfred H. Cohen, and Lawler, Allen & Van Dyke, for appellants. Anderson & Anderson and Munson & Barclay, for respondent.

SHAW, J. This is an action brought to obtain an injunction against defendants restraining them from cutting or otherwise interfering with a pipe line of plaintiff's extending across the land of appellant Emily G. Cohen, and by means whereof plaintiff conducts certain waters developed upon contiguous lands to the consumers thereof.

The case was submitted upon an agreed statement of facts, it being stipulated that the court might base its conclusions of law thereupon and render judgment accordingly. The court adopted the statement of facts as its findings, and, in addition thereto, found that all the allegations of the complaint were true, and that all of the denials of the answer to the complaint were untrue. These two findings should, if findings be necessary in such a case, dispose of the contention of appellant. It has been held, however, that, where a case is submitted upon an agreed statement of facts, no findings are necessary, the only question being as to what is the law applicable to those facts. Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; McMenomy v. White, 115 Cal. 339, 47 Pac. 109. This being true, it is necessary to call attention to such parts of this lengthy narrative as may be pertinent to a proper consideration of the question presented.

From this statement it appears that in 1893 May I. Gould, who was the owner of the land across which said pipe line extends, executed a deed of trust whereby she conveyed said lands to a trustee as security for the payment of a loan obtained from the appellant Emily G. Cohen. Default was made in the payment of this loan, and on February 20, 1899, the trust was executed by sale of the property to said Cohen, who immediately entered into possession thereof. On April 30, 1898, said Gould, the then occupant and owner of said land subject to said deed of trust, executed to one Dunham, the grantor of plaintiff, a deed whereby she granted to said Dunham a right of way across the lands in question for the construction of said pipe line, which he immediately constructed over and across said lands, since which time he and his successors in interest have continuously used said pipe line for the purposes for which it was intended. This deed to Dunham was not recorded, and defendants had no knowledge of its existence at the time Emily G. Cohen acquired title to and possession of the land. On May 25, 1899 (after Cohen had acquired title and possession of said land), Dunham joined with others in the execution of a deed whereby they conveyed said pipe line, with certain water rights and water-bearing land, to plaintiff. This deed was recorded May 31, 1899. Plaintiff and his predecessors in interest had for more than six years prior to the acts complained of maintained said pipe line across said lands of appellant Emily G. Cohen, and had been in the continuous, open, visible, and exclusive use and possession of said pipe line during all of said time under and by virtue of said grants from May I. Gould and said Dunham and others, and during all of said time had openly, visibly, notoriously, and continuously conducted waters over the said lands of said

Cohen through said pipe line without interruption in the use of said pipe line so granted to him and his predecessors by the aforesaid grants. It appears that since November 22, 1899, appellant Emily G. Cohen has been continuously engaged in litigation with plaintiff and others over the question of ownership of the waters carried through said pipe line by plaintiff and the right to the use thereof, in which litigation said defendant Emily G. Cohen has denied plaintiff's right to use or carry away any of said waters by means of said pipe line or otherwise. When said Cohen acquired title to said lands and took possession thereof on February 20, 1899, appellant learned that respondent was using said pipe line and operating the same over her land, but she had not learned that plaintiff claimed to have constructed said pipe line over said lands under and by virtue of the unrecorded deed from May I. Gould. On November 22, 1899, Emily G. Cohen commenced an action against the plaintiff, who, on February 6, 1900, in an amended answer filed therein, alleged that they (plaintiff herein and others) "admit that they conducted by means of pipes the waters of said springs and the said developed waters across certain lands described in the complaint, but allege that the same was under grant of right of way from May I. Gould of date April 30, 1898, to Edward Dunham, and under grant from William Hefferman to Edward Dunham, conveying said land to said Edward Dunham, of date April, 1898, and at date of said deeds May I. Gould was in possession of said land claiming the same, and said William Hefferman held the record legal title thereto." Hefferman held a sheriff's deed to said lands under a sale made upon execution issued upon a judgment rendered against said Gould. During all of the times in question plaintiff and his predecessors in interest maintained and operated said pipe line over and across said lands, and conducted water through the same with the knowledge of the appellant Emily G. Cohen, and without any objection or interference therewith from her, except as hereinafter stated, and without rendering any compensation for the use of said pipe line; but he never at any time informed her in words that he claimed a legal right so to do. On April 15, 1905, asserting her right so to do, defendant Emily G. Cohen broke and cut said pipe line, thereby preventing the use of the same by plaintiff, who immediately entered upon said lands along the line of said pipe line, and, after making the repairs necessary to restore it to a condition of usefulness, instituted this action, alleging in his complaint that defendants threatened to and would, unless restrained by an order of court, again destroy the pipe line and render it impossible to conduct the water through the same, all of which was admitted.

While freely admitting plaintiff's possession and use of the pipe line for a period of more than five years, and that such use and occupation was open, notorious, continuous, and uninterrupted, and with the knowledge and acquiescence of appellant Emily G. Cohen, it is nevertheless contended that these facts are insufficient to establish a prescriptive right in plaintiff, for the reason that it is not shown that such use and possession was under a claim of right, and hence the possession is lacking in one of the essential elements necessary to constitute an adverse holding, without which possession could not ripen into a prescriptive right. It is also insisted that as the sale under the deed of trust canceled all rights acquired by Dunham by virtue of the unrecorded deed from May I. Gould, such deed could not constitute color of title, and plaintiff's possession was therefore that of a tenant at will of appellant Emily G. Cohen. In Thomas v. England, 71 Cal. 460, 12 Pac. 493, it is said: "To perfect an easement by occupancy for five years, the enjoyment must be adverse, continuous, open, peaceable. It must be adverse, and under claim of a legal right so to do, and not by the consent, permission, or indulgence merely of the owner of the alleged servient estate." Adverse use is inconsistent with a license or permissive use. The occupation in order to constitute an adverse user must be based upon a claim of right. This claim may be made by acts alone quite as effectively as by the use of words either oral or written. Barnes v. Light, 116 N. Y. 34, 22 N. E. 441. Possession and user as owners are accustomed to hold and use such property without recognition of title in another, or disavowal of title in himself, will, if unexplained, raise a presumption of title in the occupant, and in the absence of evidence in rebuttal will establish the fact of a claim of title. La Frombois v. Smith, 8 Cow. 589, 18 Am. Dec. 463. "If there has been the use of an easement for 20 years unexplained, it will be presumed to be under a claim of right and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant, unless contradicted or explained." Washburn on Easements and Servitudes, p. 156. In Cox v. Forrest, 60 Md. 74, it is said: "Where one, however, has used a right of way for 20 years unexplained, it is but fair to presume the user is under a claim of right, unless it appears to have been by permission."

Under the admitted facts, it devolves upon appellant to show that the user was by permission, or otherwise explain it. The only contention upon this point urged by appellant is that, respondent having entered under the deed from May I. Gould, executed subsequently to the deed of trust, under which appellant Emily G. Cohen acquired title, became a tenant of said Cohen by sufferance in subordination to the title of appellant, which relation would continue until a disavowal on his part, with notice of such disavowal brought home to appellant. In support of this position counsel cites, among other cases, Graydon v. Hurd, 55 Fed. 724, 5 C. C. A. 258. This was a sale under a decree foreclosing a mortgage, and the decree directed that persons in possession of the land should deliver possession to the purchaser "on production of the deed to the premises and a certified copy of the order confirming the report of such sale after such order has become absolute." The court held that this order was a recognition of the relation of landlord and tenant by sufferance between the purchaser and occupant of the land. In its opinion the court says: "There is some conflict in the decisions of the state courts upon the question," thus apparently recognizing the fact that the Supreme Court of this state has held contrary to the rule there laid down. In McDermott v. Burke, 16 Cal. 580, the Supreme Court, in considering the questions says: "The relation between the purchaser and tenant is that of owner and trespasser until some agreement, express or implied, is made between them with reference to the occupation." No such agreement was ever made. Plaintiff never acknowledged any one as lessor, nor recognized the title of any one as being paramount to his own. He did not enter or occupy the land by virtue of any license or permissive right, but entered, as alleged in the answer filed on February 6, 1900, in the action brought by Emily G. Cohen against the La Canada Land & Water Company, under a grant of right of way from Gould and Hefferman, the latter alleged to be the holder of the legal title to the right so granted. That the legal title was vested in the trustee and the deed in fact conveyed no title is immaterial. It nevertheless constituted color of title (Wilson v. Atkinson, 77 Cal. 485, 20 Pac. 66, 11 Am. St. Rep. 299; Packard v. Moss, 68 Cal. 123, 8 Pac. 818; Cameron v. United States, 148 U. S. 308, 13 Sup. Ct. 595, 37 L. Ed. 459; Wood on Limitation of Actions, § 259); and whether sufficient or not, this allegation in the answer gave Emily G. Cohen notice (if notice were necessary) that plaintiff's occupancy was under a claim of right, and, under the provisions of section 322 of the Code of Civil Procedure, possession must be deemed to be held adversely.

The deed is of no consequence so far as defining the extent of the right; its only function being to furnish a basis for the claim, the extent of which is measured by actual occupation and use. "Where location and duration of a way are not defined, they may be fixed by use and acts of acquiescence." Washburn on Easements, § 239. The facts clearly show that the general attitude of the parties was from the first one of hostility towards each other, and that from November 22, 1899, they were continuously engaged in litigation. "The relations of the parties, their conduct, the situation of the property, and all the surrounding circumstances" (Clarke v. Clarke, 133 Cal. 667, 66 Pac. 10), evidence the fact that the use was under a claim of right, rather than by reason of a mere matter of neighborly accommodation.

We attach no weight to appellants' contention that the condemnation suit brought by plaintiff should constitute an estoppel against his plea of a prescriptive right. It clearly appears that the purpose sought was not to acquire by condemnation the right then in use, but a right of way for a pipe line of increased capacity, as well as certain tunnel rights.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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7 Cal. App. 76

NELSON v. NELSON. (Civ. 448.)

(Court of Appeal, Second District, California. Nov. 25, 1907. Rehearing Denied by Supreme Court Jan. 23, 1908.)

1. DIVORCE—DISPOSITION OF PROPERTY—COMMUNITY PROPERTY UNDER STATUTE.

Under Civ. Code, § 146, subd. 1, providing that upon granting a divorce for extreme cruelty the court may assign the community property to the parties in such proportions as it may deem just, plaintiff, on obtaining a divorce for extreme cruelty, cannot, because of that fact alone, claim as a matter of right more than half as the community property, the apportionment resting in the discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 714, 715.]

2. SAME — REVISION ON APPEAL — QUESTIONS PRESENTED BY RECORD.

Under Civ. Code, § 148, permitting revision of the trial court's disposition of community property in all cases, its award will not be disturbed where the facts and conditions upon which it was based do not appear from the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 768.]

3. SAME—PRESUMPTIONS—SALE OF COMMUNITY PROPERTY—NECESSITY.

Where property is ordered sold and the proceeds divided under Civ. Code, § 147, permitting the court, whenever necessary, to order the community property sold upon divorce and the proceeds divided between the parties, it will be presumed, nothing appearing to the contrary in the record, that the court upon sufficient facts deemed the sale necessary.

Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action for divorce by Emma Nelson against Carl I. Nelson. From that part of the judgment disposing of the community property, plaintiff appeals. Affirmed.

Paul E. Ussher and H. A. Massey, for appellant. Munson & Barclay, for respondent.

SHAW, J. Action for divorce upon the ground of extreme cruelty. The divorce was granted plaintiff upon the ground prayed for, and the community property, consisting of a lot and residence valued at $2,500, besides household furniture, was awarded in equal shares to the parties. The court adjudged that the real estate be at once sold for the sum of $2,500 cash, and ordered a commission issued to one Lacey to sell the same for said sum and divide the proceeds between the parties. Findings were waived. Plaintiff appeals on the judgment roll from that part of the decree awarding her one-half of the community property, and also from that part of the said decree ordering the real estate to be sold for $2,500 cash.

1. Appellant insists that, under the provisions of section 146 of the Civil Code, she was entitled to more than one-half of the community property. Subdivision 1 of said section provides: "If the decree be rendered on the ground of adultery, or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just." Section 148 of the Civil Code provides that the disposition of the community property and the discretion of the trial court in respect thereto are subject to revision on appeal.

Appellant's contention is that in all cases a party granted a divorce upon the ground of extreme cruelty is, by virtue of that fact alone, entitled to an award of more than one-half of the community property. We do not so interpret subdivision 1 of section 146 of the Civil Code. A wise exercise of discretion in considering all the facts of the case and condition of the parties may justify an equal division of the community property. When such an award is made, this court, in the absence of anything in the record disclosing the facts of the case and conditions upon which the court based such award, should not interfere with an order making such division. "Where the evidence is not in the record, and this court has not all the facts of the case and the condition of the parties before it, and cannot say that the division was not just, the action of the superior court in dividing the property will not be disturbed upon appeal." Gorman v. Gorman, 134 Cal. 378, 66 Pac. 313.

2. Section 147, Civ. Code, provides that, whenever necessary, in disposing of the community property, the court "may order a partition or sale of the property and a division or other disposition of the proceeds." Reid v. Reid, 112 Cal. 274, 44 Pac. 564. We must presume, in the absence of anything to the contrary in the record, that the court upon sufficient facts before it deemed it necessary, in making a division of the community property, to order it sold and the proceeds divided.

Judgment affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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7 Cal. App. 49

HARLAN v. GLADDING, McBEAN & CO. et al. (Civ. 361.)

(Court of Appeal, Third District, California. Nov. 22, 1907.)

1. ASSIGNMENTS—ORDER.

An instrument by which the drawees were directed to pay plaintiff $220 from the proceeds of a lot of hay in the course of shipment by the drawer to the drawees was a mere order and not an equitable assignment of the fund, and was therefore revocable by the drawer before acceptance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 99–105.]

2. SAME—ACTION.

No action can be maintained on an order for the payment of money drawn on a third person and revoked by the drawer before acceptance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 39.]

3. JUSTICES OF THE PEACE — JURISDICTION — PRESUMPTION.

The law presumes nothing in favor of the jurisdiction of a justice of the peace, a party asserting such jurisdiction being required to show affirmatively every fact necessary to create it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 216.]

4. SAME — EXCHANGE OF JUSTICES — WRITTEN REQUEST.

A justice of the peace of another township had no jurisdiction to sit in place of another justice in the absence of a written request from the latter, required by Code Civ. Proc. § 105.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 147, 206.]

5. BILLS AND NOTES—ORDERS—"DURESS."

Civ. Code, § 1567, provides that an apparent consent is not real or free when obtained through duress, and section 1569 declares that any unlawful detention of the property of any person constitutes duress. *Held* that, where plaintiff held possession of the property of the drawer of an order sued on under an attachment issued by a justice without jurisdiction, an order executed by the drawer to relieve his property from such writ was subject to rescission for duress under section 1566, providing that a consent which is not free is nevertheless not absolutely void, but may be rescinded, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 242–247.

For other definitions, see Words and Phrases, vol. 3, pp. 2268–2276; vol. 8, pp. 7645–7646.]

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Action by Paul C. Harlan against Gladding, McBean & Co. and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Paul C. Harlan, for appellant. T. T. Gregory, for respondents.

BURNETT, J. The nature of the action is shown by the following allegation of the complaint: "On January 6, 1904, * * * defendant herein, Jacob Kunzler, for a valuable consideration, duly assigned, by means of a written assignment and order to plaintiff herein, the claim of said defendant Jacob Kunzler against said defendant Gladding, McBean & Co. (a corporation) for $220 of the sum to be thereafter paid by said defendant Gladding, McBean & Co. to said defendant Jacob Kunzler for a certain lot of tule hay on said January 6, 1904, in course of shipment by said defendant Jacob Kunzler to said defendant Gladding, McBean & Co.; that said written assignment and order was, upon said January 6, 1904, and at and in the said county of Solano, executed and delivered to plaintiff herein by said defendant Jacob Kunzler; and that said written assignment and order was and is in the words and figures following, to wit: 'Suisun, Cal., Jan. 6, 1904. To Gladding, McBean & Co.: You are hereby directed to pay to Paul C. Harlan, Esq., two hundred and twenty dollars from the proceeds of the lot of tule hay now in course of shipment to your firm from this place. [Signed] Jacob Kunzler." Judgment was for defendants, from which plaintiff brings the appeal on a bill of exceptions.

The court finds that the instrument in writing set out in the complaint was "made, executed, and delivered by said defendant Kunzler to plaintiff; that thereafter the plaintiff presented said instrument to said Gladding, McBean & Co. and demanded payment thereof; that prior thereto said Kunzler notified, directed, and ordered said Gladding, McBean & Co. not to pay said plaintiff anything upon said written instrument, if the same were presented, and that he had revoked it; that thereupon said Gladding, McBean & Co. refused to pay to plaintiff any money upon said order; that at the time of such presentment of said order said Gladding, McBean & Co. had in its possession to the credit of said Kunzler as the proceeds and price of said lot of tule hay more than sufficient money to pay said order; that there is another action pending between plaintiff's assignee and the defendants involving the same cause of action; and that said order was made "under duress, and is without consideration, void, and of no effect." All the adverse findings are challenged by appellant as not supported by the evidence.

There is also a controversy between the parties as to the effect of the said written instrument; the appellant contending that it amounted to an equitable assignment to him pro tanto of the fund in the hands of the corporation due Kunzler, while respondents maintain that it was a mere order revocable by the drawer before acceptance by the drawee, and resulting in an equitable assignment only in case of said acceptance. It will be observed that there is nothing in the form of the instrument to indicate an assignment. It is simply an order upon Gladding, McBean & Co., given to plaintiff by Kunzler for the payment of a part of the fund in the hands of said company belonging to said Kunzler. There is nothing in the evidence to indicate that the instrument was intended as other than what its language imports. There seems no difference in principle between an order like this and the case of a check or bill of exchange. In Pullen v. Placer County Bank, 138 Cal. 172, 66 Pac. 740, 71 Pac. 84, in reference to checks, it is said: "A check is only a direction to the bank to pay a certain sum of money to the person therein named. The money does not thereby become the property of the payee, nor is it placed beyond the control of the depositor. Until it is presented to the bank, the drawer may countermand its payment, or he may direct a different disposition of the moneys to his credit." In Donohoe-Kelly Banking Co. v. S. P. Co., 138 Cal. 190, 71 Pac. 96, 94 Am. St. Rep. 28, it is said: "Turning to the view of the question present- by appellants, we find the cases quite numerous holding that an order, check, or bill of exchange, drawn for a part of a fund, does not operate as an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft." In the last-cited opinion a large number of cases is reviewed, among them Harrison v. Wright, 100 Ind. 515, 58 Am. Rep. 805, wherein it is declared: "In the absence of evidence to the contrary, or of a showing of an intention to assign a part of a fund in the hands of a drawee, * * * it should be presumed that the payee or holder of a check takes it upon the credit of the drawer, of whom he may collect if payment be refused by the drawee."

Here the evidence shows without conflict that Kunzler notified Gladding, McBean & Co. that he had revoked said order, and said company thereupon refused and declined to accept it and notified plaintiff of the revocation. Under such circumstances an action upon said order would not lie against either of the defendants.

Again, assuming that the instrument in question constituted an assignment, the court found that it "was made under duress." In this connection respondents contend that the action of the plaintiff in securing the order constitutes "coercion of the most pronounced degree." To understand respondents' position it will be necessary to bear in mind that the justice of the peace in Suisun township, A. F. Hitchcock, was ill, and he requested plaintiff to get Justice Klahn of Green Valley township, in the same county, to sit for him in the case. Plaintiff accordingly secured Justice Klahn, and after the proper preliminary proceedings were taken he issued the writ of attachment, which was levied upon Kunzler's hay. Section 105 of the Code of Civil Procedure provides a certain course to be taken to give authority or jurisdiction to a justice of the peace to try a cause in another township. There must be a written request of the other justice, "and while so acting he shall be vested with all the powers of the justice for whom he so holds court." No such course was pursued in this case, and hence it must be held that Justice Klahn was without jurisdiction. It is well settled that the law presumes nothing in favor of the jurisdiction of justices' courts, and a party who asserts a right under the judgment of a justice must affirmatively show every fact necessary to confer such jurisdiction. Swain v. Chase, 12 Cal. 283; Jolley v. Foltz, 34 Cal. 321; Kane v. Desmond, 63 Cal. 464; Eltzroth v. Ryan, 89 Cal. 140, 26 Pac. 647. As one of the steps necessary to confer jurisdiction upon Justice Klahn was lacking, the property of Kunzler was illegally detained by virtue of the writ of attachment. Section 1567 of the Civil Code provides that "an apparent consent is not real or free when obtained through (1) duress," and section 1569 provides that "duress consists in * * * (2) unlawful detention of the property of any such person."

In Brumagim v. Tillinghast, 18 Cal. 271, 79 Am. Dec. 176, it is said by the court, through Chief Justice Field: "What shall constitute the compulsion or coercion which the law will recognize as sufficient to render payments involuntary may often be a question of difficulty. It may be said in general that there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money."

Quotation is made with approval from Forbes v. Appleton, 5 Cush. (Mass.) 117, wherein it is said: "In general, the cases that have been treated as exceptions are cases where the possession of the property upon which the lien was claimed was already in the party demanding the money, or cases in which the party had no other means to save himself from imprisonment or his property from sale on execution or warrant of distress but by paying the money demanded."

Among other cases is also Mays v. Cincinnati, 1 Ohio St. 268, wherein it is stated that: "This unbroken chain of authority seems to warrant the conclusion that a payment of money upon an illegal or unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it."

Duress means a condition of mind produced by improper external pressure or influence that practically destroys the free agency of the party and causes him to do an act or make a contract not of his own volition, but under such wrongful external pressure, and it is to be determined by all the attendant facts and circumstances. Pride v. Baker (Tenn. Ch. App.) 64 S. W. 329; Collins v. Westbury, 2 Bay (S. C.) 211, 1 Am. Dec. 643. Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them but refuses to surrender them unless the exaction is endured. Fuller v. Roberts, 35 Fla. 110, 17 South. 359; Lonergan v. Buford, 148 U. S. 581, 13 Sup. Ct. 684, 37 L. Ed. 569.

In the case at bar plaintiff testified: "I think I may have stated to him, 'If you give me the order for this amount, I will let the hay go.' He wanted his hay. It was then being moved from the vessel over to the train. * * * I don't remember exactly how it happened; but the understanding was that as soon as he had entered into that agreement, and we had accepted that order, we were to release that hay, because that was the only object he had in giving the order." The foregoing would seem to establish the conclusion that the detention of the hay by plaintiff was unlawful; that its release was the moving influence, the external pressure that induced Kunzler to execute the order or assignment; and that his act was therefore, in contemplation of our statute, involuntary, and was lacking in the element of consent which is required for a valid agreement. However, it does not follow that the contract was void, as section 1566 of the Civil Code provides that "a consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission."

Kunzler rescinded promptly by notifying Gladding, McBean & Co. and also plaintiff through said firm of his revocation of said instrument, and as there was nothing for him to restore he seems to have done all that is required by the statute to constitute rescission.

The finding as to revocation is not as explicit as it should be, but in view of the evidence it could not be in favor of appellant. It is at least doubtful whether the court had any jurisdiction of the cause, but at any rate the judgment for the reasons stated is correct.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; Hart, J.

7 Cal. App. 8

ALPER et al. v. TORMEY et al. (Civ. 377.)

(Court of Appeal, Third District, California. Nov. 16, 1907. On Rehearing, Dec. 16, 1907. Rehearing Denied by Supreme Court Jan. 14, 1908.)

1. Adverse Possession—Hostile Character of Possession—Permissive Use.

By "permissive" use is meant a license exercised in subordination to another's claim and ownership.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 283.]

2. Appeal—Questions of Fact—Findings of Court—Conclusiveness.

Whether the use of an easement of a right of way was under a claim of right or in subordination to and recognition of another's title is a question of fact for the trial court, and its finding is binding on review if it finds any substantial basis in the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979-3982.]

3. Easements—Prescription—Presumption of Grant.

A grant of an easement will be presumed on proof of use and enjoyment for a time corresponding with the period of limitation for quieting title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 89.]

4. Same—Evidence—Sufficiency.

The presumption of a grant of an easement on proof of use and enjoyment for a time corresponding with the period of limitation for quieting title is itself evidence sufficient to support the finding that the use was under a claim of right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 89, 93.]

5. Same—Estoppel.

That defendant, as president of a corporation, recognized in leases and a mortgage executed on behalf of the corporation that it owned an easement of a right of way for a spur track as appurtenant to its plant, and that he had a map made of the corporation's property, and added the spur track because it did not appear on the official map, and caused blue prints to be made and circulated for the purpose of securing purchasers for the property at a sale thereof, while probably insufficient to create an estoppel to deny that the corporation owned the easement, is a potential circumstance in the determination of the character of the use of the easement.

6. Evidence — Weight of Testimony—Hostile Witness.

Where a witness, from his interest in the outcome of the suit, is naturally hostile, his testimony may be viewed in the light most favorable to the adverse party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2439.]

7. Easements —Creation—Evidence—Sufficiency.

In an action to restrain interference with the use of an easement, the evidence of defendant himself *held* to support a finding that the use of the easement was adverse and under a claim of right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 93.]

Appeal from Superior Court, Contra Costa County; W. S. Wells, Judge.

Action by A. Alper and others against Patrick Tormey and others. From a judgment for plaintiffs, and an order denying a new trial, Patrick Tormey appeals. Affirmed.

R. H. Latimer and L. F. Tormey, for appellant. Heller & Powers and L. H. Brownstone, for respondents.

BURNETT, J. This action was brought to restrain defendants from interfering with plaintiffs' use and enjoyment of certain railroad spur tracks. These spur tracks were connected with and constituted an important part of a large meat-packing plant owned and operated by the Union Stockyard Company, situated at Rodeo, Contra Costa county. Two tracks were built, both running—one easterly and the other westerly—from the buildings of the stockyard company to the main lines of the Southern Pacific Railroad Company. The east track, the only one in controversy here, was constructed some time prior to the other. The land upon which said buildings were located was originally bought by one Wheeler, and there is evidence justifying the inference that Tormey sold to him the right of way for the east spur track. Subsequently Wheeler conveyed all his rights to the said Union Stockyard Company, which was incorporated in 1890, and of the corporation Tormey became president. As such president, on behalf of said corporation, he executed leases and a mortgage of the corporation's property, including "all the buildings * * * and appurtenances now erected or in the process of erection upon said blocks, * * * and all and every railroad tracks and railroad superstructures which have heretofore and may hereafter be built by the party of the first part, leading from the line of the track of the Northern Railway Company now operated by the Southern Pacific Company, and used and intended to be used in connection with the improvements and machinery in said blocks, or any or either of them." In the year 1895 the corporation was adjudged an insolvent. Tormey, who was the largest creditor, was naturally interested in getting as much as possible for the property, and for that purpose he had a map made of it, and he added the east spur track, because it did not appear on the official map. He caused blue prints of this map to be made and circulated for the purpose of securing purchasers for the property. Judgment was rendered for plaintiffs against the defendants. The defendant Tormey appealed from said judgment, and from the order denying his motion for a new trial.

It is not disputed that plaintiffs acquired whatever rights the said corporation had in and to the said east spur track. The main controversy, however, is as to the sufficiency of the evidence to support the finding "that said defendant Tormey granted to said Union Stockyard Company, plaintiffs' predecessor in title, before or at the time said spur tracks were constructed, the right of way over the said property owned by him on which said spur tracks are now situated for said spur tracks and for the uninterrupted use of the same, and plaintiffs and their predecessors in title have been in the continuous, open, and peaceable possession of said right of way and said spur tracks for more than nine years last past, and said possession has been under a claim of title and adverse to these defendants and to all the world, and defendants have had knowledge thereof." It will not be controverted that if the evidence shows a title by prescription this is sufficient to uphold the judgment regardless of whether a grant was actually proved. The elements of title by prescription are so familiar as not to require restatement. We simply refer to a few of the many cases where the subject is discussed. Barbour v. Pierce, 42 Cal. 662; Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Alta Land Co. v. Hancock, 85 Cal. 226, 24 Pac. 645, 20 Am. St. Rep. 217; Franz v. Mendonca, 131 Cal. 205, 63 Pac. 361; Clarke v. Clarke, 133 Cal. 667, 66 Pac. 10; Franz v. Mendonca, 146 Cal. 640, 80 Pac. 1078; also Am. & Eng. Ency. of Law, vol. 22, p. 1183, and notes. There is no question here that the use of the easement was open, notorious, peaceable, continuous for the statutory period, and with the knowledge and acquiescence of the defendants.

There is only one proposition concerning which there can be any difference of opinion, and that is whether said use was under a claim of right, or in subordination to and recognition of Tormey's title. Appellant claims that the evidence shows that the use was only "permissive" and not "adverse." There is some confusion in many of the cases in the use of the term "permissive," as an adverse possession in a sense must be by permission or acquiescence of the one against whom it is invoked. But, imputing to the term the meaning clearly intended of a license exercised in subordination to appellant's claim and ownership, still it is a question of fact to be determined by the trial court, and under the well-established rule its determination against appellant's contention is binding upon us, if it finds any substantial basis in the evidence. Appellant insists that the burden is upon plaintiffs to prove the easement citing American Co. v. Bradford, 27 Cal. 361; De Frieze v. Quint, 94 Cal. 663, 30 Pac. 1, 28 Am. St. Rep. 151; Ball v. Kehl, 95 Cal. 613, 30 Pac. 780; San Francisco & S. J. V. Ry. Co. v. Leviston, 134 Cal. 412, 66 Pac. 473. But he seems to lose sight of the fact that it is not a question here of who has the burden of proof, or whether the issue has been established by a preponderance of the evidence, but that the only consideration concerning us is whether there is any evidence to support the finding of the trial court.

In reviewing the action of the lower court the following obvious reflections must be taken into account: A grant of an easement will be presumed on proof of use and enjoyment for a time corresponding with the local period of limitation for quieting titles to land. Am. & Eng. Ency. of Law, supra. This, of course, is equivalent to the presumption that the use was under a claim of right, as the grantee holds adversely to the grantor, and not in subordination to the latter's title. This presumption is itself evidence which is sufficient to support the finding. Again, the conduct of appellant is consistent only with the position that it was understood that the corporation owned the easement as appurtenant to its manufacturing plant. Appellant so recognized it in the execution of the instruments to which we have referred, and in the blue prints which he made and circulated. This is probably insufficient to create an estoppel, but it is a potential circumstance in the determination of the character of the use of the easement. Even if appellant had testified positively that there was no such grant, and that the use was only "permissive" and not under a claim of right, we cannot say that the trial court would have been bound to so find in opposition to the adverse inferences suggested by his conduct and the said presumption. Again, plaintiffs, to establish their case, relied largely, as far as the testimony of witnesses is concerned, upon that of appellant himself. The court had a right to consider the fact that from his interest in the outcome he was naturally a hostile witness, and there is justification for viewing his testimony in the light most favorable to respondents' contention. In that testimony we think there is positive support for the conclusion that the use of the easement was adverse and under a claim of right. Appellant, among other things, testified: "It was always understood by everybody that those tracks were to be used in conjunction with the slaughter house. The tracks were put down for the use of the packing houses. There wasn't any question about the spur tracks being used for the benefit of the packing houses, except a part of the spur tracks were on my land, and it was understood that the Union Stockyard Company should buy a piece of land from me and have it surveyed, and they never paid me for it, and I never gave them a deed. * * * I never heard any question as to the title of the stockyard company to any of the property that they had. It was always assessed to them. * * * The stockyard company never had any trouble with anybody about the tracks. Whenever they wanted to use it they used it without anybody's objecting. * * * I never made any opposition to them building the switch, because they asked my consent about it, and I gave them my consent. * * * I didn't inform anybody that I claimed the land east of the town free from any easement. The time I tore up the tracks and made a demand for the box shucks was the first time I ever claimed to have the right to forbid anybody using the spur tracks. That was in July, 1901. * * * Mr. Wheeler bought 700 acres down towards the powder works. He said, 'I want to buy 800 or 900 acres from you.' I said, 'Mr. Wheeler, you come down on the ground, and whatever you take off the front you take right back to the county road parallel to that line of fence and lay this track down, and, of course, this tract outside of this land was sold,' and Mr. Wheeler said then, 'When we get this thing fixed up we will pay you for that.'"

It would seem to be a fair inference from the foregoing that it was the intention of the parties that at the time of said conversation the title should pass from appellant to Wheeler. It was an attempt to sell, and not simply an agreement to sell in the future. The subsequent conduct of the parties shows that they considered the transaction a sale, at least to the extent of the easement, and even of the small strip of land over which the spur track was laid. It does not affect the case that the price was not paid. It is unfortunate that the corporation became involved, and presumably was not able to pay its debts in full; but this does not change the rule that "a parol gift or grant of the right of way or easement followed by possession, use, and enjoyment of it, with the knowledge of the grantor or donor for over five years, invests the grantee or donee with an absolute title to the right of way or easement." Ashley v. Ashley, 4 Gray, 197; Sumner v. Stevens, 6 Metc. 337; Arbuckle v. Ward, 29 Vt. 43. Of course, it is technically inaccurate under our practice to characterize the agreement of sale as a "parol grant"; but the transaction furnished Wheeler a "color of title," and afforded convincing evidence that his possession of the easement was begun and continued under claim of right.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Petition for Rehearing.

BURNETT, J. After a careful examination of appellants' petition herein for a rehearing of the cause before this court, we see no reason for a modification of the views expressed in the main opinion rendered in said cause.

A rehearing is therefore denied.

We concur: CHIPMAN, P. J.; HART, J.

152 Cal. 602

GLASS v. LAWLOR, Judge.

(Supreme Court of California. Jan. 3, 1908.)

COURTS—APPELLATE JURISDICTION—DISTRICT COURT OF APPEAL.

Code Civ. Proc. § 652, and Pen. Code, § 1174, providing for proving exceptions, being merely incidental to appeals, fall within the provision of Const. art. 6, § 4, providing that existing statutes as to appeals to the Supreme Court shall apply to appeals to the District Court of Appeal so far as consistent with that article, and hence the District Court of Appeal may take cognizance of a proceeding to prove an exception without an order from the Supreme Court transferring the matter to it for decision.

In Bank. Original application to the Supreme Court by Louis Glass for an order transferring to the District Court of Appeal for the First District a proceeding to prove an exception improperly disallowed by the superior court for use on his appeal to the District Court of Appeal from a conviction in the superior court.

BEATTY, C. J. The petitioner having been convicted in the superior court upon a criminal charge, has appealed to the District Court of Appeal for the First District, which, in his case, is the proper court of review on direct appeal. For the purpose of the appeal he desires to prove an exception which he alleges the trial court has wrongfully refused to allow. For this purpose he has filed a petition in said District Court of Appeal, but the justices of that court being doubtful of their authority to grant the relief prayed without an order of this court transferring the matter to them for hearing and decision, he has made application here for such an order.

We do not deem it necessary to make any special order of transfer, as we think the District Court of Appeal has been given authority to act in such matters by the recent amendment to article 6 of the Constitution by which the court was created and its jurisdiction defined. By section 4 of that article it is provided: "All statutes now in force allowing, providing for, or regulating appeals to the Supreme Court shall apply to appeals to the District Courts of Appeal so far as such statutes are not inconsistent with this article and until the Legislature shall otherwise provide."

We are of the opinion that the provisions for proving exceptions (Code Civ. Proc. § 652; Pen. Code, § 1174), and for obtaining certificates of probable cause for appeal (Pen. Code. § 1243), being merely incidental to appeals, fall within the meaning of this clause of the Constitution, and that petitions under these sections, and all others relating to the mode of presenting appeals or stay of proceedings pending appeal, are properly cognizable in the "District Court of Appeal having jurisdiction under the Constitution of the particular cause by direct appeal from the trial court."

The petition is returned to the District Court of Appeal for such action as is proper in the premises.

We concur: LORIGAN, J.; SHAW, J.; HENSHAW, J.; ANGELLOTTI, J.

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152 Cal. 579

CITY OF SOUTH PASADENA v. PASADENA LAND & WATER CO.

(L. A. 1,793.)

(Supreme Court of California. Jan. 2, 1908.)

1. WATERS AND WATER COURSES — WATER COMPANIES—FRANCHISES AND PROPERTY—TRANSFERS.

A quasi public corporation, engaged in supplying water for public use, cannot, without legislative sanction, transfer to another the entire property devoted to such service and the business of carrying it on.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 287.]

2. CORPORATIONS — TRANSFER OF PROPERTY — LEGISLATIVE AUTHORITY.

In the absence of legislative restrictions, an ordinary commercial corporation, not doing a public service business, can alienate its entire property whenever it is necessary or proper to do so for the best interests of its stockholders and creditors.

3. WATERS AND WATER COURSES — WATER COMPANIES — TRANSFER OF PROPERTY AND FRANCHISE—STATUTES.

Civ. Code, § 361a, providing that no transfer of the business, franchise, and property, as a whole, of any corporation, shall be valid without the consent of two-thirds of the stockholders thereof, etc., embodied in the part of the Code devoted to provisions concerning corporations, expresses a consent to a transfer in the manner prescribed, prohibits a transfer in any other mode, deprives ordinary business corporations of the power previously possessed of alienating its entire property, and confers on quasi public corporations authority to transfer their entire property, franchises, and business as a whole, and a public service corporation engaged in supplying water for public use may transfer its property, franchise, and business as a whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 287.]

4. SAME—FRANCHISES.

The right of a quasi public corporation, engaged in supplying water for public use, resulting from its laying and using water pipes in the streets of a city, as authorized by Const. art. 11, § 19, is a species of real property, properly designated as a franchise, and is transferable, under Civ. Code, § 361a, relating to the transfer of the business, franchise, and property of a corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 287.]

5. Same.

A transfer by a quasi public corporation engaged in supplying water for public use of its business, franchise, and property as a whole, as authorized by Civ. Code, § 361a, does not relieve the franchise or any property held under it or for its operation from any liability, and the transfer is not prohibited by Const. art. 12, § 10, providing that the Legislature shall not pass laws permitting the alienation of any franchise, so as to release the franchise or property held thereunder from the liabilities of the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 287.]

6. Mandamus — Water Companies — Performance of Obligations.

Persons to whose use water is appropriated or dedicated by a quasi public corporation engaged in supplying water for public use, whether the water is supplied for use on land for irrigation, or for personal use, to all persons within a specified territory, are vested, under Const. art. 14, § 1, and Civ. Code, §§ 549–552, relating to the use of water appropriated for sale or distribution, etc., with a right to have the supply continued by whosoever may be in control of the corporation, which right is enforceable by mandamus.

7. Corporations—Transfers of Property.

A transfer of property used in public service from one corporation to another is invalid unless the transferee has power to accept the property and continue the use to which it has been devoted.

8. Municipal Corporations — Acquisition of Water System—Statutes.

Under St. 1891, p. 102, c. 96, authorizing any city to acquire water rights, etc., for supplying its inhabitants with water, and under the charter of the city of Pasadena [St. 1901, pp. 888–890, c. 11, and St. 1905, pp. 1019, 1021, c. 19] authorizing the city to maintain waterworks for supplying its inhabitants with water, and to purchase property both within and without its limits, etc., the city has authority to acquire and carry on a water system outside the city, so far as it may be necessary or convenient to accomplish the main purpose of furnishing water to it and its inhabitants.

9. Same.

A mere grant of power to a city to provide and supply water to its inhabitants gives power to acquire for that purpose water supplies without the city.

10. Same — Powers Incident to Those Granted.

The powers of a municipal corporation include not only those expressly named in the grant of powers, but also the authority to do such acts as are incidental and necessary to the exercise of the powers specifically granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 149.]

11. Evidence—Judicial Notice.

The court will take judicial notice that designated cities are situated in an arid region where there is little, if any, water not already applied to some valuable public or private use, and that the water sources in that vicinity are in great demand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 9, 10.]

12. Waters — Public Water Supply — Acquisition of Waterworks System.

A city acquiring the property, franchise, and business of a quasi public corporation engaged in supplying water to a municipality subject to the power of the municipality to fix the rates for water supplied, and to control the manner of laying pipes in its streets, acts in a proprietary capacity in carrying on the obligations of the quasi public corporation to supply water to the municipality, and the powers of the city and the municipality are separate and distinct, and the city is under the obligation and possesses the rights of the quasi public corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 278.]

13. Municipal Corporations — Powers — "Municipal Affair."

The supplying of water by a city to outside territory, when incidental to the main purpose of supplying water to its own inhabitants is a "municipal affair" of the city, within Const. art. 11, § 6, providing that the charters of cities "except in municipal affairs" shall be controlled by general laws, and the charter of the city prevails over the general legislation embodied in Act March 27, 1897, St. 1897, p. 182, c. 121, authorizing a city, having in its supply more water than is necessary for its inhabitants, to sell the surplus, etc.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4619; vol. 8, p. 7726.]

14. Same.

Where a quasi public corporation engaged in supplying water to the inhabitants of a municipality transfers its property, franchise, and business to a city, empowered to acquire a waterworks system, the city acquires the property, franchise, and business of the corporation, subject to the obligation to furnish water to the inhabitants of the municipality, which obligation it must perform.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 278.]

15. Waters—Public Water Supply—Rights in Streets—"Corporation Duly Incorporated."

Where a city, pursuant to its authority to acquire a waterworks system to supply water to its inhabitants, purchases the property, franchise, and business of a corporation engaged in supplying water to the inhabitants of a municipality, and the city possesses as an incident to its power to supply water to its inhabitants power to furnish water to others, the city is a "corporation duly incorporated" within Const. art. 11, § 19, providing that in any city, where there are no municipal waterworks, any "corporation duly incorporated for such purpose" may lay mains in the streets for supplying water.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 279.]

16. Equity—Adequacy of Legal Remedy.

Where the remedy by mandamus is adequate, a suit in equity cannot be maintained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 151, 152.]

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by the city of South Pasadena against the Pasadena Land & Water Company. From a judgment for defendant rendered after sustaining a general demurrer to the complaint, plaintiff appeals. Affirmed.

John E. Carson and Lynn Helm, for appellant. Anderson & Anderson, for respondent.

SHAW, J. The defendant is a corporation engaged in supplying water to certain parts of the cities of Pasadena and South Pasadena, respectively, for the use of the respective inhabitants thereof within said territories, and to the said cities, respectively, for sprinkling of streets. The territory thus supplied within South Pasadena embraces from one-half to two-thirds of its area. This suit is to enjoin the defendant from selling and transferring to the city of Pasadena its water, water rights, water plant or system, and all franchises and property of any and every description heretofore used by the defendant in so supplying said water to the plaintiff and its inhabitants, as aforesaid. It appears that the defendant is about to make such transfer, so far as it has the lawful power to do so. A general demurrer to the complaint was sustained, and thereupon judgment was given for the defendant, from which the plaintiff appeals. The record further shows that an answer was filed with the demurrer, that plaintiff demurred to the answer and moved to strike out certain parts thereof, and that this demurrer was overruled, and the motion denied. As we have concluded that the demurrer to the complaint was properly sustained, the other orders are immaterial to the disposition of the appeal.

It is proper to say here that two other cases, namely, Graham v. Pasadena Land & Water Company (L. A. No. 1,957) 93 Pac. 498, and Orcutt et al. v. Pasadena Land & Water Company and the City of Pasadena (L. A. No. 1,958) 93 Pac. 497, the latter begun by residents of South Pasadena, entitled to water from the defendant water company, and the former by a stockholder of the defendant herein, to obtain similar relief were submitted with this case, and that, as requested by counsel, the briefs in those cases have been considered in this case, so far as applicable.

The appellant presents for our determination four questions: First. Has the Pasadena Land & Water Company, while it continues to exist as a going corporation and without the assent of the state, power or authority to transfer its entire property, privileges, and franchises, and thereby discharge itself of the duty and deprive itself of the ability to continue the public service of supplying water to the plaintiff and its people? Second. Has the state consented to such transfer? Third. Has the city of Pasadena, to which the transfer is to be made, power to accept said property, privileges, and franchises and to perform the duties to the plaintiff and its people hitherto imposed upon and performed by the Pasadena Land & Water Company, and which constitute a charge upon the property to be transferred? Fourth. If such power is possessed by the respective corporations, as aforesaid, can the subsequent performance of such duties by the city of Pasadena be enforced by the city of South Pasadena and its inhabitants entitled to the water, or only by the grantor, the Pasadena Land & Water Company? The first, second, and fourth of these propositions will be considered together.

1. The respondent is a quasi public corporation, engaged in supplying water for public use. This is admitted, and it is also conceded that corporations of that character cannot, without legislative sanction, transfer to another the entire property devoted to such service and the business of carrying it on. This appears to be settled by the authorities. Visalia Gas, etc., Co. v. Sims, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. Rep. 105; Thomas v. Railroad Co., 101 U. S. 82, 25 L. Ed. 950; Central T. Co. v. Pullman P. P. Co., 139 U. S. 48, 11 Sup. Ct. 478, 35 L. Ed. 55; Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; York, etc., Ry. Co. v. Winans, 17 How. (U. S.) 30, 15 L. Ed. 27; Green Bay, etc., Co. v. Union S. B. Co., 107 U. S. 98, 2 Sup. Ct. 221, 27 L. Ed. 413; Cumberland T. & T. Co. v. Evansville (C. C.) 127 Fed. 187; Morawetz on Cor. §§ 565, 1114, 1115, 1129; 1 Clark & Marshall on Cor. § 162. In 1903 the Legislature enacted section 361a of the Civil Code, which reads as follows: "No sale, lease, assignment, transfer, or conveyance, of the business, franchise and property, as a whole, of any corporation now existing, or hereafter to be formed in this state, shall be valid without the consent of the stockholders thereof, holding of record at least two-thirds of the issued capital stock of such corporation; such consent to be either expressed in writing executed and acknowledged by such stockholders, and attached to such sale, lease, assignment, transfer, or conveyance, or by a vote at a stockholders' meeting of such corporation, called for that purpose; but with such assent, so expressed, such sale, lease, assignment, transfer, or conveyance shall be valid; provided however, that nothing herein contained shall be construed to limit the power of the directors of such corporation to make sales, leases, assignments, transfers, or conveyances of corporate property other than those hereinabove set forth." This enactment is not, on its face, a mere negative or prohibitive statute, forbidding that which before was permitted. It is both affirmative and negative in its terms. Its affirmative provisions may be paraphrased thus: "With the consent of the stockholders thereof, holding of record at least two-thirds of its issued capital stock (expressed in the prescribed manner), any corporation in this state may make a valid sale, lease, assignment, transfer or conveyance of its business, franchises and property, as a whole." It expresses a consent to such transfer in the manner prescribed, as well as a prohibition against such transfer in any other mode.

In the absence of legislative restrictions, it is the law in this state that an ordinary commercial corporation, not doing a public service business, can alienate its entire property whenever it is necessary or proper to do so for the best interests of its stockholders and creditors. Miner's Ditch Co. v. Zellerbach, 37 Cal. 588–592, 99 Am. Dec. 300. And it would seem that the stockholders and creditors, alone, would have the right to object to such a transfer by a corporation of that character (Oakland R. R. v. Oakland, etc., R. R. Co., 45 Cal. 379, 13 Am. Rep. 181; Illinois Bank v. Pacific Railway Co., 117 Cal. 332, 49 Pac.

197), though we presume the state could maintain an action to forfeit the corporate franchise for nonuser or misuser. In the case first cited, the Miner's Ditch Company, which had transferred its entire property, was, in fact, a water company selling water upon the market to miners for their use. But this was before the Constitution of 1879 had declared the use of water for sale, rental, or distribution, to be a public use. The opinion distinctly declares it to be a matter of private concern only, and the decision is expressly based on that fact, distinguishing that class of corporations from quasi public corporations. The effect of this statute is, therefore, twofold. It deprives ordinary private business corporations of the power they previously possessed to dispose of their entire property, franchises, and business, as a whole, at the will of a mere majority of the stockholders, or of less than two-thirds of them, and it confers upon quasi public corporations the power to make such dispositions with the consent of two-thirds of the stockholders expressed in the mode fixed, a power which such corporations did not have before. The words of the section expressly apply to "any corporation" then existing or thereafter to be formed. It constitutes a part of the Code devoted to general provisions concerning all corporations, except those of a public nature, such as cities, counties, school districts, and the like. There is nothing in the context of the Code which requires, or would justify, an interpretation limiting its meaning so as to exclude quasi public corporations. The words are express—positive—not at all ambiguous in this particular, and the intent is clear. There is no occasion for resorting to implication to give them an effect not expressly declared, nor for applying the rules restricting the meaning of ambiguous statutes affecting public interests. It is suggested that, if taken literally, it would give power to transfer the corporate franchise, the right to be a corporation and do business in that capacity. We do not perceive that this is important in this case, even if it were true, for it is not alleged that the defendant is attempting to transfer any franchise of that character. The Legislature doubtless had in mind the fact that there are many quasi public corporations doing business in the state, and possessing rights and privileges, properly termed "franchises," which they had acquired and possessed after they became incorporated, and which they had devoted to the public service in which they were engaged, and which, therefore, could not be disposed of without legislative assent, and the word "franchise" was aptly used to describe this class of property and leave no doubt as to what was intended. The transfer of all its property would not work a dissolution of the corporation, nor operate as a transfer of the corporate franchise. Miner's Ditch Co. v. Zellerbach, supra, page 590 of 37 Cal. (99 Am. Dec. 300).

The defendant company had laid its water pipes in the streets of the cities of Pasadena and South Pasadena, was using those streets as a way through which to transmit water to the users, and had the right to make this use of the streets under the provisions of article 11, § 19, of the Constitution. This right, when made available by actual possession and use, is a species of real property, appropriately designated as a franchise. Stockton, etc., Co. v. San Joaquin Co., 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174. The appellant argues that this right, or franchise, is not in its nature, transmissible, or alienable, unless the precise mode of transfer is fixed by statute, and a means provided for the enforcement of the use against the transferee, and that section 361a is inadequate in these respects. In this connection counsel cite section 10 of article 12 of the Constitution, which is as follows: "The Legislature shall not pass any laws permitting the leasing or alienation of any franchise, so as to release the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges."

It is urged that the effect of a transfer, such as that here proposed, would relieve the defendant corporation of its duty to continue the service of supplying water, which is imposed upon it by reason of its control of the water and its enjoyment of the constitutional franchise to use the streets for its pipe lines, and that there would be no corresponding transfer of the duty to the transferee of the property, the city of Pasadena, nor any means of enforcing from said city the performance of that duty. The section does not forbid the transfer of a franchise so as to relieve the previous owner thereof, or the grantee or lessee, personally, from liability incurred in the operation of the franchise, if such a thing were possible. It merely forbids the transfer of a franchise "so as to relieve the franchise, or property held thereunder," from liabilities so incurred or contracted. The Code section (361a) authorizes a transfer of such franchise, or of all the interest the possessor may have in it, but it does not purport to relieve the franchise itself, or any property held under it or for its operation, from any liability or charge imposed, or to be imposed, upon it. If the proposed transfer provided that the property and franchise should be free from any such liability existing against it, or thereafter to arise from its possession and use, or attempted to transfer it so as to free it therefrom in the hands of the transferee, the transaction would be, to that extent, void, and the transferee would take the franchise and property pertaining to it subject to all the burdens of this nature, and, so long as it held it, would be obliged to continue the performance of the public service to which the property and franchise had been dedicated, or to allow others to do so in its behalf. Fellows v. Los Angeles (Cal.

Sup.) 90 Pac. 141. This is the purpose and effect of the constitutional provision above given. The transfer will have the effect of divesting the defendant company of the property, and as, according to the admitted allegations, there is no other water supply available, it will then have neither the means nor the ability to continue the performance of the public duty of supplying water for public use. It could not directly abnegate this personal duty without the consent of the proper public authority, and, of course, it could not do it indirectly by the device of transferring to another the only means whereby the duty could be performed. The effect of the statute (section 361a) is to give this consent, in pursuance whereof the public agent in charge of the use and property will be changed, and the effect of the constitutional provision is that the new agent must continue to devote the property to the same use as before. There does not appear to be anything unlawful, unconstitutional, or improper in a change so made.

The contention that no remedy exists to compel performance by the successor in interest, is without force. In case of the establishment of a water system of this character, all the persons to whose use the water is appropriated or dedicated are vested with a right to have the supply continued by whomsoever may be in control thereof. Const., art. 14, § 1; Civ. Code, §§ 549-552; Crow v. San Joaquin, etc., Co., 130 Cal. 309, 62 Pac. 562, 1058; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264; Price v. Riverside, etc., Co., 56 Cal. 432. If the water is supplied for use upon land for its benefit, as for irrigation, the right to receice and use it becomes in the nature of an appurtenance to the land. If it is supplied for personal use to all persons within a certain territory or to all of a certain class within the territory, the right to its use is personal to the inhabitants of the territory, or to the members of the class, as the case may be, so long as they remain such. In either case the right may be enforced against the person in control of the supply and the works by which it is distributed, regardless of the title, by means of an action in mandamus to compel the continuance of the distribution, in the usual and proper manner, to those entitled. Price v. Riverside, etc., Co., page 434 of 56 Cal.; Merrill v. South Side Irr. Co., 112 Cal. 426, 44 Pac. 720; Fellows v. Los Angeles, supra.

Our conclusion is that all of the objections to the validity of section 361a, and all of the reasons advanced for giving it a meaning different from its literal import, are untenable, and that it gives authority to the defendant to make the transfer of its business, franchises, and property, as a whole, in the manner prescribed and as here proposed. It is admitted that the statutory manner of making the transfer has been and will be followed.

2. It is settled law that a transfer of property used in a public service, from one corporation to another, although made by a corporation having power to convey, is invalid unless the transferee has the power to accept the property, and continue the use to which it has been devoted. If such power is wanting in the transferee, the transfer is not binding on the grantor or lessor. Central Transportation Co. v. Pullman P. P. Co., supra; Thomas v. Railroad Co., supra; Oregon Ry. Co. v. Oregonian Ry. Co., supra; Pennsylvania R. R. Co. v. St. Louis R. R. Co., 118 U. S. 307, 6 Sup. Ct. 1094, 30 L. Ed. 83. For the purposes of the case we may concede that the plaintiff, or any private party, has sufficient interest to raise this question.

We are of the opinion that the city of Pasadena has the power to accept the transfer in question, and to undertake and perform the public service of supplying the water to the cities of Pasadena and South Pasadena and the respective inhabitants thereof, as it has been heretofore supplied, which is the duty attached to the property and imposed upon the possessor thereof. The statute of 1891 on this subject is broad and comprehensive. It is as follows: "Any incorporated city in this state may acquire by gift, purchase, or condemnation proceeding under the power of eminent domain, water, water rights, reservoir sites, rights of way for pipes, aqueducts, flumes, or other conduits, and all other property and appliances suitable and proper for supplying such city and its inhabitants with water." St. 1891, p. 102, c. 96. The special charter of the city of Pasadena gives the city power, "to construct and maintain water works, pipes, pipe lines, aqueducts and hydrants for supplying the city and its inhabitants with water, and the right to supply water to persons who live without the city limits." Subdivision 8, § 3, art. 1, St. 1905, p. 1021, c. 19. It further provides for a board of water commissioners of five members, which board is given "control and management of all water and waterworks that now belong, or may hereafter be acquired by the city," and for a "water fund" which may be applied to the "purchase of necessary lands, water rights, and other property" for the improvement of the water system. Subdivision 2, § 6, art. 6½, St. 1905, p. 1019. Subdivision 4 of section 3, art. 1, gives the city power "to purchase, receive, have, take, hold, lease, use and enjoy property of every kind and description, both within and without the limits of said city and control and dispose of the same for the common benefit." By subdivision 16 of the same section power is given to create a bonded debt, equal to 15 per cent. of the assessed value of the property, to pay the cost of public utilities, and under subdivision 23 it may exercise the right of eminent domain to acquire "water, water rights and waterworks, within or without the corporate limits, necessary or convenient for the use of said city and its inhabitants." St. 1901, pp. 888-890, c. 11.

These provisions are ample to confer power to acquire and carry on a water system outside the city, so far as it may be necessary or convenient to do so in order to accomplish the main purpose of furnishing water to the city and its inhabitants. Indeed, it is so seldom that a water supply can be obtained within the limits of a city, especially in this state, that a mere grant of power to provide and supply water to the city and its inhabitants would be construed to give power to acquire for that purpose water supplies without the city. The powers of a municipal corporation include not only those expressly named in the grant, but also "the authority to do such subsidiary acts as are incidental and necessary to the exercise of" the powers specifically described. Von Schmidt v. Widber, 105 Cal. 157, 38 Pac. 682. Or, as stated by Mr. Dillon, they include "those necessarily or fairly implied in or incident to the powers expressly granted." 1 Dill. Mun. Cor. (4th Ed.) § 89; Hammond v. San Leandro, 135 Cal. 452, 67 Pac. 692. Under powers much less comprehensive in terms it has been held that a municipal or public corporation may carry on a system and supply water to persons outside its limits, whenever it becomes necessary or convenient to do so in order to accomplish the main purpose of supplying waters to those within. In Fellows v. Los Angeles, supra, in considering a provision merely giving that city power to acquire water and water rights within or without the city for the use of its inhabitants, it is said: "In the exercise of this power, it would have the right to buy from any corporation or person, engaged in supplying water for public use outside the city, any surplus water which such person might possess. If it were necessary, in order to obtain such surplus, the city might, under this power, purchase the entire water supply of such person or corporation and the water plant or system used in connection with it, so that, after operating the system and supplying the persons entitled to use the water, it could devote the surplus to the use of the inhabitants of the city." In Hewitt v. San Jacinto Irr. Dist., 124 Cal. 192, 56 Pac. 893, it was held that an irrigation district, under its general power to acquire and hold such water, water rights, and other property as should be necessary to supply water to irrigate the lands within the district, had power to purchase and hold water already in part used on lands outside the district, to take it subject to such use, and to continue to furnish the water to such outside lands as it had been furnished before. These authorities would seem sufficient to settle the question in favor of the respondent. The ingenuity of counsel for appellant has, however, suggested many objections to the rule stated and difficulties which he fears may arise in its application, and, in view of the importance of the question, we deem it proper to discuss them at more length.

In considering what powers are necessary, incidental, or fairly to be implied from the powers expressly given to the city of Pasadena by the foregoing provisions, it is proper to look to the conditions surrounding the city at the time. The court will take judicial notice that the two cities interested are situated in a comparatively arid region where there is little, if any, water not already applied to some extremely valuable public or private use, and that water sources in that vicinity are in great demand, and command a high price where they can be purchased at all. It appears from the complaint that for many years the defendant company has been supplying water to portions of the two cities, precisely as it does now, the area supplied in South Pasadena being about two-thirds of its territory, that more than 300 families are now supplied therein from this source, and that if they are now deprived thereof there is no other known source from which it can be replaced, and they would be without water for any purpose. It may well be assumed that Pasadena could obtain no sufficient quantity of water for a municipal water system, except by buying or condemning that portion of the water of the defendant company now distributed to its inhabitants, or some other supply already devoted to use outside the city. It would be bad public policy under these conditions, to require a city, desiring to obtain water for its inhabitants, to take water in use by others for similar purposes outside its limits, where the effect would be to devastate and depopulate such outside territory. To condemn the individual right of each member of the outside community would be impracticable, and even if it could legally be done it would probably prove too costly for the resources of the city. To separate the supply, and endeavor to control, manage, and, if necessary, develop and increase the supply from time to time, in concert or partnership with some other corporation, would probably cause many complications, and render the successful administration of the municipal system much more difficult and doubtful. In order to accomplish the purpose for which these powers were given it is reasonably certain that it would be advisable, and it might be necessary, for the city to take over a supply already partly in use outside, and continue the service to the outside territory, while supplying the remainder to the use of its own people. These probabilities, and the conditions we have stated, must have been well known to the framers of the charter, to the people of Pasadena, and to the Legislature, when the charter was prepared, adopted and ratified. In view of all the circumstances, we may reasonably believe that the clause adopted in 1905, giving the "right to supply water to persons who live without the city limits," was intended to authorize a plan such as that here under consideration. If not designed to authorize some similar plan it might as well never have been enacted at all.

Under the Constitution South Pasadena has power to fix the rates to be charged for water supplied to its inhabitants, and to control the manner of laying and repairing pipes in its streets for that purpose. Necessarily, it has this power as against another city engaged in supplying such water, as well as when an individual or water corporation does so. It is suggested that the two cities each represent the sovereign power, and would have equal authority in all municipal affairs, that a conflict would ensue, and that such consequences cannot be considered as intended, unless the intention is expressly and unmistakably declared. In this connection the rule is invoked that there cannot be two municipalities exercising the same powers at the same time within the same territory. But the two cities would not be of equal authority with respect to the use of water in South Pasadena in such a case. South Pasadena would have the power above stated, under the Constitution, and Pasadena, so far as that service is concerned, would be subject to those powers to the same extent as the Pasadena Land & Water Company is now subject thereto. In the carrying on of the water service to the people of South Pasadena the city of Pasadena will not be acting in its political, public, or governmental capacity as an agent of the sovereign power equal in all respects to the city within which it operates. In administering a public utility, such as a water system, even within its own limits, a city does not act in its governmental capacity, but in a proprietary and only quasi public capacity. Davoust v. Alameda, 149 Cal. 70, 84 Pac. 760, 5 L. R. A. (N. S.) 536; Illinois, etc., Bank v. Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; Esberg Cigar Co. v. Portland, 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651. Having taken over the whole system subject to the burden of supplying a part of the water to inhabitants of South Pasadena, the city of Pasadena will have no greater rights or powers, respecting that part of the service, than its grantor previously had. It will be under the same obligation as its grantor to continue the service and supply the water to all persons who may become entitled to it in the future, so long as it retains possession and control of the property so charged. Fellows v. Los Angeles, supra. The powers of the two cities in regard to this water service will be separate and distinct, one will be subordinate to the other, and, hence, there will not be two cities exercising the same powers in the same territory at the same time. South Pasadena, within its own limits, will be the sole representative of sovereignty in the fixing of rates, and in the supervision of the streets, and Pasadena will be subject thereto, as a private person. If, by fixing too low rates, South Pasadena should attempt to compel the service to be made at a loss, Pasadena would have the same remedies, and no greater, in the courts, that a quasi public corporation or natural person would have in the same circumstances. The fact that the outside service is within another city does not appear to be a significant factor in the question of the power. If it were in a rural community, the rates charged would be subject to judicial control to make them reasonable. Being in another city, the serving city has a right to demand reasonable rates, and may enforce them if not granted. The limitations would not affect the power in one case more than in the other.

The act of March 27, 1897 (St. 1897, p. 182, c. 121), authorizes a city having in its supply more water than is necessary for its inhabitants, to sell the surplus, but provides that contracts for such sales shall not run for a period longer than one year. It is contended that the service of water to outside communities is not a "municipal affair," within the meaning of that phrase in section 6, art. 11, of the Constitution, that it is therefore subject to general laws, and that, under the above-mentioned statute, the city cannot undertake, as it proposes to do, to render a perpetual water service to the inhabitants of outside territory, which, it is claimed, will be equivalent to a contract to sell to them its surplus water for a period longer than one year. There are two answers to this contention. The supplying of water to outside territory, being necessarily a matter incidental to the main purpose of supplying water to its own inhabitants, is as much a municipal affair of Pasadena as is the main purpose, which is conceded to be such, and therefore the charter provisions relating thereto prevail over general laws, if inconsistent therewith. In truth, however, the city will not be selling its surplus in the sense intended by the statute. The right to the use of the required quantity of this water is now vested in the city of South Pasadena and its inhabitants within the portion of its territory where it is to be served and the city of Pasadena does not propose to take away this right. It is about to buy only the right of the Pasadena Land & Water Company to the water, which did not include the use. It will be obliged to put it to the same use as fully as that company is now compelled to do so. Water which is in this manner dedicated to the use of an outside community, cannot be at the same time surplus water subject to sale to others. The sale is already, in effect, accomplished. The city of Pasadena, with respect to this part of the water, will hold title as a mere trustee, bound to apply it to the use of those beneficially interested.

Section 19, art. 11, of the Constitution, provides that, in any city where there are no municipal waterworks for the supply of its inhabitants, "any individual, or any corporation duly incorporated for such purpose," may lay mains in the streets for supplying such water. This grant clearly does not, in terms, extend to a municipal corporation. It is contended that it, in effect, forbids the exercise of such privilege by another city. The provision is intended to further the interest of the public and facilitate the supply of water to the inhabitants of the city, and it should be liberally construed to effect that purpose. When the state gives such power to a city that, as an incident to supplying water to its own people, it may furnish water to the inhabitants of another city to whose use a part of the water is dedicated, the city having such incidental powers should be considered as a "corporation duly incorporated for such purpose." A city is duly incorporated for all purposes to which its powers extend. There is nothing incongruous, or particularly unusual in such an arrangement. In other states similar powers have been upheld. Mayo v. Dover, etc., Co., 96 Me. 539, 53 Atl. 62; Cooper v. Brooklyn, 11 App. Div. 71, 42 N. Y. Supp. 762; Hartford v. Hartford W. Com., 68 Conn. 323, 36 Atl. 786; People v. Briggs, 50 N. Y. 553; Pittsburgh v. Brace, 158 Pa. 174, 27 Atl. 854.

It is alleged that the city of Pasadena threatens and intends, when it has acquired the water system of the defendant corporation, to cut off the supply of water to South Pasadena and its inhabitants, that it is acquiring the water for its own inhabitants, whose needs will be so great that the entire water supply will be required therefor, that, in order to carry out its purpose, it will be compelled to refuse to continue supplying water to outside persons, and that it will deprive the plaintiff and its inhabitants of water unless the proposed sale is enjoined. It sufficiently appears from what has been said that, if the other allegations of the complaint are true, this could not be lawfully be done. We have shown that if it is attempted the persons injured will have a remedy by a suit in mandamus. There will therefore be an adequate remedy at law, and a suit in equity to enjoin the threatened transfer cannot be maintained.

The court below properly held that the complaint did not state facts sufficient to constitute a cause of action.

The judgment is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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152 Cal. 599

ORCUTT et al. v. PASADENA LAND & WATER CO. et al. (L. A. 1,958.)

(Supreme Court of California. Jan. 2, 1908.)

1. Waters and Water Courses—Injunction—Right to Water Supply.

A city which acquires the water system of a quasi public corporation, engaged in supplying water for public use, does so as a corporation engaged in supplying a public use, and on its refusal to furnish water to those entitled thereto the remedy is by mandamus and not by injunction.

2. Same — Injunction — Grounds — Probability of Injury.

Where the general allegations in a complaint that a city acquiring the water system of a public water supply company intends to divert the whole water supply to the use of its own inhabitants, are mere conclusions, based on the theory that the city has no power to continue serving persons outside of its limits, and that it has the right to change the use to which the water had been appropriated without the consent of the persons beneficially interested, and are insufficient to authorize an injunction on the ground that the rights of persons entitled to water are in danger of injury.

3. Waters and Water Courses—Municipal Corporations — Acquisition of Water Supply—Persons Entitled to Question Authority.

Where the law and charter of a city giving it power to acquire the water system of a quasi public corporation, engaged in supplying water for public use, do not require that the purchase, when made, shall be approved by the voters of the city, it is immaterial so far as the purchase is concerned whether the voters on being asked to vote for the issuance of bonds to buy the system were informed that the system was burdened with the duty of supplying water to individuals, and collateral inquiry on behalf of persons not taxpayers or residents of the city into the validity of the purchase cannot be made on that ground nor on the ground that the bonds issued are invalid.

In Bank. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by O. W. Orcutt and others against the Pasadena Land & Water Company and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Lynn Helm and John E. Carson, for appellants. Anderson & Anderson, Porter, Sutton & Cruickshank, John C. Fitz Gerald, Fitz Gerald & Barry, J. P. Wood, City Atty., and Works, Lee & Works, for respondents.

SHAW, J. The transaction attacked in this case is the same that was considered in South Pasadena v. Pasadena Land & Water Company (L. A. 1,793) 93 Pac. 490. We refer to that case for a more detailed statement of the facts, which, with the exceptions to be mentioned, are substantially the same as the facts involved here. A general demurrer to the amended complaint was sustained, without leave to amend further, and from the judgment thereon given the plaintiffs appeal.

The plaintiffs are residents of the portion of South Pasadena supplied with water by the defendant company, and owners of land therein, and it is alleged that a certain share of said water is appurtenant to the respective tracts of land for irrigation and domestic use thereon. They sue on behalf of themselves and of others having similar rights. The fact that the right to receive the water is appurtenant to the land and is a private right of property, and not a mere right as one of a class entitled to share in a public use, does not in any way materially distinguish the case from South Pasadena v. Pasadena Land & Water Company, supra. If the city of Pasadena should acquire the water system of the defendant water company, it would do so as a corporation engaged in supplying a public use, and the right to mandamus, if it should refuse to furnish water to those who were entitled thereto, would be as clear in such a case as if the water right was not a private right or an appurtenance to real estate, but was a right to share in a public service of water, such as that considered in the former case. There would therefore be an adequate remedy at law, and the right to an injunction was properly denied. Furthermore, it does not clearly appear that the rights of the plaintiffs are in any immediate danger of injury. There are general allegations that the city of Pasadena threatens and intends to divert the whole water supply to the use of its own inhabitants, if it should require the same, and will, in that event, deprive the plaintiffs of any share thereof. But the context shows that these are obviously mere conclusions, based on the theory that that city has no power to continue serving persons outside of its limits, and that it would have the right to change the use to which the water had been appropriated without the consent of the persons beneficially interested. It is not claimed that the city is about to do this, but that it will do so in the future, if the necessities of its own inhabitants demand it. It is not to be presumed that this will be done, in the face of a decision of this court declaring that it would be unlawful. Anything short of a reasonable probability of injury is insufficient to warrant the issuance of an injunction against the act which it is claimed will cause such injury. Lorenz v. Waldron, 96 Cal. 249, 31 Pac. 54. The appellants do not argue this point, and have apparently abandoned it. We think it is without merit.

The complaint alleges that the city of Pasadena has declared that the cost of the water system it proposes to buy is too great to be paid out of the ordinary revenues of the city, and that, in pursuance of proceedings in that behalf, its citizens have voted bonds whereon to raise sufficient money to pay the price agreed to be paid therefor. It is further claimed that the proceedings to issue bonds are defective to such an extent that the bonds are void, and from this it is argued that the city has no power to buy the property. The particular objection alleged is that the voters were asked to vote for the issuance of these bonds to buy the water system, but that they were not informed by resolution, notice, or otherwise that the system was burdened with the duty of supplying water to plaintiffs and to a large part of the city of South Pasadena, and was to be acquired subject to that burden. It is not necessary to pass on the merits of this objection to the validity of the bonds. The provisions of law and of the city charter giving the city of Pasadena power to take this property and continue the outside service are set forth and fully considered in the opinion above mentioned. These provisions do not require that the purchase, when made by the city of Pasadena, shall be approved by the voters of the city. It is immaterial, so far as the purchase is concerned, whether the voters knew of the incumbrance on the property or not. Collateral inquiry on behalf of persons not taxpayers or residents of the city of Pasadena into the validity of the purchase cannot be made on that ground, nor on the ground that the bonds are invalid and that consequently the city cannot buy the property. The plaintiffs have no interest in these questions. If the Pasadena Land & Water Company is satisfied on the score of price and of the ability of the city to pay, other persons cannot revise its decision, in the absence of any showing that they are interested as stockholders and will suffer injury. The validity or invalidity of the bonds is immaterial. Purchasers thereof may be found, and if they take them it is sufficient. If none are sold, the proposed transfer to the city may fail, in which case plaintiffs should be satisfied with the result. The other points urged in this case are considered and disposed of in the opinion in South Pasadena v. Pasadena Land & Water Co., supra.

The judgment is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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152 Cal. 596

GRAHAM v. PASADENA LAND & WATER CO. (L. A. 1,957.)

(Supreme Court of California. Jan. 2, 1908.)

1. WATERS AND WATER COURSES—IRRIGATION—WATER RIGHTS.

A corporation owning a water supply for land conveyed the land to a purchaser, and subsequently transferred the supply with its water system to a third person. The by-laws of the corporation provided that the water should be supplied to the land to be used thereon. *Held*, that the right to receive water for the land was an easement appurtenant thereto within Civ. Code, §§ 552, 801, defining the rights of purchasers to use water for irrigation, etc.

2. APPEAL—ERRONEOUS FINDINGS—PREJUDICIAL ERROR.

Where the court held that owners of land had the right to receive water for their lands, and that the right was a continuing one, in effect running with the land for its benefit, an erroneous finding that the right was not an easement appurtenant to the land was not cause for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4234, 4235.]

3. WATERS AND WATER COURSES—SALE OF WATER COMPANY—RIGHTS OF USERS OF WATER.

Where a water company, bound to supply water to land as an easement appurtenant thereto, sought to transfer its system, subject to the rights of the owners of the land as consumers and users of the water, and the transferee sought to purchase, subject to the rights of the owners which it would protect, an owner of such land could not maintain a suit to restrain the transfer on the ground that by it he would be deprived of his rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 314.]

4. CORPORATIONS—TRANSFERS OF PROPERTY—DISSENTING STOCKHOLDERS.

A stockholder of a quasi public corporation, engaged in supplying water for public use, is bound by the action of the holders of two-thirds of the stock and the directors consenting to a transfer of the property, franchise, and business of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 665-668.]

In Bank. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Margaret C. Graham against the Pasadena Land & Water Company. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Affirmed.

Lynn Helm, John E. Carson, and William Collier, for appellant. Porter, Sutton & Cruickshank and Anderson & Anderson, for respondent.

SHAW, J. The record presents appeals by the plaintiff on a judgment in favor of the defendant and from an order denying her motion for a new trial. The transaction involved in the case, the validity of which is attacked by the plaintiff, is the same as that which was considered and held valid by us in the companion case entitled City of South Pasadena v. Pasadena Land & Water Co. (L. A. No. 1,793) 93 Pac. 490. The facts are fully stated in the opinion in that case, so far as they correspond with the facts here. In this case a trial was had and findings made which present some different questions. We will, in this opinion, consider only these questions, so far as they are presented in the argument.

The plaintiff owns land on which she resides. It is situated within the district served with water by the defendant, in the city of South Pasadena. She is also a stockholder in the defendant company. She sues on behalf of herself and of other stockholders similarly situated and having similar rights. It is specifically alleged that the water furnished for use on the land is an easement appurtenant to the land. The court found that this allegation was not true. It is admitted by the pleadings, however, that the plaintiff had bought the land from the San Gabriel Orange Grove Association, a corporation which then owned the water supply in question, and which afterwards transferred the said supply together with this water system to the defendant, that the by-laws of said association provided that the water should be supplied to the lands which it sold to be used thereon, and that always thereafter said water was supplied to said land for such use in accordance with the original understanding. It is clear that the finding is not warranted by the admitted facts of the case, and we think it was not sustained by the evidence introduced. Under the facts stated, the right to receive water from the supply under the control of the defendant is clearly appurtenant to the land of the plaintiff. Civ. Code, §§ 552, 801. The finding, however, is a mere conclusion of law, and, besides, we think it is entirely immaterial. The record shows that it was assumed throughout the case that the plaintiff and others similarly interested have the right to receive of the waters in controversy for use on their respective tracts of land a sufficient quantity for the need thereof, if there is enough for that purpose, and, if not, then their due share of the water available, and that this is a continuing right and still remains vested in them. This being the case, it is immaterial whether the court below understood that this right came within the legal definition of an easement appurtenant to the land or not. Taking the view apparently held by that court, the right would run with the land for its benefit, and the owner of the land would have the same right to enforce the delivery of the water as if it were an easement and appurtenance as claimed. An erroneous finding upon an immaterial issue is not cause for a reversal.

The court further found that it was the intention of the defendant company to transfer its water plant and system to the city of Pasadena, subject to all the rights of the plaintiff as a consumer and user of the water; that the city has offered to buy all the defendant's water, subject to the obligations of the defendant to its consumers; and that the company has duly accepted said offer and authorized a conveyance thereof to be made on its behalf, subject to the condition that all users and consumers of the water, outside of the city of Pasadena, shall be fully protected in their rights as they now exist, and in the use of water as now enjoyed. This finding is not challenged by the specifications. It sufficiently appears therefrom that the defendant is not purporting to transfer its property so as to deprive the plaintiff or those in her situation of the water rights they now enjoy, and hence she is not entitled to an injunction on that ground.

So far as her rights as a stockholder of the defendant are concerned, she is bound by the action of the holders of two-thirds of the stock consenting to the transfer proposed and the action of the directors in accordance therewith. It is not claimed that there is any fraud in the transaction. The right of the defendant company to make this transfer and all other questions presented by the record, not mentioned above, are fully considered and decided in South Pasadena v. Pasadena Land & Water Company, above referred to. No injurious error appears in the record.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

7 Cal. App. 79

PEOPLE v. NAPOLI. (Cr. 104.)

(Court of Appeal, First District, California. Dec. 4, 1907. Rehearing Denied Jan. 2, 1908; Denied by Supreme Court Jan. 27, 1908.)

CRIMINAL LAW — NEW TRIAL — STATUTORY PROVISIONS—CONSTRUCTION.

Laws 1907, p. 998, c. 537, providing that, when any bill of exceptions, etc., on motion for new trial, is lost or destroyed by fire or other public calamity, and no other record of the proceedings on the trial can be obtained, and the action is subject to review by motion for new trial pending, and it is "by the court in which such action or proceeding is pending" deemed impossible to restore the proceedings, etc., the court shall have power to grant a new trial, has reference to a trial court, and does not apply where an accused has appealed after a motion for new trial is denied.

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge

Angelo Napoli was convicted of murder in the second degree, and from a denial of a motion for a new trial, made pending an appeal from the conviction and denial of a former motion for new trial, he appeals. Affirmed.

Daniel O'Connell, for appellant. Attorney General Webb, for the People.

COOPER, P. J. Defendant was convicted in the superior court of the crime of murder in the second degree. He made a motion for a new trial, which was denied, and he appealed to this court from the order and judgment of conviction, which appeal has never been disposed of. After the said appeals had been perfected, and before the defendant's bill of exceptions had been allowed and settled by the trial court, all the records of the proceedings in said cause were destroyed by the fire of April 18, 1906, and the record has never been restored. The defendant, in May, 1907, made a second motion for a new trial, under an act entitled "An act providing for the disposition of actions and proceedings in which bills of exceptions and statements on motion for a new trial have been lost or destroyed by conflagration or other public calamity," approved March 25, 1907. St. 1907, p. 998, c. 537. The court denied the said second motion, and this appeal is from the latter order.

The act provides: "When any proposed bill of exceptions, or statement of the case on motion for a new trial, in action or proceedings, is lost or destroyed by reason of conflagration or other public calamity, and no other record of the proceedings upon the trial thereof can be obtained, and such action or proceeding is subject to review by motion for new trial, pending at the time of such loss or destruction, and it is by the court in which such action or proceeding is pending, deemed impossible or impracticable to restore such proceedings (and to settle a bill of exceptions or statement of the case containing such proceedings) so as to enable the court to review the judgment or order therein by motion for new trial, the court may grant a new trial of such action or proceeding if at the time of such loss or destruction a motion for new trial be pending therein, and such action or proceeding shall thereupon be tried anew. In order to grant such new trial, it shall be unnecessary to have any bill of exceptions or statement of the case settled, but upon the facts above recited being shown to the satisfaction of the court by affidavit or otherwise, the court shall have power in its discretion to grant such new trial." The act has reference to a trial court in which the "action or proceeding is pending." It is therein provided that "the court may grant a new trial of such action or proceeding if at the time of such loss or destruction a motion for a new trial be pending therein, and such action or proceeding shall thereupon be tried anew. After the superior court had denied the motion for a new trial, and the defendant had appealed, the motion was no longer pending in that court. That court had lost jurisdiction, and the action was then in the appellate court for review on questions of law. Peycke v. Keefe, 114 Cal. 213, 46 Pac. 78; Vosburg v. Vosburg, 137 Cal. 493, 70 Pac. 473. It is not necessary to decide the question as to whether or not the act applies to civil cases only. It is sufficient to say that in this case the order of the trial court was correct, and must be affirmed.

So ordered.

We concur: HALL, J.; KERRIGAN, J.

152 Cal. 604

SCOTT et al. v. SAN BERNARDINO VALLEY TRACTION CO. (L. A. 1,589.)

(Supreme Court of California. Jan. 13, 1908. Rehearing Denied Feb. 10, 1908.)

1. Street Railroads — Collision of Car with Team—Contributory Negligence.

Whether one who, on the busiest street in the city, at the busiest time, in driving across a street car track, had the hind wheel of his buggy struck by a street car going up a slight grade, at a speed of four miles an hour, without warning, and without attempt to stop it till it was within five or six feet of the buggy, was guilty of contributory negligence, is a question for the jury, though when he got into the buggy and started his horse the car, not seen by him, was standing at the crossing, with its front end 59 feet from where he must cross the track, and though, while he listened attentively, without hearing anything, he did not look beyond the side curtains of his buggy so as to see the car till his horse was across the track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 255–257.]

2. Same—Negligence—Instructions.

Modifying the requested instruction of defendant, in an action for the collision of a street car with a buggy, that, if defendant's employés in charge of the car, as soon as they discovered the dangerous position of plaintiff, used ordinary care to prevent the collision, defendant would not be liable for any collision which might have been prevented, if such employés had had other appliance than what they had for preventing a collision, by adding the words, "unless a mere running of the car without having it provided with such additional appliances, if they were any, would in itself have amounted to wanton and reckless conduct on the part of defendant," was not error.

3. Trial — Instructions — Error Cured by Other Instructions.

Where the complaint alleged $14,000 damages for personal injuries, and $1,000 for expenses in curing the same, and there was no evidence of expense, any error in instructing that the verdict should be "in such sum as damages, not exceeding the $15,000 asked for in the complaint," as may have been sustained by plaintiff on account of the collision, is harmless; the jury having otherwise been directed to estimate the damages from the facts and circumstances in evidence, that they should take into consideration all the facts and evidence before them, and that plaintiffs were entitled to such damages as the jury should find from the evidence, so that they must have understood they were unauthorized to give damages for expenses alleged, but not proven, and the verdict having been only for $1,500.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 703–718.]

In Bank. Appeal from Superior Court. San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Jennie R. Scott and another against the San Bernardino Valley Traction Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

E. R. Annable, Goodcell & Leonard, and Byron Waters, for appellant. Prescott & Morris, for respondents.

SHAW, J. This is an action by husband and wife to recover damages sustained by the wife from personal injuries alleged to have been caused by the negligence of the defendant. Plaintiffs recovered, and the defendant appealed from the judgment within 60 days after its rendition. A bill of exceptions sets forth the evidence.

A street car operated by defendant collided with a buggy in which the plaintiffs were driving, whereby the plaintiff Jennie R. Scott was thrown out and injured. It is contended that the plaintiff George H. Scott was negligent in driving upon and across the track in front of the car, and that this negligence contributed to the injury. In considering this proposition, it is necessary always to bear in mind that the jury has found to the contrary. In this case it not only returned a general verdict to that effect, but, in answer to a specific question, it declared that George H. Scott did not negligently drive upon the track. If there was any substantial evidence in support of this fact, the verdict must stand, although the preponderance of the evidence may be against it. The question whether or not upon a given occasion the conduct of a person is negligent is always comparative and relative. The conduct must be compared to that of an assumed person of ordinary prudence, and must be considered with relation to all the circumstances attending the occasion which might reasonably be taken into consideration by a person of ordinary prudence in determining what his conduct should be. The circumstances to be considered are those which the evidence shows may reasonably be supposed to have been known to such person, and to have influenced his mind and actions at the time. These are not necessarily the circumstances which afterwards, in the light of the event, it can be seen should have been known to him, and should have influenced his conduct. Nor is his wisdom in determining what to do to be judged by the event. We must, as nearly as possible, put ourselves in his place; he being compelled to act without foreknowledge, and with only ordinary prudence and wisdom to guide him. In some particular cases of frequent occurrence it has been established by a long course of judicial decision that certain precautions are presumptively necessary to constitute due care, and that, if one of these precautions is omitted, negligence will be presumed as matter of law. For example, one who, in traveling a public road, crosses the track of an ordinary steam railroad, must, before going upon the track, look and listen for an approaching train, and must generally stop for that purpose. If it does not appear that he did these things, he will be considered guilty of negligence, unless he shows some extraordinary and unusual conditions which rendered it unnecessary. But in general negligence is a question of fact for the jury, and the law has fixed no exact standard of care other than the general one that it must be such as a reasonably prudent man would exercise in the particular circumstances. Hence in ordinary cases it is peculiarly a question for the jury or court trying the cause to decide as a matter of fact whether or not the person was culpably negligent. Judged by these rules, we think the verdict in this case is supported by sufficient evidence.

The collision occurred on Orange street, in the city of Redlands, at a point about 98 feet south of the south intersecting line of State street. Scott and his wife drove up Orange street from the north, and stopped in front of a store on the west side of that street at a point almost directly opposite where the collision took place, where, leaving the buggy and horse by the curb facing south, in care of his wife, Scott went into a hat store, one door further south than the buggy, to make a purchase. Upon coming out he got into the buggy and drove off. He wished to go north on that street, and in order to do so it was necessary for him to cross to the other side of the street, turning his horse and buggy around in the operation so as to face them north. Accordingly he started to drive in a course curving to the east and north and crossing the car track so as to bring his horse to the east side of the street and east of the car track with its head to the north. He got the horse and all of the buggy, except the left hind wheel, across the track, when the defendant's car, which was going south, struck that wheel with such force that it was broken to pieces, and the plaintiff Jennie R. Scott was thrown out and severely injured. The buggy had immovable side curtains so placed that the driver, while in the usual position, could not readily look to the rear. While Scott was in the hat store, the car in question had come from the north, and had stopped at the corner on Orange street south of State street. As Scott came out of the store and walked northerly to his buggy, the car was standing at the corner in plain sight and in line with his buggy. He looked both ways as he got into the buggy. The evidence is not clear on this point, but the jury may justly have inferred the fact. However, he did not observe the car, and it must be conceded that he did not look with care. There is a conflict of evidence upon the question whether the car had started south or was standing motionless at the corner at the time he made this observation, got into the buggy, and started to make the turn to the north. Gaylord testified that he was standing on the east side of Orange street to the north and rear of the car; that when he first noticed it the car was just a trifle from the corner of State street in motion, going south; that he next observed a horse coming across the track to the south of the car, with a buggy attached; that the car was then about two car lengths (78 feet) from the horse, and could not have more than started from the corner. If this was true, the car must have been standing still when the horse started. Meek, who was on the car, testified that the car was standing at the corner when the buggy started. Smith, for the defense, testified that the car was just starting in motion as he saw Scott start across the track, which, of course, was some seconds after Scott started from the side of the street, if the witness is to be taken literally. Some of the statements of these witnesses on cross-examination might be construed to be inconsistent with this testimony, but the apparent inconsistency may easily be reconciled. There was other evidence indicating that the car started before Scott did; but, as we must view the case, the fact was established that he started while the car was standing still upon the track, with the front end 59 feet from the point where he must cross the track. He did not observe the car when he started; but, as he would have seen it if he had looked attentively, his conduct must be judged as if he had seen it there standing, and had then started to cross in front of it.

The evidence further shows that he listened attentively while crossing the track, and heard no gong or sound of car wheels; that he was slightly dull of hearing, but not hard of hearing; that he could not see far toward the rear of the buggy from his position in the buggy; that when he got on the track he had turned sufficiently to see down the street a little farther in the direction from which the car was coming, but saw no car approaching; that he first saw the car after his horse was across the track and had turned to the north, and while his hind wheel was still on the track. The car was then some 10 or 12 feet away, and he urged his horse ahead to get the buggy out of the way of the car, and thought he was going to get clear. As it was, the car barely caught the hind wheel. The car did not slacken its speed until it struck the wheel or until it was within 5 or 6 feet of it. The evidence shows that the motorman did not see the buggy nor make any effort to stop the car until his attention was called to it by others in the car about the time it struck the buggy, and that he then stopped it within a distance variously estimated at from 6 to 15 feet. The car was then going up a slight ascending grade at the speed of four miles an hour, according to the estimate of most of the witnesses. There was evidence of actual observation, showing that the cars, when running at practically the same speed, covered the distance of 59 feet from the place of starting to the point of collision in six seconds, actual time, or at an average speed of 6.7 miles an hour. This would be fully as satisfactory as estimates of eyewitnesses. As it was at rest at the beginning, it might be inferred from this that the speed gradually increased from nothing at the start to a rate much faster than the average speed, and that it was going at this rapid rate when the collision occurred. It was upon the busiest street in Redlands, and at the busiest time of the day. Other teams were on the street in that block at the time, and another car was standing at the next corner to the south. It was customary at that time of day for cars going south on Orange street to stop on the south side of State street to let off passengers. Some teams standing on the east side of Orange street prevented plaintiff from going straight across the track, compelling him to turn in closer to the rails than he otherwise would.

It is the law that one walking or driving in a public street is bound to use reasonable care to look and listen as he goes, so as to be able to avoid collisions with others exercising the common privilege of using the street. This duty is not confined to persons driving or about to drive upon a street car track. It rests alike upon every person while in a public street. It is as obligatory upon the motorman propelling a car as upon the footman, horseman, and driver. In determining whether or not he will cross such a street at any given time and place, one may, and often must, act upon the theory that he has an equal right with others, and upon the belief and expectation that others as well as himself will use the reasonable care that the situation requires, and that, while he is necessarily looking out ahead to avoid running down any person on the street and to guide himself or his team, others approaching him from the side will in like manner look out ahead and avoid a collision with him. A street car cannot go on the street except upon its rails, and hence it has the better right to that space, to which others must yield when necessary; but otherwise its rights are not superior to that of any other person who has occasion to use the street. Shea v. Potrero, etc., Co., 44 Cal. 414; Clark v. Bennett, 123 Cal. 280, 55 Pac. 908. The reasonable care which is required must be measured by all these conditions, rights, and circumstances. The foot passenger or driver of a horse has a right to expect that those in charge of street cars will operate them in the manner and run them at the speed which is customary at the particular place, and that they will give the usual warnings and signals, and take the usual precautions to avoid injury to others. Orcutt v. Pac. C. R. Co., 85 Cal. 299, 24 Pac. 661; Driscoll v. Cable R. R. Co., 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203. In a crowded street it is often necessary and not inconsistent with reasonable prudence for a person to cross the street in front of street cars, in motion or at rest, at a point so near that it would be prima facie an act of negligence, if attempted at another place where the streets are less crowded and the cars usually run faster. The rights and obligations of all persons using a public street are, in this respect, reciprocal. Each may rightfully expect that the other will, at the proper time, discharge his proper duty toward others. He cannot rely wholly on the care of others, nor, on that account, neglect to use the precautions which the particular situation demands of him. But he frequently must, to some extent, depend on others in such situations, and his conduct must be considered in view of that fact in determining whether or not it is negligent. His care, or want of care, in such cases is generally a matter to be determined by the jury from all the circumstances surrounding him at the time. Clark v. Bennett, 123 Cal. 277, 55 Pac. 908.

Assuming, therefore, that George H. Scott did see the car standing at the corner of State street, and apparently about to start south, and that he thereupon started to drive across the street to turn northward, as he did, we cannot say, as a matter of law, that it was a negligent act. People do the same thing every day under similar conditions in every city. It cannot be said that an act which the majority of men would do in the existing circumstances, and which we may presume is usually done in safety, is negligence per se. "It falls within the province of the jury, not only to determine the facts constituting negligence, but also the question as to what would be the conduct of a person of ordinary prudence, under similar circumstances, which commonly is a question of fact, not of law. In general, all these questions are for the jury, whose verdict in favor of the plaintiff must be regarded as conclusive, unless the validity of the defense, both as to the existence of the negligence and its effect as contributing proximately to the injury, follows necessarily from the undisputed facts." Schneider v. Market St. Ry. Co., 134 Cal. 488, 66 Pac. 737. "It cannot be said that a person is guilty of contributory negligence merely because he attempts to cross a street railway when a car is approaching. If that were so, he could never attempt to cross such a track in the crowded parts of a city where there is practically always an approaching car; and, in such case, as street cars go at a comparatively low rate of speed and are quickly stopped, the question of negligence would depend on the proximity or remoteness of the car, and upon all the other circumstances surrounding the occurrence. In such a situation the traveler cannot be held to exercise the very highest prudence and judgment. It is sufficient if he exercises that degree of care and prudence and good sense which men who possess those qualities in an ordinary or average degree exercise." Clark v. Bennett, 123 Cal. 278, 55 Pac. 908.

It may be conceded that the failure of Scott to observe the car standing at the corner ready to start at the time he started to make the turn was negligence. But the jury would have been justified in finding that, even if he had seen the car, it was not negligence for him to attempt to cross in front of it, and they may rightly have concluded that his negligent failure to perceive it did not contribute to the injury. Their verdict compels us to assume that they took that view. A negligent act or omission "must have contributed directly to the injury, or, however improper or illegal it may have been in the abstract, no action or damages can be founded upon it." McKune v. Santa Clara, etc., Co., 110 Cal. 486, 42 Pac. 981.

With respect to his failure after he got upon the track to lean forward and look toward the car to see if it was approaching before he was so far turned as to be able to see it from his position in the buggy, we are of the opinion that the question whether or not he exercised ordinary prudence was also for the jury to decide. The car, according to its custom, would not be going at full speed at that point. It was on an ascending grade, equipped with air brakes, and could be quickly stopped. It was the motorman's duty to keep watch ahead of his car for vehicles, and it is to be presumed that he usually did his duty in that respect. Scott found other teams obstructing his course and requiring his attention to avoid them. It is not clear from the evidence that, even if he had looked when upon the track and had seen the car approaching, he would or should have anticipated the acceleration of its speed which the evidence indicates may have been given to it, or the culpable carelessness of the motorman in running the car at that speed in such a place without looking ahead, or that, from all the circumstances as then presented to his mind, reasonable prudence would have required greater effort in urging his horse forward, or a change in its course. He cannot be charged with negligence per se, under all the circumstances, unless we are prepared to say that in the crowded streets of a city one who presumes to drive in front of a street car just starting from a corner is guilty of negligence in law, if he does not expect and use due care to guard against the gross and culpable negligence of a motorman in propelling his car along the street in utter disregard of the safety of others. We should have to license those in charge of the cars at such places to act with the utmost recklessness, to the end that the travelers who failed to anticipate and avoid the danger therefrom could be charged with contributory negligence, and the company thereby escape liability. The greater their negligence, the better their defense. Whatever the rule may be with regard to the right of travelers at steam railroad crossings, reason and authority require that in the crowded streets of a city, where their rights are equal, the rule should be that a traveler has the right to assume until his senses, exercised with reasonable diligence, inform him to the contrary, that the persons operating street cars will use ordinary care, give the usual signals, and keep the usual lookout ahead. Driscoll v. Cable R. R. Co., 97 Cal. 567, 32 Pac. 591, 33 Am. St. Rep. 203; Strong v. S. & P. R. R. Co., 61 Cal. 328; Shearman and R. on Neg. § 31.

It is unnecessary to discuss at length the question of the sufficiency of the evidence to prove the negligence of the motorman. Out of his own mouth he stands convicted. Conceding that the actions of the horses standing in front of the store at his left attracted his attention in that direction, it did not justify him in proceeding blindly up the street without looking ahead or slackening his speed. In response to an interrogatory the jury found specially that the motorman, after he discovered the dangerous position of plaintiffs, used ordinary care, with the appliances under his control, to prevent the collision. As this issue was determined in favor of the defendant, it is unnecessary to consider the refusal of the court to give instructions relating to the conduct of the motorman at that time. Such ruling must necessarily have been harmless in view of the instructions given.

The defendant asked the following instruction: "If the jury find from the evidence that defendant's employés in charge of the car at the time of the collision, as soon as they discovered the dangerous position of plaintiffs, used ordinary care to prevent the collision, the defendant would not be liable for the result of any collision which might have been prevented if such employés had been possessed at that time of other appliances for preventing the collision which they did not possess." The court gave it; but added the following: "Unless a mere running of the car without having it provided with such additional appliances, if there were any, would in itself have amounted to wanton and reckless conduct, on the part of the defendant." We do not think there was any error in this of which the defendant can complain.

The complaint alleged that the plaintiffs had suffered damage to the amount of $14,000 by reason of the injuries to Mrs. Scott, and to the extent of $1,000 by reason of expenses in curing her hurts. There was no evidence of any expense. The answer denied that plaintiffs had, by reason of the collision, sustained any damage in excess of $1,000. The verdict fixed the damages at $1,500. The court instructed the jury that if they found for the plaintiffs, the verdict should be "in such sum as damages, not exceeding the sum of $15,000 asked for in the complaint, as may have been sustained by them on account of said collision." The defendant urges this as a prejudicial error, as from the evidence the plaintiffs were not entitled to more than $14,000. The jury, in other instructions, were directed to estimate the damages "from the facts and circumstances in evidence," that in determining the amount "they should take into consideration all the facts and evidence before them," and that, if they found for the plaintiffs, "the plaintiffs are entitled to recover from the defendant such damages as you may find from the evidence" plaintiffs have sustained by reason of the accident. It is clear that the jury must have understood that they were not authorized to give damages for expenses which were alleged but not proven, and, hence, they must have entirely disregarded the claim for expenses. And as the verdict was much less than the $14,000 claimed for the personal injury to Mrs. Scott, it is plain that the error in stating it as $15,000 did not injure defendant.

There are no other points of sufficient importance to require notice.

The judgment is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.

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152 Cal. 615

McCAUGHEY et al. v. LYALL et al. (L. A. 1,967.)

(Supreme Court of California. Jan. 14, 1908. Rehearing Denied Feb. 14, 1908.)

1. ADMINISTRATORS — MORTGAGES — FORECLOSURE BY ACTION — PARTIES DEFENDANT — HEIRS OF MORTGAGOR.

In an action to foreclose a mortgage executed by a decedent, the heirs of decedent need not be joined, but the only necessary party defendant is the administrator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1779.]

2. CONSTITUTIONAL LAW — DUE PROCESS OF LAW—RIGHTS OF HEIRS.

The Legislature has full control of descents and distributions of estates, and the rights of an heir are merely those which he takes under legislative provision, and it has full power to provide that, in actions for the enforcement of claims against an estate, only the administrator need be made a party defendant, and that the heir shall be represented by the administrator; and the question of the constitutionality as not being due process of law in violation of Const. art. 1, § 13, or as being in violation of Const. U. S. Amend. 14, or of Code Civ. Proc. § 1582, providing that actions for the recovery of any property, or to determine any adverse claim thereon, and actions founded on contracts, may be maintained by and against administrators, cannot arise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 929.]

Department 2. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Edward Quigley McCaughey and others against Alexander Lyall and others to have it adjudicated that plaintiffs were the owners of an undivided half of certain land, and recover possession thereof. Judgment for defendants, and plaintiffs appeal. Affirmed.

McNutt & Hannon and Wm. G. Griffith, for appellants. B. F. Thomas and W. P. Butcher, for respondents. H. J. Finger, pro se.

McFARLAND, J. George McCaughey died intestate on March 1, 1890. The plaintiffs are his children and heirs at law. During his lifetime, on June 6, 1889, the deceased executed a mortgage on certain land to one H. J. Finger to secure a promissory note for $500, which was due and unpaid at the death of the decedent. After his death Susan McCaughey was duly appointed and qualified as administratrix of his estate. The note and mortgage were duly presented to the administratrix, and were allowed by her and approved by the probate judge. In January, 1894, Finger commenced an action against the administratrix to foreclose the mortgage, but did not make plaintiffs parties to such action. Such proceedings were had that a judgment of foreclosure was regularly rendered under which the land was duly sold by the sheriff on April 10, 1895, to defendant Lyall, who in due time received a sheriff's deed therefor. Several years afterwards this present action was brought by said heirs to have it adjudicated that they are the owners of an undivided one-half of the said land, that the claim of the defendants thereto be adjudged null and void, and that plaintiffs recover the possession of the land, etc. A general demurrer to the complaint was interposed by the defendant Lyall and by other defendants. The demurrers were sustained, and, plaintiffs declining to amend, judgment was rendered for defendants. From this judgment plaintiffs appeal.

The point relied on by appellants for reversal is that the judgment in the foreclosure suit was null and void as against them, because they were not made parties to that suit, and were not given notice of its pendency. Counsel for appellants say in their brief: "This cause is brought here for the purpose of having reviewed a single question arising from the record. This question is best suggested by the inquiry, can the heir at law be divested of the title which the law casts upon him at the death of his intestate ancestor by any proceeding to which he is not made a party? This court has more than once decided the question in the affirmative. We believe the decisions are wrong in the particulars to which we shall presently advert, and we, therefore, shall respectfully urge that they be overruled and the right rule of the law established." This statement and admission make it unnecessary for us to review the former decisions of this court to show that they do establish the law in the manner as admitted by appellants. Some of the cases are these: Cunningham v. Ashley, 45 Cal. 485; Bayly v. Muche, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486; Finger v. McCaughey, 119 Cal. 59, 51 Pac. 13; Dickey v. Gibson, 121 Cal. 276, 53 Pac. 704. In these cases it is held that, in an action to enforce claims and liens against an estate where the same might have been maintained against the deceased, if living, the only necessary party defendant is the administrator; and as those decisions have established a rule of property under which no doubt many titles are held, we have no disposition at this time to review the question again and consider the correctness of those decisions. It is clearly a matter to which the rule of stare decisis should apply.

Appellants contend that the former decisions should not be taken as final because, if the construction which they give to certain sections of the Code, and particularly section 1582 of the Code of Civil Procedure, are correct, then those sections are unconstitutional as violative of section 13, article 1, of the Constitution of this state, which declares that no one can be deprived of property "without due process of law," which they say includes "notice" to the person who is to be deprived of property. The fourteenth amendment of the federal Constitution is also invoked. As our state Constitution does not deal in any way with heirship and descents and distributions of estates, it is somewhat difficult to imagine how, on that subject, any constitutional question can be discovered or invented. At all events we see none here. The Legislature had full control of the whole subject, and the rights of an heir are merely those which he takes under legislative provision. The right to be an heir at all comes from the Legislature. Now the Code, which provides that upon the death of the ancestor the title to his land vests immediately in the heirs, has many other provisions which limit and qualify that title and subject it to many conditions deemed proper for the settlement of estates. There is no doubt that the Legislature has the power to provide that in suits for the enforcement of claims and liens against the estate only the administrator need be made a party defendant; and that is exactly what the Legislature did by section 1582 of the Code of Civil Procedure, as decided by the former decisions. Counsel contends that this construction of the section is wrong; but no constitutional question arises. The Legislature has also, beyond doubt, the power to declare that in proceedings against an estate like those above mentioned the heir should be represented by the administrator and therefore not entitled to notice; and the former decisions declare that such, under the law, is the rule. Counsel claim that this decision is also wrong; but still no constitutional question arises. The heir takes, subject to the conditions imposed by the statutory law, which alone gives him any right at all.

The judgment appealed from is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

7 Cal. App. 84

SPENCER v. McCAMENT. (Civ. 437.)

(Court of Appeal, Second District, California. Dec. 5, 1907.)

1. APPEAL — REVIEW — TRIAL JUDGE'S OPINION.

The opinion of the trial judge constitutes no part of the record on appeal, and, though the reasons assigned therein for his rulings are erroneous, error in the decision cannot be predicated thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2339.]

2. SPECIFIC PERFORMANCE — CONTRACTS ENFORCEABLE—CONDITIONS IN CONTRACT—MODIFICATION OF CONDITIONS—ESTOPPEL.

In a suit to compel specific performance of a contract to convey land upon the removal by plaintiff of a planing mill from the land within 30 days thereafter, defendant having extended the time of removal at plaintiff's request, on which extension plaintiff relied and did not remove the mill until after the expiration of the 30 days, defendant is estopped to set up the failure to perform the provision requiring removal within 30 days as a defense.

3. PRINCIPAL AND AGENT—UNAUTHORIZED ASSUMPTION OF AGENCY—PAYMENTS TO ASSUMED PRINCIPAL—EFFECT.

It was immaterial whether a person receiving money as agent for another was in fact his agent for that purpose, where he deposited the money in bank to the credit of such other person.

4. APPEAL — REVIEW — QUESTIONS OF FACT — CONFLICT IN EVIDENCE.

Where there is a substantial conflict of evidence upon all the issues, the judgment of the trial court will be affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979–3982.]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Franklin R. Spencer against J. O. McCament. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

C. M. Simpson (H. G. Simpson, of counsel), for appellant. D. Z. Gardner and Thos. L. Neal, for respondent.

SHAW, J. This is an action to enforce specific performance of a contract to convey real estate. Judgment was rendered for plaintiff, from which, and an order denying his motion for a new trial, defendant prosecutes this appeal.

The contract, dated November 9, 1905, is set out in hæc verba in the complaint. The consideration for the purchase was $1,350. The sum of $50 was paid upon execution of the contract, which provided that $100 was to be paid upon the execution and delivery of a good and sufficient deed, and $600 on or before one year from date, and $600 on or before two years from date. It was also provided that, if the remaining payments be not made according to this agreement and contract, the above-mentioned deposit of $50 should be forfeited without recourse. The contract also contained the following clause: "This sale is on the condition that the planing mill and appurtenances shall be moved from the north side of Center street within 30 days."

Plaintiff alleges that on December 7, 1905, he paid the $100 mentioned in the contract, and duly performed on his part all of the conditions of said contract, but that defendant refuses to make the conveyance of the property in accordance with said contract. The answer denies the payment of $100, denies that plaintiff removed said planing mill within 30 days, as agreed, and sets up affirmative matters to the effect that there was made contemporaneously with said written contract an oral agreement, whereby plaintiff covenanted as a part of the consideration for said purchase, that he would erect and operate said planing mill upon the land so purchased, provided he could obtain a license so to do from the proper city authorities. It is further alleged that this part of the agreement relating to the erection and operation of the said planing mill upon the lands purchased was, through inadvertence and mistake, omitted from the written contract; and defendant asks that the contract be reformed by inserting the same therein, and alleges that plaintiff has not erected and operated said planing mill upon said land so agreed to be conveyed.

1. The opinion of the trial judge, to which appellant devotes a great part of his argument, constitutes no part of the record on appeal. Assuming the reasons assigned for his rulings to be erroneous, error cannot be predicated thereon. Higgins v. Los Angeles Ry. Co., 4 Cal. App. 722, 91 Pac. 344. Whatever views the trial court may have entertained with reference to the propriety of admitting testimony in support of the alleged contemporaneous oral agreement and its omission from the written contract, it nevertheless appears from the record that all evidence offered in support thereof was received, and that such testimony was contradicted by the defendant, and a finding made thereon.

2. There was no error in denying defendant's motion for nonsuit. The testimony on behalf of the plaintiff made out a prima facie case, showing that he had fully complied with the provisions of the written contract, as set out in his complaint, except as to the provision relating to the removal of the planing mill within 30 days. Upon this point the evidence shows that defendant had some 6 days before the expiration of the time, at plaintiff's request, extended the time within which to make the removal, and that plaintiff relied upon the extension so granted, and did not remove the mill until several days after the 30-day period had expired. This was sufficient to constitute an estoppel against defendant from exacting a strict performance of the contract in this respect.

3. The $100 called for in the contract was paid to one Wilson, who signed a receipt therefor as agent of defendant. The purchase had been made through him, and the deposit of $50 paid to him. It seems immaterial, however, whether or not he was such agent, for it appears that he deposited the $100 in bank to defendant's account, of which fact defendant had notice.

There is a substantial conflict of evidence as to all the issues, and for that reason alone, if for no other, the conclusions of the trial court must be affirmed.

Judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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7 Cal. App. 99

PEOPLE v. WHITE et al. (Cr. 64.)

(Court of Appeal, First District, California. Dec. 10, 1907.)

1. FALSE PRETENSES—SUFFICIENCY OF INFORMATION — REPRESENTATION CONCERNING EXISTING CONTRACTS.

An information for obtaining money under false pretenses alleged that defendants, intending by false representations to obtain money of F., fraudulently represented to him that a certain company was a responsible corporation, and that it would pay F. $100 upon receiving from him $1 per week for 65 consecutive weeks, that certain contracts between the company and F. were payable in $100 at the end of 65 consecutive weekly payments of $1, that F. believed the false representations and paid defendants money on the strength thereof. *Held* that, as the only fair inference from the allegations as to the contracts referred to is that they had already been executed by F., defendants' representations were concerning existing contracts, and did not constitute the obtaining of money by false pretenses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 38-41.]

2. SAME—CONNECTION BETWEEN FALSE REPRESENTATIONS AND DELIVERY OF MONEY.

The information was insufficient, since no natural connection appeared between the representations charged to have been made by defendants and the delivery of the money to them and no connection was shown, inasmuch as it was not alleged that defendants had any connection with the company, nor that F. was induced to contract with it, nor that he had entered into the contracts described or any others by reason of defendants' representations, nor that the money was paid defendants under such contracts, nor for the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 38-41.]

3. SAME—REQUISITES OF INFORMATION.

An information for obtaining money under false pretenses must show that it was obtained by the false pretenses alleged; and, where there appears to be no natural connection between the pretenses and the delivery of the money, the necessary additional facts must be alleged to show the relation, and a failure to show the connection is a material defect which is not cured by verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, §§ 38-41.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

J. L. White and another were prosecuted for obtaining money under false pretenses. From an order sustaining demurrers to the information, the people appeal. Affirmed.

Attorney General Webb, for appellant. Hiram W. Johnson, Aitken & Skaife, and Walter Gallagher, for respondents.

HALL, J. This is an appeal by the people from an order sustaining the demurrers of the defendants to an information drawn under section 532 of the Penal Code, and comes before us upon a bill of exceptions duly settled. The defendants were jointly charged, but demurred separately, the demurrers being both general and special.

We think the demurrers were properly sustained by the trial court. The information is quite long, and we do not think it necessary to set it out at length in order to make clear the point involved in the attack on the information. In substance it is alleged that the defendants, intending by false and fraudulent representations to obtain the personal property and money of J. M. Furrer, with intent to cheat and defraud said Furrer of the same did "willfully and unlawfully, knowingly and designedly, falsely and fraudulently, pretend and represent to said J. M. Furrer that the Mutual Mercantile Company was a responsible business corporation, doing business at No. 121 Geary street, in the city and county of San Francisco; that the Mutual Mercantile Company would pay to the said J. M. Furrer one hundred dollars ($100) in lawful money of the United States of America, upon receiving from him one dollar ($1.00) in lawful money of the United States of America a week for sixty-five consecutive weeks; that certain contracts in said Mutual Mercantile Company, known as 'Series A,' and numbered 198, 199, 200, 232, 233, 234, 235, 236, 237, and 271, between the said Mutual Mercantile Company and the said J. M. Furrer were each payable in the sum of one hundred dollars ($100.00) in lawful money of the United States of America at the end of sixty-five (65) consecutive weekly payments of one dollar ($1.00) in lawful money of the United States of America each." Here follow other representations affecting the responsibility of said company, followed by proper allegations of the falsity of the various pretenses and representations, and of the knowledge thereof of defendants. It is then in substance alleged that said Furrer believed said false representations and pretenses, and was induced thereby to deliver to, and did deliver to the defendants at the city and county of San Francisco, $87 during the months of May and June, in the year 1905, of the money of said Furrer.

It is nowhere alleged in the information that the defendants had any connection with the Mutual Mercantile Company, or that said Furrer was induced to enter into any contract or business relation with said company. It is not alleged that said Furrer entered into the contracts described, or any contracts with said company, by reason of such representations, nor does it appear that the money alleged to have been paid to defendants was paid on or under such contracts, or for said company. The only fair inference from the allegations of the information is that the contracts referred to, "numbered 198, 199, 200, 232, 233, 234, 235, 236, 237, and 271, between the said Mutual Mercantile Company and the said J. M. Furrer," had already been entered into by said Furrer. In this respect the representation was concerning certain contracts "between the said Mutual Mercantile Company and the said J. M. Furrer." In other words, defendants' representations were concerning existing contracts.

From this analysis of the information it is apparent that there does not appear to be any natural connection between the representations charged to have been made by the defendants and the delivery of the money to defendants. The representations were concerning a company with which it is not alleged that defendants had any connection, nor with which said Furrer entered into any relations because of said representations. "The indictment must show that the property was obtained by means of the false pretense alleged. Accordingly, when there appears to be no natural connection between the pretense and the delivery of the property, such additional facts as are necessary to show the relation must be alleged. A defect in the indictment arising from failure to show the connection between the false pretense and the obtaining is a material one, and it is not cured by verdict." 19 Cyc. 429, and numerous authorities cited under note 37.

Roper v. State, 58 N. J. Law, 420, 33 Atl. 969, is a case quite like the one at bar. The indictment charged that Roper made certain false representations to John J. Renshaw concerning the financial responsibility of the Mutual Land & Building Syndicate, which representations were properly set forth and negatived. It was then in the usual form alleged that thereby Roper obtained from Renshaw $3,000. The court said: "If it be true, as stated, that Renshaw, the person defrauded, parted with his money to the defendant merely because the later falsely asserted and represented that a certain association, with which neither he nor the defendant had any apparent connection, had a genuine existence, the inducement to his act was not what the law regards as a false pretense. * * * If A. should falsify in stating to B. that C. was a man of property, such fabrication would not per se in any conceivable way induce B. to part with his property to A. And yet this is the entire criminal case made in this indictment."

So in the case at bar Furrer parted with his money to defendants because defendants made representations as to the responsibility of a third party with which defendants had no apparent connection, and with which Furrer entered into no connection, contractual or otherwise, by reason of the representations. In Hurst v. State, 39 Tex. Cr. R. 196, 45 S. W. 573, it was held that an indictment for swindling by false representations concerning a collecting agency was insufficient because it did not appear that defendant had any connection with the agency.

In none of the cases cited by appellant concerning the sufficiency of the indictment (People v. Jordan, 66 Cal. 11, 4 Pac. 773, 56 Am. Rep. 73; People v. Wasservogle, 77 Cal. 175, 19 Pac. 270; People v. Cadot, 138 Cal. 527, 71 Pac. 649) did any such defect exist in the indictment or information as exists in the information in the case at bar.

For the reasons above set forth, the court did not err in sustaining the demurrers of defendants, and the orders and judgments are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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7 Cal. App. 95

PARRISH et al. v. RIVERSIDE TRUST CO., Limited, et al. (Civ. 423.)

(Court of Appeal, Second District, California. Dec. 7, 1907. Rehearing Denied Jan. 6, 1908; Denied by Supreme Court Feb. 3, 1908.)

1. Venue — Change of Venue — Statutory Provisions—Discretion of Court.

Code Civ. Proc. § 398, provides that if an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, it must be transferred for trial to the nearest and most accessible court where the like objection or cause for making the order does not exist. *Held*, that a disqualified judge has no discretion, and must perform the duty imposed by the provision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, §§ 71, 72.]

2. Same — Affidavits as to Disqualification—Who may File.

Code Civ. Proc. § 398, requires a judge who is disqualified to act in a matter pending in his court to transfer the case to the nearest and most accessible court where the like objection does not exist. Section 170 defines the disqualification, and provides that applications for transfer based thereon shall be made upon affidavits, and provides a right to file counter affidavits when the facts are in dispute; but there is no special provision restricting to either party the right to make and file affidavits. Defendants filed affidavits that both judges of the county where the action was brought were disqualified, and that R. county was the nearest and most accessible county. Plaintiff thereupon filed an affidavit, in no wise controverting such statements, but showing that the judge of R. county was also disqualified. Defendants thereupon filed an additional affidavit that the judge of O. county, the next nearest and most accessible county, was also disqualified, and the court thereupon made an order, reciting the disqualification of the judges of the three counties, and transferring the cause to another county as the nearest and most accessible court to which objection on account of the disqualification of the judges did not exist. *Held* that, though none of the affidavits were counter affidavits, they were properly considered, and the order was properly made.

3. Same—Effect of Statute—Selection of Judge.

By entertaining the affidavits filed by plaintiff, the court did not exercise a discretion in transferring the cause, nor select the judge who was to try it, since the law makes the selection when the undisputed facts are before the court.

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Samuel B. Parrish and others against the Riverside Trust Company, Limited, and others. From an order of the superior court of San Bernardino county transferring the cause to Los Angeles county for trial, defendants appeal. Affirmed.

M. B. Kellogg, John G. North, and Collier & Carnahan, for appellants. Byron Waters and C. C. Haskell, for respondents.

ALLEN, P. J. Appeal by defendants from an order of the superior court of San Bernardino county transferring a cause for trial to the county of Los Angeles. The action was originally brought in San Bernardino county. The defendants in due time filed affidavits showing that both judges of San Bernardino county were interested in the result of the suit, and therefore, under section 170, Code of Civil Procedure, disqualified to sit and act, and, further, that Riverside county was the nearest and most accessible county. The plaintiffs thereupon filed affidavits in no respect controverting those of defendants, but which show that the judge of the superior court of Riverside county was also interested in the result of the suit, and therefore disqualified to sit and act. Defendants thereupon filed an additional affidavit showing that the superior judge of Orange county was also interested in the result of the suit, it appearing that Orange county, next to Riverside county, was the nearest and most accessible county to that of San Bernardino. The superior court of San Bernardino county thereupon made its order, reciting the disqualification of the judges of the three counties named, and ordering the cause transferred to Los Angeles county as the nearest and most accessible court to which objections on account of the disqualification of the judges did not exist. The authority for the transfer is contained in section 398, Code of Civil Procedure: "If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, * * * it must be transferred for trial * * * to the nearest and most accessible court, where the like objection or cause for making the order does not exist."

A disqualified judge has no discretion, and must perform the duty imposed by this provision. Livermore v. Brundage, 64 Cal. 300, 30 Pac. 848. Section 170 defines the disqualification, and provides that applications for transfer based thereon should be made upon affidavits. There is nothing specifically stated in either section, or suggested thereby, which can be interpreted as restricting to any particular party the right to make and file the affidavits. It is true that section 170 confers the right to file counter affidavits when the facts are in dispute; but in this case no facts are in dispute, and none of the affidavits on file may be properly termed counter affidavits, but all are in line as establishing the facts warranting a transfer to the proper county.

Appellants insist that the court, in entertaining the affidavits filed by plaintiffs, was sitting and acting in the cause in which he was interested to the extent that he was passing upon the qualification of the judge in Riverside county, and that he was violating the well-established rule that "he should neither try his own cause nor select his judge." We do not construe the section as attempting to confer upon a disqualified judge a right to select a judge; but, on the contrary, the duty imposed is to accept the affidavits, when not controverted, as true, and transfer the cause, not to a judge of his own selection, but to the nearest and most accessible court where no disqualification exists. The law selects the judge when the undisputed facts are before the court. The Supreme Court of Wisconsin, in the case of Northwestern Iron Co. v. Crane, 66 Wis. 567, 29 N. W. 655, in construing a somewhat similar statute, says: "The primary purpose of this section was to prescribe the court to which such cause should be sent on such application." The application was made by both parties, and the nearest and most accessible county where the cause could be properly tried was made apparent. We are unable to see where the judge transcended his authority, or did any act other than to perform a plain duty devolving upon him by statute. The court had jurisdiction to make the order, and we perceive no error therein.

The order is affirmed.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 87

MYERS et al. v. CITY OF OCEANSIDE.

(Civ. 415.)

(Court of Appeal, Second District, California. Dec. 7, 1907. Rehearing Denied by Supreme Court Feb. 5, 1908.[1])

1. DEDICATION—REVOCATION.

Where after the execution of deeds of lots, "together with an interest in block 19, according to above plat as a public square forever," or "together with an interest in lots 7, 8, 9, 10, 11, and 12 in block 19, according to above plat as a public square forever," in some of the latter of which deeds "public park" was used instead of "public square," grantor filed a map displaying block 19 as subdivided into building lots, including lots 7, 8, 9, 10, 11, and 12, but in no manner indicating any intention to dedicate any part of the block to park purposes, conceding the declarations in the deeds to show an offer of dedication, the filing of the map was a complete revocation thereof, so far as the public was concerned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 79.]

2. SAME — ACCEPTANCE — NECESSITY — COMPLETE DEDICATION.

Where there is a complete dedication, no acceptance is required, it being presumed from the benefits arising from the dedication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 64, 65.]

3. SAME.

Where there is a mere offer of dedication, there must be an acceptance, and until there is the owner may at any time revoke the offer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 64–68.]

4. SAME.

Revocation of an offer of dedication may be evidenced in various acts inconsistent with the use for which it is claimed the land was dedicated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 77–79.]

5. SAME.

Where an offer of dedication has been revoked, later acts cannot operate to revive the revoked offer, even if sufficient to show an acceptance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 77–79.]

6. SAME—COMPLIANCE WITH CONDITIONS.

Use of land for purposes of a highway and as a camping place by strangers are insufficient to show an acceptance of an offer of dedication for park purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 73–76.]

7. SAME.

In determining whether an offer of dedication has been accepted, only such acts as tend to show an acceptance for the purpose for which the dedication is offered to be made can be considered.

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[1] BEATTY, C. J. This order is entered by direction of a majority of the Justices. I am of the opinion that the case should be reheard.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 64–76.]

8. SAME—INTENT TO DEDICATE.

In all matters of dedication the question of intention is controlling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 13.]

9. APPEAL—REVIEW—QUESTION OF FACT—INTENT TO DEDICATE.

The question of intention in matters of dedication is one of fact, and the finding of the trial court must be sustained, if there be any evidence to support it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3317–3330.]

10. DEEDS—QUITCLAIM—EFFECT TO PASS TITLE.

A quitclaim deed is as effectual to transfer title as a deed of bargain and sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 49, 394–400.]

11. QUIETING TITLE—EVIDENCE—ADMISSIBILITY—INVENTORY AND APPRAISEMENT.

Where the decree of distribution in the estate of a decedent, through which title is claimed, referred to the inventory and appraisement for purposes of description, such inventory and appraisement are competent evidence for that purpose in an action to quiet title.

12. SAME.

In an action to quiet title to lots claimed by defendant city as a public park, evidence by the city to show how the property was assessed on the assessment roll of the city was properly excluded.

13. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in an action to quiet title in the admission of immaterial evidence was not prejudicial, where the case of the party introducing the same was made independent of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4170.]

14. SAME—ESTOPPEL TO ALLEGE ERROR—ERROR INVITED BY PARTY COMPLAINING.

A party introducing improper evidence may well be estopped to complain of the admission of evidence to rebut such improper evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3591–3610.]

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Joseph E. Myers and another against the city of Oceanside. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Dadmun & Belieu and W. T. Belieu, for appellant. Wright & Schoonover, for respondents.

TAGGART, J. This is an action to quiet title to one-half of a block of land in the city of Oceanside, county of San Diego, claimed by the defendant to have been dedicated as a public park by one Andrew J. Myers, the original owner by U. S. patent, and predecessor in title to the plaintiffs. Judgment was for plaintiffs, and defendant appeals from the judgment and an order of the superior court denying its motion for a new trial.

The findings of the court were affirmative of the allegations of the complaint, which was in the usual form of a complaint to quiet title. The case made by the city is unlike that usually presented to show a dedication. The evidence establishes no express dedication, discloses no filing of a map displaying a park delineated thereon, and fails to show that any survey or location of the boundaries was ever made by the city. No permanent improvements were ever made upon the property to indicate that it was a public park, and it stands (according to the testimony of some of the witnesses), just as it has since 1883, all open, uninclosed, and crossed in various directions by teamsters at their pleasure, and in all respects the same as other unoccupied unimproved property in and about Oceanside.

The offer of dedication relied upon appears as declarations in 23 deeds of lots in the Oceanside town site, made to various persons by said Andrew J. Myers between August 11, 1883, and January 13, 1885. All of these refer to the "Lockling Survey," as shown by two different plats filed in the county recorder's office—one on June 11, 1883, and the other on October 13, 1883. Those referring to the former plat contain the clause "together with an interest in block 19, according to above plat, as a public square forever"; and those referring to the latter contain the clause "together with an interest in lots 7, 8, 9, 10, 11, and 12, in block No. 19, according to above plat, as a public square forever." In some of the latter the term used is "public park" instead of "public square." These maps were not filed at the request of Myers or of any one else claiming an interest in the land, and no words of dedication, or delineation of the so-called public square or park, appear upon either of them. They differ materially as to the location and subdivision of block 19, and the lots claimed as a park did not appear upon the one filed June 11, 1883. On July 1, 1885, a map of block No. 19, based upon a survey made by C. J. Couts, C. E., in June, 1885, was filed by Myers. This was the first map filed at his request, and was some six months later in date than the last of the 23 deeds above mentioned. It displayed all of block 19 as subdivided into building lots 50x100 feet including the half block in question, which appears thereon as lots 7, 8, 9, 10, 11, and 12, but in no manner indicates any intention to dedicate any part of the block to park purposes. On October 18, 1889, Andrew J. Myers granted to A. O. Wallace all his "right, title, and interest in the land described in a patent," etc. (referring to a patent conceded to include the land in question), "except the block upon which I have filed a homestead, and any and all lands in said tracts heretofore conveyed by me." It is from Wallace that plaintiffs deraign their title. The city of Oceanside was incorporated the latter part of the year 1888, and it never at any time passed any formal resolution accepting the so-called dedication, and prior to the date of the deed to Wallace did no act tending to show an intent to accept a dedication. There are other and later acts of the city relied upon to show an acceptance by it of an offer of dedication by Myers, but no attempt is made to show additional assent upon the part of him or his grantee to the treatment of the offer as still open. These evidences of acceptance consist of entries in the minutes of the meetings of the board of trustees in which the term "park" is used in relation to the purchase and planting of trees, furnishing water to, and collecting rates from campers for the use of the "park" in the years 1897, 1901, and 1902. As to the action taken by the officers of the city under these minutes, there is some conflict in the evidence; it appearing by the testimony of some of the witnesses that the trees were not planted on the park, and that the arrangement and care of the campers was for the purpose of collecting water rates, and incidental to keeping a camping place in order for campers who might desire to come to Oceanside.

If it be conceded that the declarations in the private deeds were sufficient evidence to show an offer of dedication, the court was justified in considering the filing of the Couts map as evidence of a full and complete revocation or withdrawal of such offer so far as the public was concerned. That the easement created for the benefit of his grantees still existed, and that the grantor was estopped to deny them such rights in block 19 as he had expressly granted to them, did not affect the public. The rights created by the deeds might be enforced by the grantees against Myers and his successors in interest whether there was or was not a dedication to public use (Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145), but, considered in connection with the question of dedication, the clauses creating the interest in block 19 were merely admissions on the part of Myers of an intention to dedicate. They did not constitute an express dedication, and were not evidence tending to show an express dedication. There was not a complete dedication, as would have been the case if the deeds had been made to the city or to some one for the benefit of the public, or if the map filed at Myers' request had shown words of dedication on its face. In case of a complete dedication no acceptance is required, it being presumed from the benefits arising from the dedication. San Leandro v. Le Breton, 72 Cal. 175, 13 Pac. 405. It is important, therefore, to observe the distinction between a complete dedication and a mere offer of dedication. In the latter case there must be an acceptance, and until there is the owner may at any time revoke and withdraw the offer. Revocation may be evidenced in various acts inconsistent with the use for which it is claimed the land was dedicated. This may be by filing a map or plat upon which the property is delineated as private property, or by conveying the title of it to a third person without recognizing the easement. Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141; Schmitt v. San Francisco, 100 Cal. 308, 34 Pac. 961. In the latter case, unless the grantee expressly indicates an intention to keep the offer open, it will be presumed that he does not intend to do so. Forsyth v. Dunnagan, 94 Cal. 441, 29 Pac. 770. The owner may revoke until some one has acted upon the offer in such a mode that they would be injured by the revocation. Schmitt v. San Francisco, supra.

A revocation before an acceptance having been shown, the whole question of dedication must be eliminated from the case in considering the findings. Prescott v. Edwards, 117 Cal. 301, 49 Pac. 178, 59 Am. St. Rep. 186. The filing of the Couts map, the conveyance of the land to Wallace without reservation, and the sworn declarations of Myers on the witness stand, all tended to show an intention to revoke any offer of dedication that had been made or which could have been inferred from the deeds made by Myers, and were sufficient to support the finding of "no dedication." The later acts of the city could not operate to revive the revoked offer, even if sufficient to show an acceptance. But they were not sufficient for this purpose. Use of the land for purposes of a highway and as a camping place by strangers are not within the purposes of the dedication contended for. There was nothing shown in the way of planting and maintaining shrubbery and trees on the land and a keeping of it as a "park" in the common acceptation of that term. No intention to carry out the purposes of the dedication is shown. Only such acts as tend to show an acceptance for the purpose indicated can be considered. Archer v. Salinas City, supra. The question of intention is the controlling one in all matters of dedication, and it is one of fact, and the finding of the trial court in this respect must be sustained if there be any evidence to support it. City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90; Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855.

We cannot agree with appellant's contention that a quitclaim deed is no evidence of title. It was announced as the well-established doctrine in this state in Graff v. Middleton, 43 Cal. 344, that quitclaim deeds are as effectual to transfer title to lands as deeds of bargain and sale, and a decree quieting the title of a party claiming under a quitclaim deed was sustained in that case. That case has been frequently affirmed. Rego v. Van Pelt, 65 Cal. 254, 3 Pac. 867; Spaulding v. Bradley, 79 Cal. 456, 22 Pac. 47; Taylor v. Opperman, 79 Cal. 470, 21 Pac. 869; Nidever v. Ayers, 83 Cal. 42, 23 Pac. 192. While there are purposes for which the inventory and appraisement in the estate of a deceased person is not admissible as evidence, or at least is immaterial (Nathan v. Dierssen, 146 Cal. 63, 79 Pac. 739), in the case at bar the decree of distribution in the estate of A. O. Wallace.

deceased, through which plaintiffs claim title, referred to the inventory and appraisement in that estate for purposes of description. It was competent evidence for that purpose.

There was no material error prejudicial to defendant's case committed by the court in the 40 rulings excepted to by it. Some of these are covered by the foregoing views of the court, and those not so disposed of are not especially urged in the brief. The most important of them relate to rulings rejecting testimony offered by defendant to show how the property was assessed on the assessment roll of the city. This was entirely immaterial in the case as presented. It could not conclude the property owner. San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405. At the time these books were made there was no pending offer to dedicate, and if there had been the assessor had no authority to accept for the public. Schmitt v. San Francisco, supra. The testimony of the county assessor in this same connection was admitted without objection to show that the property had not been assessed to Myers for a number of years, and in response to this plaintiffs were permitted to introduce certificates of sales of some of the lots for taxes. Conceding this to have been error, it in no manner prejudiced the case of defendant, as that of plaintiffs was made independent of this evidence. Defendant's estimate of the admissibility of the testimony in this respect appears to be governed by the question, what is its effect? While one error cannot be held to offset another, the party introducing improper evidence may well be estopped to complain of the court's permitting the introduction of evidence at the request of the other party to rebut such improper testimony. If either party were claiming under a title acquired by adverse possession, the question whether or not the property was assessed, and to whom and who paid the taxes, etc., might have been material, but no such title was attempted to be established here. The evidence introduced improperly was immaterial but not prejudicial.

The other exceptions do not require consideration, and, the record showing no prejudicial error, the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

152 Cal. 637

McKEE v. DODD. (S. F. 4,381.)

(Supreme Court of California. Jan. 21, 1908. Rehearing Denied Feb. 17, 1908.)

1. LIMITATION OF ACTIONS—COMPUTATION OF TIME—ABSENCE FROM STATE.

Code Civ. Proc. § 339, subd. 1, provides that an action upon a contract founded on a written instrument executed out of the state must be commenced in the state within two years. Section 351 declares that if, when a cause of action accrues against a person, he is out of the state, the action may be commenced within two years after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not a part of the time limited for the commencement of the action. *Held*, that where a note was expressly made payable in New York, and the parties were residents of that state when it was executed, but the maker was a nonresident thereof when the cause of action on it accrued and subsequently came to California, the statute only commenced to run in his favor when he came to the state, and where he left the state, returning for occasional visits which aggregated less than two years, the time that he was absent from the state was not a part of the time within which the suit could be brought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 439–455.]

2. SAME—NONRESIDENCE.

Code Civ. Proc. § 361, provides that when a cause of action has arisen in another state, and by the laws thereof an action thereon cannot be maintained by reason of lapse of time, an action thereon shall not be maintained against him in this state except in favor of one who has been a citizen, and has held the cause of action from the time it accrued. The maker of notes payable in New York left that state, was in Europe when the notes became due, and afterwards took up his residence in Hawaii after the maturity of the notes, and remained there for a length of time which, under the Hawaiian statute of limitations, would bar an action on the notes. *Held*, that the Hawaiian statute of limitations did not bar an action brought against the payor's executor in California, since the action arose primarily in New York, and the section has reference only to the primary and original jurisdiction in which a cause of action arises, and does not contemplate other jurisdictions where the debtor may have resided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 4–8.]

3. ACTION—NATURE AND ELEMENTS OF CAUSE OF ACTION.

A "cause of action" arises out of an antecedent primary right and corresponding duty and the breach of the right and duty by the person on whom the duty rests; the primary right and duty and the wrong together constituting the cause of action in the legal sense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 1.

For other definitions, see Words and Phrases, vol. 2, pp. 1015–1019; vol. 8, p. 7598.]

4. LIMITATION OF ACTIONS — PLACE OF ACCRUAL OF CAUSE OF ACTION.

In a legal sense a cause of action cannot have two places of origin, but can arise in but one place, and, in the case of a note made payable in the state where the payee lives, it arises in that state.

5. COURTS—COMITY—RIGHTS OF CREDITORS.

As between the states the same rights are reserved by the Constitution to the citizens of one that are accorded to the citizens of another, but, beyond this, the ability of a creditor to pursue his debtor in a foreign jurisdiction rests wholly upon comity and upon the laws of such jurisdiction.

6. EXECUTORS AND ADMINISTRATORS — PRESENTMENT OF CLAIMS—CLAIMS OF NONRESIDENT CREDITOR—COMITY.

Since the statute does not forbid a creditor and resident of a sister state the right to present his claim against an estate being administered in this state, whether the administration be primary or ancillary, comity will dictate that such a claim should be entertained.

Department 2. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by John McKee against Rebecca A. Dodd, executor of James Dodd. Judgment for plaintiff, and defendant appeals. Affirmed.

W. M. Cannon, for appellant. A. P. Black, for intervener. Mullany, Grant & Cushing, for respondent.

HENSHAW, J. This is an action on a claim against the estate of James Dodd, deceased, based upon three promissory notes which were executed in 1891 in New York to plaintiff, and payable in that state; plaintiff and the deceased at that time both being residents thereof. All of these notes by their terms became due and payable before the expiration of the year 1891. Shortly after their execution Dodd left New York and never returned. He was in Europe until May, 1892, and thence came to California, arriving here in June, 1892. He kept a liquor saloon in San Francisco until April, 1893, when he sold out his business and went to Honolulu, H. I. He entered business in Honolulu, resided and had his domicile there until his death in January, 1900. During the time of his residence in Honolulu he made visits to San Francisco, but the total length of his stays in this state aggregated less than two years. He left estate, consisting of real and personal property, in Hawaii and in California. His will was duly admitted to probate in Honolulu, and ancillary administration was had in the superior court of the city and county of San Francisco. Such property as he left in this state is here in process of administration. McKee, the plaintiff, continued to reside in New York. He presented the notes for payment to the executrix as a claim against the estate in California, which claim was allowed by her. The court refused its allowance, whereupon this action was commenced. It was known to plaintiff that Dodd was residing in Honolulu. The court awarded judgment to plaintiff upon his claim and defendant appeals, presenting three contentions.

1. Appellant urges that the notes are barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, by which section an action upon a contract founded upon an instrument in writing executed out of the state must be commenced in this state within two years. Section 351 of the Code of Civil Procedure in this connection declares that "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not a part of the time limited for the commencement of the action." Appellant relies upon the case of Palmer v. Shaw, 16 Cal. 93, as supporting her contention that when Dodd came to the state the cause of action against him here arose, that the statute of limitations then began to run, and that his subsequent departure from the state did not stay this running; but in Palmer v. Shaw, not only was the court's attention not directed to this proposition, but in fact the defendant had been in the state more than two full years before the action was brought, whereas the deceased in this case had been in the state, aggregating all of his visits, less than five hundred days. The rule is to the contrary of appellant's contention, and has been expressly so decided in Dougall v. Schulenberg, 101 Cal. 154, 35 Pac. 635. That case is the exact parallel of this as to the leading question involved, and it is there declared that where a note sued upon was in express terms payable out of the state, and the payors were nonresidents of the state when the cause of action accrued, the statute only commenced to run in their favor when they came to this state, and if afterward they left the state, the time during which they were so absent will not be a part of the time within which the suit must be commenced. It follows herefrom that plaintiff's cause of action was not barred by subdivision 1 of section 339 and section 361 of the Code of Civil Procedure.

2. Appellant next contends that the cause of action was barred by section 361 of the Code of Civil Procedure. This section is as follows: "When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued." In support of appellant's position under this section it was established in evidence that under the laws of Hawaii an action for the recovery of any debt founded upon any contract, obligation, or liability, where the cause of action has arisen in any foreign country, must be commenced within four years after the cause of action accrues. Appellant's reasoning and argument is this: That a cause of action "arose" against the deceased in Hawaii upon his arrival there after the maturity of the notes; that for failure to prosecute, the right of action became barred by the statute of limitations of Hawaii; that thus is presented a case under our section 361, where, by the laws of a foreign country, an action cannot be maintained upon a contract by reason of lapse of time, wherefore no action is maintainable against such person or his estate in this jurisdiction. It is at once apparent then that the crux of this matter is to be found in the true interpretation to be given to the phrase "when a cause of action has arisen." Appellant contends that the cause of action "arose" simultaneously in New York state at the time the promissory notes became due and payable, and also in Europe, where at that moment deceased chanced to be; that subsequently the cause of action arose successively in every country through which he passed, and arose finally in Hawaii upon his arrival there. If this be the true construction of the statute, then admittedly plaintiff's cause of action is barred. It may at once be conceded that the courts have experienced difficulties in construing statutes of limitations similar in their terms to our section 361. Appellant cites many cases under her contention that the weight of authority is with her. It would not be profitable to analyze these authorities to show in individual instances where the ruling of the court was determined by differences between their statutes and our own, nor where under other circumstances the reasoning does not appeal to us as cogent. Suffice it to say that, from a consideration of all the authorities and from the very reason of the matter itself, we are satisfied that appellant's position cannot be maintained. A cause of action, as Professor Pomeroy points out with his usual lucidity (Remedies and Remedial Rights, § 452 et seq.), arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests. "Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term and as it is used in the Codes of the several states." It was the right of plaintiff to look for payment of his debt at the time it became due and at the place of payment—New York state. It was the duty of the deceased to pay the debt, not only when it became due, but at the place of payment—New York state. His failure in this regard gave

rise to the cause of action, and, clearly therefore, that cause of action arose in the state of New York. In a legal sense the cause of action cannot have two places of origin. It can arise in but one place, and that, in such a case as this, is where the note is payable and the payee resides. As between the states the same rights are reserved by the Constitution to the citizens of one that are accorded to the citizens of another. But beyond this, the ability of a creditor to pursue his debtor in foreign jurisdictions rests wholly upon comity and upon the laws of such jurisdiction. This cause of action, therefore, did not arise against the deceased in Europe, where he chanced to be; and, indeed, in the particular country of his location at the time of his default, no remedy may have been open to plaintiff. Whatever subsequent remedies by way of rights of action may have accrued to plaintiff because of the deceased's presence in various states and countries, they were one and all subordinate to and depended upon the vital and essential fact that the cause of action had arisen against him in the state of New York. Story v. Thompson, 36 Ill. App. 370; Chevrier v. Roberts, 6 Mont. 319, 12 Pac. 702; Doughty v. Funk, 15 Okl. 643, 84 Pac. 484, 4 L. R. A. (N. S.) 1029; McCann v. Randall, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 666. We conclude, therefore, upon this point that section 361 has reference only to the primary and original jurisdiction in which the cause of action arises, and does not contemplate other jurisdictions in which a cause of action may arise or accrue, depending upon the peripatetic inclinations of the defendant, and in the case at bar, unquestionably, the cause of action had its origin and primarily "arose" in the state of New York.

3. The last contention which appellant advances is that administration in this state being ancillary, no claim of a citizen of a foreign state can here be recognized at all, regardless of any question of the statute of limitations, but that such claim must be transferred to the court of primary jurisdiction. Undoubtedly, there is authority holding this view. Undoubtedly, also, this rule is ably controverted upon the ground that it is unsound in morals, as well as in law, and violates the constitutional guarantee of equal privileges and immunities to citizens. Reference herein may be made to the case of Shegogg v. Perkins, 34 Ark. 117, and to the conflicting views of the justices of that court upon the matter. In Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432, it was declared that a state statute giving to residents of that state a priority over nonresidents in the distribution of the assets of a foreign corporation is violative of article 4 of the Constitution of the United States, giving equal privileges and immunities to the citizens of the several states, and as denying to every person within its jurisdiction the equal protection of the law. We find no statute of our state which, in terms, denies to a creditor and resident of a sister state the right to present his claim here, whether the administration in our courts be primary or ancillary, and, in view of the provision of the Constitution of the United States above referred to, we should doubt the validity of such a statute if found upon our books. However, upon this matter it is necessary here to say no more than that, since our statutes do not forbid, comity will dictate that such a claim should be entertained.

For these reasons the judgment appealed from is affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

(152 Cal. 643)

GILLESPIE et al. v. GOULEY. (S. F. 4,277.)

(Supreme Court of California. Jan. 21, 1908.)

1. QUIETING TITLE — PARTIES — PLAINTIFFS—JOINDER.

Two sons claiming that each owns a divided half of certain land under the will of their mother, and seeking to remove from their title the cloud of a fraudulent deed affecting the moieties of both, were properly joined as plaintiffs, under Code Civ. Proc. § 381, providing that any two or more persons claiming any interest in land under a common source of title, whether holding as tenants in common, joint tenants, copartners, or in severalty, may unite in an action against any person claiming an adverse estate therein, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 65.]

2. JUDGMENT—PARTIES—MISJOINDER OF PARTIES PLAINTIFF—EFFECT.

A woman died leaving three sons. By her will certain land was to be divided equally between two of the sons. Before her death, however, she was defrauded of the land. The sons joined in a suit to recover the property. The court found that the two sons took as devisees, but that the third son had no interest in the subject-matter of the action, and, for misjoinder of parties plaintiff, gave judgment for defendant. Code Civ. Proc. § 578, provides that judgment may be given for or against one or more of several plaintiffs, and may, when justice requires it, determine the ultimate rights of the parties on each side as between themselves. *Held*, that the court should have dismissed the action as to the third son, retained it as to the other plaintiffs, and rendered such judgment in their favor as they were entitled to under the findings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 414.]

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by William M. Gillespie, administrator, and others against Ellen Gouley, administratrix. From a judgment for defendant, plaintiffs appeal. Reversed, with directions.

John B. Carson, Carlton W. Greene, and Lewis & Royce, for appellants. Henry C. McPike, for respondent.

HENSHAW, J. The facts necessary for an understanding of this action will be found stated in the former opinion of Gillespie v. Gouly, 120 Cal. 515, 52 Pac. 816. The plaintiffs sued to recover the real property as the heirs at law of Ann Gilfeather, deceased, who was the original owner of it, and who had been defrauded of it by a judgment and proceedings taken thereunder while she was insane. Upon a retrial of the cause the court found these facts to be as charged. The answer, however, had affirmatively pleaded that these plaintiffs had no interest in the property as heirs at law of Ann Gilfeather, deceased, for the reason that Ann Gilfeather had died testate, and by her will had specifically devised the property in question to two of her sons; that is to say, to her son Dennis one-half of the property, specifically devised by metes and bounds, and to her son Edward the other moiety. The court found in accordance with the allegations of the answer. It further found that while these two sons took as devisees under the will of their mother, the third plaintiff, James, was not interested in the property or in the subject-matter of the action at all. There thus resulted, at least so far as the plaintiff James is concerned, a misjoinder of parties plaintiff. The court therefrom concluded that all of the plaintiffs must fail in their action, and gave judgment accordingly in favor of defendant. This appeal is upon the judgment roll alone, and it is contended that the court, under its findings of fact above adverted to, erred in the judgment which it gave.

The action is one, the bringing of which is authorized under section 738 of the Code of Civil Procedure. Section 381 of the same Code declares that any two or more persons claiming any estate or interest in land under a common source of title, whether holding as tenants in common, joint tenants, copartners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, etc. The plaintiffs Dennis and Edward, claiming as devisees, the common source of title being the will of their deceased mother, and seeking to remove from their title the cloud of the fraudulent deed which affected the whole land, indubitably brought themselves within the provisions of section 381 of the Code of Civil Procedure. Thus, in People v. Morrill, 26 Cal. 336, it is held that parties who have a common interest in annulling a patent, although their interest in the land adverse to the patent is not joint, may join as plaintiffs in an action to procure its cancellation. This is well nigh parallel to the case at bar. While the parties hold their moities in severalty, they are seeking the annulment of a deed which equally affects the lands of both. Our Code section in this regard embodies the rule governing the joinder of parties to an action as enunciated by Judge Story, who says: "The result of the principles to be extracted from the cases on this subject seems to be that where there is a common liability and a common interest, a common liability in the defendants and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit."

The plaintiffs, other than the brother James, were thus properly joined as plaintiffs in this action. The brother James, as has been stated, appears without any interest whatsoever in the controversy. What result should follow the determination of this fact? Section 578 of the Code of Civil Procedure presents the complete answer to this question. It declares: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves." Under the way thus clearly pointed out, the judgment of the court as to James should have been his dismissal from the action, retaining the action as to the other plaintiffs and rendering judgment in their favor, such judgment as, under the findings which the court made, they were clearly entitled to.

It follows, therefore, that the judgment of the trial court must be reversed, and a judgment in accordance with the foregoing entered; that is to say, as to the plaintiff James, a judgment dismissing him from the action, as to plaintiffs William Gillespie, representing Dennis Gilfeather and Edward Gilfeather, a judgment in their favor upon the findings made by the court.

It is ordered accordingly.

We concur: ANGELLOTTI, J.; LORIGAN, J.; SHAW, J.; McFARLAND, J.

152 Cal. 634

MUIR v. HAMILTON et al. (Sac. 1,246.)

(Supreme Court of California. Jan. 20, 1908.)

1. Mortgages — Failure of Consideration for Debt Secured—Effect.

A client, to secure his contingent liability to pay his attorney in the event he was successful in a suit, gave the attorney a note for the amount of compensation, and gave a deed of real estate to a third person as security therefor. The suit was lost, and the note and deed remained in the hands of the original parties. *Held*, that the client was entitled to a cancellation of a deed which was in effect a mortgage, because there was a total failure of consideration for the note.

2. Evidence—Parol Evidence—Failure of Consideration of Note.

As between the original parties to a note, failure of consideration thereof may be shown by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1981-1989.]

Department 2. Appeal from Superior Court, Placer County; Albert G. Burnett, Judge.

Action by William Muir against George W. Hamilton and another. From a judgment for plaintiff, defendants appeal. Affirmed.

J. M. Fulweiler, Chas. Tuttle, L. L. Chamberlain, and Geo. W. Hamilton, for appellants. W. H. Slade, J. D. Meredith, and F. P. Tuttle, for respondent.

HENSHAW, J. Plaintiff brought his action to quiet title to certain parcels of land situated in the county of Placer. The gravamen of the action rests upon the following facts, which plaintiff alleges, and which the court found upon ample testimony, to be true: In the year 1897 plaintiff was engaged, as plaintiff, in a certain litigation with F. P. Tuttle. He employed the defendants, father and son, who were attorneys at law, to prosecute on his behalf this litigation, under an agreement that the defendants were to devote their time and legal services to the prosecution of the action, and, in the event that its final determination should be in favor of plaintiff, defendants should receive as compensation for their services the sum of $5,500, of which sum the defendant George W. Hamilton was to receive $2,500, and the defendant Joe Hamilton was to receive $3,000. In the event, however, that the action was determined adversely to plaintiff, defendants were to receive no compensation whatever. For the purpose of securing this contingent obligation plaintiff executed and delivered to the defendant Joe Hamilton his promissory note for $3,000, and to the defendant George W. Hamilton his promissory note for $2,500. Furthermore, for the sole purpose of securing the payment of this contingent fee, so evidenced by the promissory notes, plaintiff executed a deed of all the property here in controversy to defendant George W. Hamilton. At the time it was agreed that this deed should be deposited by way of escrow with the defendant Joe Hamilton, and the defendant Joe Hamilton would hold the same in escrow until the final determination of the action of Muir v. Tuttle. In the event that the action of Muir v. Tuttle was finally decided in favor of plaintiff, Joe Hamilton was to deliver the deed to the defendant George W. Hamilton, who, under these circumstances, would take the same as security for the contingent fees. But in the event that the action of Muir v. Tuttle was finally determined in favor of defendant, said Joe Hamilton agreed to redeliver to plaintiff the deed and the promissory notes. The action of Muir v. Tuttle resulted in a final judgment for defendant. The defendant George W. Hamilton delivered his promissory note for $2,500 to plaintiff, but the defendant Joe Hamilton failed, neglected, and refused to surrender his note for $3,000 with the other securities and documents. The defendant George W. Hamilton secured possession of the deed, and in violation of the agreements, caused it to be placed of record in the office of the recorder of the county of Placer.

These findings, which as we have said are amply supported by the evidence, are sufficient to uphold the conclusions of law to the effect that plaintiff was the absolute owner of the land, and was not indebted to the defendant Joe Hamilton in the sum of $3,000, or in any sum whatever, nor to George W. Hamilton in any sum whatever; that the consideration for which the notes were given had wholly failed, and that plaintiff was entitled to his decree quieting title to the land in the complaint described; as a part of the relief under which decree, it was ordered that the deed of plaintiff to Hamilton be declared void and canceled.

The trial court stated that the vital question in the case was whether the agreement of plaintiff was to pay an unconditional or contingent fee. This, appellants say in their brief, is an illustration and a demonstration that the court has confused the true issue, and that the true issue is, did the execution and unconditional delivery of the promissory notes create an obligation against the plaintiff, and has that obligation been discharged? Under the facts of this case, the note still being in the hands of the original payee, we think the distinction that counsel makes is rather of form than of substance. There was not an unconditional delivery of the promissory notes. However closely the lips of the plaintiff might have been sealed under the law governing negotiable paper, if his notes had passed into the hands of an innocent purchaser for value before maturity, as between the original parties to an instrument, nothing is better settled than that the maker may show an original lack of consideration, or subsequent failure of consideration, which latter was done in this case. And equally is it well settled that such lack or failure of consideration may be shown by parol. Billings v. Everett, 52 Cal. 661; Braly v. Henry, 71 Cal. 483, 11 Pac. 385, 12 Pac. 623, 60 Am. Rep. 543; Jefferson v. Hewitt, 103 Cal. 624, 37 Pac. 638; 4 Am. & Eng. Ency. of Law (2d Ed.) pp. 186, 196.

The deed which plaintiff gave was, in effect, a mortgage, and was given as security for the payment of the promissory notes. The consideration for the notes having failed totally, it was plaintiff's right, as the court decreed, that the deed itself should be canceled and annulled.

The judgment and order appealed from are, therefore, affirmed.

We concur: McFARLAND, J.; LORIGAN, J.

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152 Cal. 716

STANISLAUS WATER CO. v. BACHMAN.

(S. F. 3,890.)

(Supreme Court of California. Jan. 23, 1908.)

1. VENDOR AND PURCHASER—INNOCENT PURCHASER — NOTICE — RECORDS — WATER CONTRACT.

A contract by which a water company agrees to furnish through its canal to the owner of certain land water to irrigate it, for a term of years, he to make certain yearly payments therefor, is not to be recorded in the book in which County Government Act, § 120, subd. 1 (St. 1897, p. 484, c. 277), provides that "deeds, grants, transfers and mortgages" of real estate shall be recorded; but the book provided by subdivision 12 for recording "such other writings as are required or permitted by law to be recorded," and in which it has been the custom to record water contracts and other agreements of like character, is the proper book in which to record it, so as to give constructive notice thereof.

2. MORTGAGES — FORECLOSURE — RIGHTS OF SUBSEQUENT INCUMBRANCERS.

If a mortgage given by a water company on its water system was such as to make it paramount to the rights of a landowner under the contract thereafter made with him by the company to furnish through its canal water to irrigate his land for a term of years, he to make certain yearly payments therefor, yet, he not having been made a party to the foreclosure, though his contract was recorded prior to commencement of the foreclosure suit, the purchaser under the foreclosure holds the canal system and the waters thereof subject to the rights of such landowner, at least till those rights are terminated by foreclosure proceedings to which he is a party.

3. SAME—PROPERTY PASSING—SUBSEQUENTLY ACQUIRED WATER RIGHTS.

Though a mortgage of land is made prior to the contract of the landowner with a water company, by which the company agrees to furnish through its canal to him, his heirs or assigns, water to irrigate the land for a term of years, he to make certain yearly payments therefor, the water right, when acquired, having become an easement appurtenant to the land, passed with it under the foreclosure of the mortgage.

4. WATERS—CONTRACT FOR IRRIGATION—NATURE OF PROPERTY RIGHT.

The right conferred on a landowner by his contract with a water company to have water flow from its canal, through a lateral ditch, to his land, for its irrigation, for a term of years, is a servitude on the ditch and canal, and an appurtenance to the land, and so is real property.

5. VENDOR AND PURCHASER—INNOCENT PURCHASERS—CONTRACT FOR SALE OF WATER.

An agreement of a water company with the owner of land to furnish through its canal from a certain river to the landowner, his heirs or assigns, to irrigate the land, a flow of water sufficient to irrigate it each year for a certain number of years, the devices through which the water shall be drawn from the land to be constructed by the company and the landowner to pay a certain amount yearly therefor, the contract to have the force and effect of a covenant running to and with the land and the canal, is not a mere personal covenant of the company, but, while not a lien on the canal, is an agreement for sale of real property of the company, binding on the successor in title of the company's plant, taking with notice of the agreement.

6. WATERS—CONTRACT TO SELL FOR IRRIGATION—DEFINITENESS.

The agreement of a water company to sell water for a certain price for irrigation of certain land for a term of years is sufficiently certain, the water being described as water from a certain river, to be carried through the company's canal, and it being shown that it had but one canal leading from that river, though the lateral ditch was not described, except by the statement that the company was to deliver the water on the land by means of such head gates, weirs, and devices as it should construct for that purpose, a ditch through which water was conducted to the land having thereafter been constructed by the company, and the contract in this respect having thus been made definite.

7. SAME—IRRIGATION — CONTRACT RIGHTS — CONSTITUTIONAL PROVISIONS.

Const. 1879, art. 14, declaring the use of waters appropriated for sale, rental, or distribution to be a public use subject to the regulation of the state as shall be prescribed by law, and that the right to collect compensation for water supplied to any county, city, or town, or the inhabitants thereof, cannot be exercised except by authority of and in the manner prescribed by law, does not prevent a landowner acquiring and attaching to his land a right to the permanent use of water; and, in the absence of exercise of the power, delegated by statute to county boards of supervisors, of control and regulation of waters outside of cities, the terms of a contract for furnishing water for irrigation, for a term of years, at a fixed yearly rental, remain in full force, and constitute the measure of the rights of the parties.

In Bank. Appeal from Superior Court, San Francisco County; M. C. Sloss, Judge.

Action by the Stanislaus Water Company against S. Bachman. Judgment for defendant. Plaintiff appeals. Affirmed.

J. W. Dorsey and W. E. Cashman (James F. Peck, of counsel), for appellant. W. F. Williamson, amicus curiæ. Vogelsang & Brown (Samuel C. Wiel, of counsel), for respondent.

SHAW, J. The plaintiff sued the defendant to recover $920 alleged to be due for water sold and delivered by the plaintiff to the defendant for the irrigation of 400 acres of land, or at the rate of $2.30 per acre. The defendant admitted the receipt and use of the water on the land, and offered to allow judgment in favor of plaintiff for $600, or at the rate of $1.50 per acre. The case depends on the question whether or not the plaintiff can charge more than $1.50 per acre per year for water for irrigation purposes. The court below held for the defendant, and gave judgment for plaintiff for $600, without costs. The claims of the defendant are founded upon an agreement between one Threlfall, his predecessor in the ownership of the 400 acres of land, and a corporation known as the "Stanislaus & San Joaquin Water Company," the predecessor of the plaintiff in the ownership of the water and water system in question. The said Stanislaus & San Joaquin Water Company was the owner of water rights in the Stanislaus river and a canal, whereby the water was conducted through Stanislaus county, and it was engaged in the business of distributing and selling the water to farmers for irrigation purposes. Threlfall was the owner of a large tract of land. The following is a statement of the parts of the agreement that are material to the case: The company agreed to "furnish through its canal from the Stanislaus river" to Threlfall, "his heirs or assigns, during each and every year, for the term hereinafter mentioned, for the purpose of irrigating a tract of four hundred and sixty-one acres of land, * * * a flow of water sufficient to fully irrigate said land as often as necessary during each year of said term." The land described consisted of 10 quarter sections, comprising about 1,600 acres, and the 461 acres was described as all those portions of the larger tract "lying north of Little Johns creek and south of Myrtle creek." The water was to be used for irrigating purposes only on said land, and was to be delivered by the company on the land in such manner as to make it available for use thereon. "The headgates, weirs, and other arrangements or devices through which the water shall be drawn from said canal" were to be made and placed in position by the company at its own expense, and it was to fix and control the manner of supplying the water. Threlfall agreed to pay the company "the sum of ten dollars per acre for each and every acre of said land" to which the company agreed to furnish water, with interest on such sum at 6 per cent. per annum, "principal and interest apportioned and commuted as follows: On the first day of November after the delivery of water under the contract * * * the sum of eighty cents for each and every acre of said land, and on the first day of November thereafter for the period of twenty years thereafter, a like sum, making in all twenty payments on each and every acre of said land aforesaid, which shall be in full payment of the amount provided to be paid herein," or Threlfall had the right at any time to "make a cash settlement in whole or in part of the amount unpaid, by paying the principal sum still unpaid and the interest accrued" to the time of settlement. Threlfall also agreed to pay, in addition to the above sums, the sum of $1.50 per acre per year upon each acre of the land, "as a water rental therefor," to be paid on November 1st of each year perpetually. The ninth clause of the agreement contained the following: "The said parties agree to and with each other that this contract shall have the force and effect of a covenant running to and with the said land of the party of the second part [Threlfall] and the canal of the party of the first part" (the company). The contract was executed on the 18th day of June, 1896. The land to be irrigated was situated some eight or ten miles from the canal mentioned in the agreement, or from the point thereon at which the water was to be diverted therefrom. Under a subsequent contract with the company, Threlfall constructed for the company a lateral ditch leading from the point of diversion in the canal to his lands and the company accepted this work as full payment of the $10 per acre agreed to be paid by Threlfall on the 400 acres of land for which it subsequently supplied water. This arrangement appears to have been understood as a release of both parties from the operation of the contract and the obligations thereof, with respect to the remaining 61 acres mentioned in the agreement. The company took possession of the lateral ditch, and thereafter used it to convey water from its main canal to the lands of Threlfall and other lands in the vicinity. The Stanislaus & San Joaquin Water Company had executed a mortgage on July 26, 1895, upon all of its property, including the said main canal, and all lateral ditches and appurtenances of every character connected therewith. This was prior to the contract with Threlfall, and before the construction of the lateral ditch leading to his land. This mortgage was foreclosed, and on December 17, 1898, the mortgaged property, including said lateral ditch, was sold at the foreclosure sale to J. Dalzell Brown, and the deed thereunder was afterward executed to the plaintiff, as his successor. Neither Threlfall, nor Bachman, the defendant, were parties to the foreclosure suit. In 1893 and 1894 Threlfall executed certain mortgages on his land, which were foreclosed in 1898, and Bachman obtained title to said land by deed under the foreclosure decree. Neither the Stanislaus and San Joaquin Water Company, nor the Stanislaus Water Company, were parties to that action of foreclosure. During the year 1900 Bachman was the owner of the 400 acres of land, and the plaintiff was the owner of the canal and water system. It regularly supplied water to Bachman for the irrigation of the 400 acres of land during that year. The court finds that the reasonable value of the water so supplied, independent of the terms of the contract, was $2.30 per acre, or $920 for the land supplied. This, it may be observed, was substantially the same as the value fixed in the contract, being equal to the $1.50 annual rental and the 80 cents for the annual payment agreed on. The foregoing are the principal facts upon which the rights of the parties depend.

1. The water right agreement between the Stanislaus & San Joaquin Water Company and Threlfall was on June 26, 1896, recorded by the recorder of Stanislaus county in a book kept by him in the recorder's office, and designated as "volume 6 of Miscellaneous Records." This is one of seven books of the same designation which are kept in the said office. Ever since the year 1854 it has been the custom in said county to record in these books so designated instruments filed for records of the classes known as agreements, mining locations, bills of sale, water rights, water contracts, certified copies of decrees confirming sale, articles of copartnership, assignments for benefit of creditors, assignments of sheriff's certificates of sale, bonds for deed and agreements for sale of real estate, and it does not appear that in that county any instrument of either of these classes has ever been recorded elsewhere than in said Miscellaneous Records. The substance of the agreement has been, in part, stated. There were other clauses further showing its complex character. The fifth provided that Threlfall might use water on only one-fourth of the land the first year, one-half the second year, three-fourths the third

year, and thereafter on all the land, paying rent only on the part used. By the seventh clause Threlfall granted to the company a permanent right of way over any land he owned for the canal of the company, and Threlfall was granted the right to use water from such canal for domestic purposes and to water stock, and to plant trees by the canal. The eighth provided that if, from causes not within its control, the company was unable to furnish the water, it should not be liable for the failure, and Threlfall should pay rent only for what water he received. Neither party was to be liable until delivery of water began or was tendered. It is claimed by the plaintiff that in legal effect this contract was a grant of real property—that is, of a right to demand and receive water for the irrigation of land—and that it should have been recorded in the book of deeds, instead of in the miscellaneous records, and that under the rule announced in Cady v. Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391, the record in the latter imparted no constructive notice of its contents to the plaintiff as a subsequent purchaser of the canal system and water rights of the Stanislaus and San Joaquin Water Company, and that, as it bought without actual notice thereof, it took the canal system and all the water rights free from the obligations, burdens, easements, or servitudes imposed by that contract. On the other hand, plaintiff says, if it is not such a grant, then it is a mere personal agreement to sell and deliver water from year to year, binding only on the parties, and the plaintiff is free to demand and receive for water it may sell and deliver its full reasonable value without regard to payments made by Threlfall, under the contract, to plaintiff's predecessor.

Section 120 of the county government act (St. 1897, p. 484, c. 277), as it stood at the time this agreement was recorded, provided that the recorder must "record separately, in large and well-bound separate books, in a fair hand: (1) Deeds, grants, transfers and mortgages of real estate, releases of mortgages, powers of attorney to convey real estate, and leases which have been acknowledged and approved. (2) Mortgages of personal property." Then follow 10 additional designated classes of instruments, the section closing with class "12. Such other writings as are required or permitted by law to be recorded." The instrument in question does not come within either of the classes designated as "deeds, grants and transfers of real estate." No lawyer would call it a deed or a grant. No part of it is in the form usually adopted for such instruments. With respect to the rights secured to Threlfall under the agreement, it would not, in the ordinary use of language, be called a transfer of real estate. It is an executory agreement to sell and deliver, or, to use its words, "to furnish," water to Threlfall from year to year for the irrigation of his land. Such an agreement confers a right to receive water upon the terms agreed on, and this is no doubt a right in real property, as will hereinafter appear, but it does not necessarily follow that the instrument by which it is conferred constitutes a present grant or transfer. Any agreement to sell or convey real estate gives the vendee a right which is an interest in real property, but such instruments are not grants or transfers, and no one would expect to find them recorded in a book set apart for deeds, grants, and transfers. It is a matter of common knowledge that such instruments are usually recorded in a book designated as a "Miscellaneous Record." The evidence shows that it has been the custom in Stanislaus county, ever since its organization in 1854, to record water contracts and other agreements of like character to that in question here in the books of Miscellaneous Records. We think it has always been the custom throughout the state to so record them. It must be admitted that a document so composite in its elements is better described as an instrument of miscellaneous character than as a grant or transfer of real estate, and that one would naturally look for it in the Miscellaneous Records. We think that record was the proper one in which to record it. We do not mean to imply by this that the record of such an instrument might not be effective for some purposes, if made in some other book. Courts should not be technical in such a matter where the instrument in question is so complex and difficult to classify as the one in question. The rights of parties under the recording act should not depend on the ability to properly determine the character of such an instrument. The mortgage of the water system of the Stanislaus & San Joaquin Water Company, by foreclosure whereof the plaintiff obtained title thereto, is not set forth in the record, and hence we cannot determine whether or not it was contemplated that that company, as a going concern, was thereby authorized to make contracts, such as that with Threlfall, whereby it might obtain funds to pay the principal and interest of the mortgage, and by which the mortgagee would be bound. But, if that mortgage was paramount to Threlfall's rights, it could not be enforced against him without a foreclosure to which he was a party, if suit was begun, as is conceded here, after his contract was recorded. He was not made a party thereto, and the consequence is that the plaintiff holds the canal system and the waters thereof subject to the rights of Threlfall and his successors in interest, at least until those rights have been terminated by foreclosure proceedings to which he, or they, are parties.

2. The rights of Bachman under the agreement are the same as those of Threlfall. It is immaterial that the mortgages of Threlfall's land, under which Bachman acquired title, were executed before Threlfall obtain-

ed the water right. The water right, when acquired, became an easement appurtenant to the land (Farmer v. Ukiah Water Co., 56 Cal. 13) and passed with it, upon the foreclosure sale in the same manner as any other appurtenance or fixture passes with the title and possession of land (Civ. Code, §§ 1084, 1104; Cave v. Crafts, 53 Cal. 140; Farmer v. Ukiah Water Co., supra; Cross v. Kitts, 69 Cal. 221, 10 Pac. 409, 58 Am. Rep. 558; Smith v. Corbit, 116 Cal. 591, 48 Pac. 725). It was an incident of the land, and would pass as such by a conveyance of the land, without express mention and without any reference thereto, such as by the use of the word "appurtenances" or otherwise. A conveyance of land upon a foreclosure sale must of necessity, at least as between the parties to the mortgage, carry with it a water right appurtenant to the land acquired and used by the mortgagor for the benefit of the land, although obtained after the execution of the mortgage and before the sale on foreclosure. We are cited to no authority for or against this proposition, and have not succeeded in finding any relating to it, but from the nature of the case it must be correct. Fixtures subsequently attached to mortgaged land pass to the purchaser at foreclosure sale, although not mentioned or referred to in the mortgage. Merritt v. Judd, 14 Cal. 72; 2 Jones on Mortgages, § 1657; 1 Am. & Eng. Ency. of Law, 255. The same rule applies to improvements made by the mortgagor on mortgaged land. 1 Jones on Mortgages, §§ 147, 681; Union Water Co. v. Murphy's Flat Co., 22 Cal. 631; Tibbetts v. Moore, 23 Cal. 215. We are unable to perceive any material difference in principle, in this respect, between fixtures and improvements attached to or erected upon land and a water right attached to land as an appurtenance, such as that here involved, and we hold that it is governed by the same rules. This principle probably applies also to the right of the Stanislaus Water Company to the lateral ditch built for the Stanislaus & San Joaquin Water Company from the main canal to Threlfall's land. It was used in connection with the canal for its benefit, and it was therefore an appurtenance to the canal. Although not in existence at the time the canal and water system was mortgaged, it became a part of the system as soon as it was constructed. It is not necessary to this case to determine whether or not it passed to the plaintiff by the foreclosure sale under the prior mortgage. The two interested parties appear to have assumed that it did. It was included in the foreclosure sale and in the deed to the plaintiff, and the plaintiff took possession of it accordingly and used it to carry to the plaintiff's land the water for the rental of which it here claims compensation. Under these circumstances, it is immaterial, in this action, how it acquired title to the lateral.

3. We have assumed that the right conferred on Threlfall by the agreement with the canal company was real property. This is controverted by plaintiff, and its argument is, for the most part, founded on the assumption that it was either personalty, or that the agreement constituted nothing more than a personal covenant of that company which does not bind the plaintiff, as its successor. We think neither of these propositions is correct. That water in its natural situation upon the surface of the earth, whether as a flowing stream, as a lake or pond, or as percolations in the soil, is real property will not be disputed. That it may become personalty by being severed from the land and confined in portable receptacles is also evident. There is a remark in the opinion of Field, J., in Heyneman v. Blake, 19 Cal. 595, which has apparently given rise to the notion that when water is confined in artificial channels it thereupon becomes personal property. The learned jurist there says: "Water when collected in reservoirs or pipes and thus separated from the original source of supply is personal property, and is as much the subject of sale—an article of commerce—as ordinary goods and merchandise." The law then authorized the formation of corporations to engage in "any species of trade or commerce." The corporation in question was organized to engage in the business of distributing and selling water to the inhabitants of a city for their use. The question under discussion was the authority to organize such a corporation under that law. The language quoted from the opinion is apt for the disposition of the question to which it was addressed, but it is by no means tantamount to a decision that water becomes personalty as soon as it is diverted from its natural channel or situation. No such question was involved in that case. The earth is composed of land and water and the water is not different in this respect from other material substances composing a part of the earth. Trees when felled and cut into logs and lumber; coal, iron, gold, and silver when taken from the mine; rocks when quarried from their bed; oil when pumped from its depths; clay when burned into bricks or converted into cement—all are real property before the change, but upon severance forthwith become personalty. The business of collecting water in reservoirs, conducting it in pipes to houses of a city, and there selling and delivering it to the occupants of such houses, is a process of severing the water from its connection with the earth and changing it into personal property. The person engaged therein is as much engaged in trade and commerce as is the miner, the oil producer, the brickmaker, or the cement manufacturer who sells his product. But the substances in which these persons deal do not become personalty until the severance is complete. The right to the water in the pipes and the pipes themselves, usually constitute an appurtenance to real property in such cases, and, if so, the water usually re-

tains its character as realty until severance is completed by its delivery from the pipes to the consumer. The right in water which has been diverted into ditches or other artificial conduits, for the purpose of conducting it to land for irrigation, has been uniformly classed as real property in this state. "The right to water must be treated in this state as it has always been treated, as a right running with the land and as a corporeal privilege bestowed upon the occupier or appropriator of the soil; and as such, has none of the characteristics of mere personalty." Hill v. Newman, 5 Cal. 446, 63 Am. Dec. 140. The right to have water flow from a river into a ditch is real property; and so also is the water while flowing in the ditch. Lower K. R. W. D. Co. v. K. R. & F. C. Co., 60 Cal. 410. A wrongful diversion of water flowing in a ditch is an injury to real property. Last Chance, etc., Co. v. Emigrant D. Co., 129 Cal. 278, 61 Pac. 960. The right to take water from a river and conduct it to a tract of land is realty. South Tule, etc., Co. v. King, 144 Cal. 454, 77 Pac. 1032. The right to have water flow through a pipe from a reservoir to and upon a tract of land is an appurtenance to the land. Standart v. Round Valley Co., 77 Cal. 403, 19 Pac. 689. An undivided interest in a ditch and in the water flowing therein is real property. Hayes v. Fine, 91 Cal. 398, 27 Pac. 772. A ditch for carrying water is real estate. Smith v. O'Hara, 43 Cal. 376; Bradley v. Harkness, 26 Cal. 77. And, where one person has water flowing in a ditch and another has the right to have a part of such water flow from the ditch to his land for its irrigation, the right of the latter is a servitude upon the ditch, and is real property. Dorris v. Sullivan, 90 Cal. 286, 27 Pac. 216. So, in the case at bar, the right of Threlfall and his successor, Bachman, under the agreement, to have the water flow from the plaintiff's canal through the lateral ditch, to the land, for its irrigation, is a servitude upon the ditch and upon the canal, is an appurtenance to the land, and is real property.

4. We think it is also clear that the effect of the agreement was to confer upon Threlfall a right to such portion of the water flowing from the Stanislaus river through the canal of the company as should be required for the full irrigation of the land, and to have the canal and ditch used for the purpose of conducting the same to the land, and that it is more than a mere personal covenant on the part of the company.

The agreement declares, in effect, that the obligations thereby imposed on the company shall have the force and effect of a covenant running with its canal. Covenants running with real property bind the assigns of the covenantor in the same manner as if they had personally entered into them. Civ. Code, § 1460. A lien is a charge imposed upon specific property by which it is made security for the performance of some act. Civ. Code, § 2872. If it had been provided that the agreement to furnish the water should bind the canal of the company, there would have been created thereby a lien on the canal for the performance of the act of furnishing the water as agreed. Fresno Canal Co. v. Rowell, 80 Cal. 114, 22 Pac. 53, 3 Am. St. Rep. 112; Fresno Canal Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275. By declaring that it should have the effect of a covenant running with the land of one party and with the canal of the other, the parties adopted the technical definition of such covenants to express their intention, and, in effect, declared, in the words of the Civil Code, § 1460, that the rights under the agreement should be "appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee in the same manner as if they had personally entered into them." This is not a declaration that it should bind the canal. Hence it does not come within the rule of the cases above cited, and it created no lien on the canal. But the agreement is, in legal effect, an agreement to sell a right or interest in real property. Water, flowing in a canal or artificial conduit, and delivered therefrom upon land, for the irrigation of that land, does not change its character from realty to personalty. It remains real property throughout the process, and until it serves its purpose by being absorbed into the land which it moistens. Hence, the agreement to furnish the necessary water from the canal from year to year, during the times specified, and to deliver it upon the Threlfall lands for the irrigation thereof, for an agreed price, was in substance and effect an agreement for the sale of real property of the canal company. Such an agreement, with all its terms, is binding, not only upon the maker, but upon all persons who subsequently acquire the maker's title to the property agreed to be sold, with notice of the agreement. The plaintiff, as we have seen, bought with notice, and it is therefore as much bound to comply with this part of the agreement according to its terms as if it had executed the same.

The agreement is sufficiently certain in all its particulars. The water to be furnished and sold was identified by describing it as water from the Stanislaus river to be carried through the canal of the company. It was shown by the evidence that the company had but one canal leading from that river. The lateral was not described, except by the statement that the company was to deliver the water on the land by means of such head gates, weirs, and devices as it should construct for that purpose. This left the company at liberty to choose the location and size of the ditch, provided it was so located and was of sufficient size to comply with the terms of the agreement. The uncertainty in this respect did not render the agreement invalid. It was made certain when the ditch was constructed. Winslow v. Vallejo, 148 Cal. 725, 84 Pac. 191, 5 L. R. A. (N. S.) 851, 113 Am. St. Rep. 349. Thus the subject of the agreement, the means by which it was to be performed, and the price to be paid, were sufficiently identified and described. As the Stanislaus & San Joaquin Water Company had already received part of the agreed price, neither it nor its successor, the plaintiff, was entitled to claim more than the balance of $1.50 per acre for each year, as provided in the agreement.

5. The appellant suggests that under the provisions of article 14 of the Constitution, adopted in 1879, the use of water appropriated for sale, rental, or distribution is a public use, the regulation and control of which, including the right to collect compensation for such use, is vested in the state, and that, by reason of these provisions, the making of a contract whereby one citizen is given the exclusive right to a part of such water, or by which it is set apart to a particular tract of land, at a rate fixed in the agreement, would destroy the control of the state and convert the public use into private property. If the water right of the Stanislaus & San Joaquin Water Company was in private ownership and use at the time the Constitution of 1879 was adopted, we do not see how it could become dedicated to public use by the adoption of the Constitution, or at all, except by consent express or implied of its owners. The record does not show whether it was acquired before or after that date. But, if it is conceded that the water right has become subject to public use in the sense in which that term is used in the Constitution, we do not think that any violation of the Constitution appears. The constitutional provision was not intended to prevent a landowner from acquiring and attaching to his land, a right to the permanent use of water for its irrigation. If the right to the use of water for that purpose cannot be made permanent, but is subject to change or termination at the hands of the public authorities under the guise of regulation and control, then such use would be of little value. Water for irrigation is not ordinarily used for annual crops for which the place of use can be changed from year to year, perhaps without serious injury, but for trees, vines, and alfalfa, which must be given water each year for a series of years to be successfully grown at all. To make land valuable for such use, it must have the right to a permanent and continuous use of water. The constitutional provision was not intended to prevent this. The purpose was to foster and encourage such industries, rather than to hamper and obstruct them by destructive limitations upon the right of acquiring private property. Permanent rights to the use of water for irrigation may still be obtained by contract, notwithstanding the provisions of the Constitution, subject only to the condition that the state may, if it chooses to do so, regulate and control the use. This question was fully considered and decided in Fresno C. & I. Co. v. Park, 129 Cal. 443, 62 Pac. 87, and we refer to that case for a full discussion of the subject. How far the state can go in the regulation and control of the use when thus secured by private contract it is not necessary here to decide. The Legislature had delegated the power or control and regulation of waters outside of cities to the boards of supervisors of the respective counties. St. 1885, p. 95, c. 115; St. 1897, p. 49, c. 54; St. 1901, p. 80, c. 62. It does not appear that there has been any attempt to regulate or control the use of water in Stanislaus county, and consequently the terms of the contract remain in full force and constitute the measure of the rights of the parties. Fresno C. & I. Co. v. Park, supra. And under the present statute the contract rights prevail in all cases; the boards of supervisors being powerless to affect or interfere with them. St. 1897, p. 49, c. 54.

There are no other questions demanding notice.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; McFARLAND, J.; HENSHAW, J.

152 Cal. 701

Ex parte BAGSHAW. (S. F. 1,416.)

(Supreme Court of California. Jan. 23, 1908.)

1. Licenses—Failure to Obtain—Effect of Ordinance.

A city or town ordinance is a "law of this state," within Pen. Code, § 435, prescribing a penalty for conducting business, etc., for which a license is required by any "law of this state," without procuring such license, and one who disobeys such an ordinance, not only violates it, but the state law.

2. Same—Prosecution—Jurisdiction.

Mun. Corp. Act, § 882 (St. 1905, p. 73, c. 76), gives the recorder's court in certain towns concurrent jurisdiction with justices' courts of actions, etc., arising within the corporate limits, and exclusive jurisdiction of all prosecutions for violating ordinances of the towns. Pen. Code, § 435, makes it a misdemeanor to conduct any business, etc., without a license required by law. Section 19 provides that where no different punishment is prescribed the penalty for a misdemeanor shall be within certain limits. Section 1425 gives justices of the peace jurisdiction of misdemeanors where the punishment is within that prescribed by section 19. *Held*, that a justice of the peace has jurisdiction of a prosecution for violating Pen. Code, § 435, by conducting business without a license in violation of a town ordinance, it being one of the cases in which such section 882 gives exclusive jurisdiction to the recorder's and the justices' courts; the clause of such section conferring exclusive jurisdiction upon recorders' courts not being intended to deprive the justices' court of jurisdiction of any offense under the general state law.

3. Criminal Law—Judgment—Sufficiency.

A judgment is not void for failure to sufficiently show the offense of which one was convicted, where the record includes a complaint specifically charging an offense under Pen. Code, § 435, making it a misdemeanor to conduct business without a license required by law, and the judgment refers to such complaint and imposes a penalty properly imposed upon a conviction of such offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2538.]

In Bank. Application by Thomas H. Bagshaw for a writ of habeas corpus directed to W. P. Taylor, sheriff. Writ discharged, and petitioner remanded.

O. F. Meldon, for petitioner. Thomas P. Boyd, for respondent.

ANGELLOTTI, J. Petitioner seeks to be discharged from the custody of the sheriff of the county of Marin, by whom he is held under a commitment issued by the justice's court of Sausalito township of said county, based upon a judgment given in said court upon a conviction therein of the crime of carrying on the business of selling liquor in the town of Mill Valley, a municipal corporation of the sixth class in said county, without taking out or procuring the license prescribed therefor by an ordinance of said town.

The principal contention of petitioner is that said justice's court was without jurisdiction to entertain or try said case. The municipal corporation act provides that in municipal corporations of the sixth class there shall be a recorder's court, which shall have concurrent jurisdiction with the justice's court of all actions and proceedings, civil and criminal, arising within the corporate limits of the city or town, and "exclusive jurisdiction of all actions for the recovery of any fine, penalty, or forfeiture prescribed for the breach of any ordinance of such city or town, of all actions founded upon any obligation created by any ordinance, *and of all prosecutions for any violation of any ordinance.*" Section 882 (St. 1905, p. 73, c. 74.) (The italics are ours.) The claim is that this provision confers exclusive jurisdiction upon the recorder's court of a prosecution for the carrying on of a business within the limits of a town, without taking out the license prescribed therefor by an ordinance of the town. Section 435 of the Penal Code, however, provides: "Every person who commences or carries on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor." It has been expressly held by this court that a county or city and county ordinance is a "law of this state" within the meaning of this section. In re Lawrence, 69 Cal. 608, 611, 11 Pac. 217; Ex parte Christensen, 85 Cal. 208, 210, 24 Pac. 747; Ex parte Mansfield, 106 Cal. 400, 39 Pac. 775; Ex parte Stephen, 114 Cal. 278, 46 Pac. 86. There is no distinction material here between a county ordinance and a city or town ordinance. The latter is as much a "law of this state" within the meaning of such section as is a county or city and county ordinance, and it has so been held by the District Court of Appeal for the First district. Ex parte Sweetman, 4 Cal. App. 601, 90 Pac. 1069. It appears to us to necessarily follow that the prosecution here must be held to be not for a violation of the ordinance of the town of Mill Valley, but for the commission of a crime created by a general law of the state—section 435 of the Penal Code. It is true that it is one of the essentials of such a crime that there should be an ordinance of the town prescribing a license, but this does not affect the question. The Legislature of the state has seen fit to make it a crime under the state law for any one to carry on a business for which a license is required by any law or ordinance, without procuring such license, and one who does so, not only disobeys the ordinance, but also violates the state law, and is guilty of a crime by reason of the express provision of such law. The misdemeanor created by section 435 of the Penal Code is precisely like any other misdemeanor created by the Penal Code, and punishable as it is by imprisonment in a county jail not exceeding six months or by fine not exceedng $500, or by both such fine and imprisonment (section 19, Pen. Code), is within the jurisdiction of any justice's court of the county in which it is committed. Section 1425, Pen. Code. It is one of the cases in which, by section 882 of of the municipal corporation act, the recorder's court of the city or town in which the offense is committed is given jurisdiction "concurrent with the justice's courts." It was not intended by that portion of section 882 which confers exclusive jurisdiction upon the recorder's court in certain classes of cases to deprive the justice's court of jurisdiction of any offense under the general state law. As to all such cases, the jurisdiction in the recorder's court is simply one concurrent with the justice's courts. The prosecutions for violations of ordinances declared to be within the exclusive jurisdiction of such recorder's court are prosecutions for acts which are crimes solely by reason of the fact that they are made crimes by ordinance, supplemented by the provisions of the municipal corporation act. That act makes the violation of any ordinance of the city or town a misdemeanor (section 867, Municipal Corporation Act, St. 1883, p. 272, c. 49), and if it were not for section 435 of the Penal Code, it may be that a prosecution for doing business without procuring the license required by the town ordinance would be within the exclusive jurisdiction of the recorder's court. But such act being also a crime under the general state law, a prosecution therefor will lie in the state courts.

The judgment is not void for failure to sufficiently show the offense of which petitioner was convicted. The record before us, which includes the complaint specifically charging an offense under section 435 of the Penal Code, and to which complaint the judgment in terms referred, sufficiently shows the judgment to have been based upon a conviction of the offense so charged, and the penalty imposed was expressed in certain and definite terms, and was one within the power of the court to impose upon a conviction of such offense.

The writ must be discharged, and the petitioner remanded to the custody of the sheriff of Marin county, and it is so ordered.

We concur: SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.; SLOSS, J.

(152 Cal. 697)

MERCED BANK v. PRICE et al. (S. F. 4,796.)

(Supreme Court of California. Jan. 23, 1908.)

1. APPEAL — PROCEEDINGS NOT IN RECORD — AMENDMENT OF RECORD—AMENDMENT AFTER CERTIFICATION.

On an appeal from an order denying a new trial, where the bill of exceptions on the motion was certified and filed before the motion was made, it may not be amended by inserting therein specifications of error authenticated by the trial judge as having been settled and allowed as a part of the engrossed bill of exceptions and believed by him to have been included therein, but inadvertently omitted therefrom, since the appeal from the order denying a new trial must be heard upon the same record upon which the motion for a new trial was heard and determined.

2. SAME—TIME OF AMENDMENT.

Under Code Civ. Proc. § 473, allowing amendments to pleadings and proceedings on the ground of mistake, inadvertence, etc., if made within a reasonable time, but in no case exceeding six months after the judgment or proceeding is taken, a bill of exceptions on motion for new trial may not be amended more than six months after it was certified and filed by inserting therein specifications of error authenticated by the trial judge as having been settled and allowed, but inadvertently omitted from the engrossed bill, and the order of the trial court allowing such amendment is void.

In Bank. Action by the Merced Bank, a corporation, against James D. Price and others. On a motion by defendants for an order to amend the record. Motion denied.

G. G. Goucher, W. H. Larew, and J. S. Larew, for appellants. J. W. Knox, for respondent.

PER CURIAM. This is a motion for an order permitting appellants to file, as a part of the transcript and record on appeal herein, certain specifications of the particulars in which it is claimed that the findings of the trial court are not sustained by the evidence, and certain specifications of errors of law, which were not included in the engrossed bill of exceptions as certified by the trial judge. It is made to appear by an order of the trial judge, based on the motion of appellants, that such specifications were in fact allowed and settled by the judge as a part of the bill of exceptions, and were intended and believed by him to be included in and to constitute a part of the engrossed bill signed and certified by him, but that they were by accident and inadvertence omitted from such engrossed bill. The appeal before us is one from an order denying appellants' motion for a new trial. The bill of exceptions was ordered settled on September 21, 1906, and the engrossed bill of exceptions was signed and certified by the judge on November 3, 1906, and filed as a record of the court. The order denying the motion for a new trial was made on January 4, 1907, and the appeal from such order to this court was perfected on March 1, 1907. No proceeding was instituted in the superior court for the correction or amendment of said engrossed bill by inserting said specifications until more than six months had elapsed from the date of certification thereof by the judge. On May 14, 1907, eleven days after the expiration of such six months, appellants gave notice of a motion, to be made May 27, 1907, for an order authenticating said specifications as the specifications allowed and settled by the court as a part of the bill of exceptions on the 21st day of September, 1906, and as intended and believed by the court to be included in and to constitute a part of the engrossed bill signed on November 3, 1906, and the court, after hearing said motion, made the order asked on June 10, 1907. A certified copy of such order, attached to a certified copy of such specifications, has been produced in this court.

1. In our judgment at least two of the objections made to the granting of the motion are good. The proceeding instituted by the motion for authentication, etc., in the trial court was one for the amendment of the record of that court upon which the motion for a new trial had been heard and determined. It is immaterial in this connection that the proposed amendments merely included matters that had in fact been allowed by the judge, and thus ordered included in the bill to be subsequently signed by him. Whether or not a bill of exceptions has been correctly engrossed so as to embody all that the judge at the time of actual settlement ordered incorporated in it is a matter to be determined by the judge at the time the engrossed bill is presented for certification (Ryer v. Rio Land, etc., Co., 147 Cal. 465, 82 Pac. 62), and his certification of the same is a determination that it is so correctly engrossed. The bill when certified by the judge is filed with the clerk (section 650, Code Civ. Proc.), and as so certified becomes the record of the court, and the only record in the matter. The motion for a new trial, so far as it is based on a bill of exceptions at all, is based and must be heard and determined on the bill of exceptions as so certified and filed, or as previously corrected under section 473 of the Code of Civil Procedure. It is settled that an appeal from an order denying a new trial deprives the superior court of jurisdiction to set aside such order; that, while that order is in force, the record upon which it is based cannot be changed; and that this court must review the order upon the

same record upon which it was made. See Baker v. Borello, 131 Cal. 617, 63 Pac. 914. A different rule applies where the bill of exceptions is to be used on an appeal from a decision made before the bill of exceptions was settled; the effect of an amendment in such a case being simply to enable this court to review the decision of the lower court in view of all the facts which that court had before it when it made its decision. This is shown by In re Lamb, 95 Cal. 408, 30 Pac. 568, an appeal from an order setting apart a homestead, where, after appeal taken, the judge of the superior court allowed the bill settled after the making of the order, to be amended by the insertion of specifications of insufficiency of evidence. It is possible that in the case at bar, if it could be made to appear that the motion for a new trial was heard and determined upon the theory that said specifications were in fact a part of the certified bill, a different rule might obtain. It is, however, unnecessary to determine this question for two reasons: First, the record does not so show; and, second, the motion here made must also be denied upon a second ground, which we will now proceed to discuss.

2. It has already been noted that no application for any amendment was made within six months after the certification of the engrossed bill by the judge. As we have seen, the certification was an adjudication by the judge that all the matters ordered incorporated in the bill had been set forth therein, and that the bill so certified constituted the bill of exceptions as ordered settled by him. It constituted a "proceeding" taken against appellants within the meaning of section 473 of the Code of Civil Procedure, through the mistake, inadvertence, and excusable neglect of appellants. It is settled that, under the procedure in this state, the power of the court to amend its record in matters of this character, and thus to relieve a party from the effect of a mistake, etc., therein, is derived from and limited by the terms of section 473 of the Code of Civil Procedure, allowing amendments to pleadings or proceedings on the ground of mistake, inadvertence, surprise, or excusable neglect. See Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590, and cases there cited. It was held in the case just cited that, when a statement on motion for new trial is settled and filed, it becomes a record of the court, and is only subject to the action of that tribunal within the time limited by section 473 of the Code of Civil Procedure, and that section authorizing relief to be granted a party only when application is made therefor within six months from the time the judgment, order, or proceeding against him is taken, an application for amendment made more than six months from the date of certification is too late, and a court is without power to grant the relief. This conclusion was in line with several prior decisions of this court, and we find nothing in conflict therewith. The well-settled rule that a court has the power to correct its records at any time, so as to make them truly show a judgment or order actually made, where such judgment or order has been incorrectly entered or recorded by reason of mistake of a ministerial officer making the entry, such as the clerk of the court, has no application here. It follows from what we have said that the order of the superior court allowing the amendment is void, and that the specifications sought to be filed cannot be considered as a part of the bill of exceptions on this appeal.

The motion must be denied; and it is so ordered.

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152 Cal. 712

FERGUSON et al. v. BASIN CONSOL. MINES. (Sac. 1,461.)

(Supreme Court of California. Jan. 23, 1908. Rehearing Denied Feb. 20, 1908.)

1. Evidence — Statements of Agent — Authority.

Statements and admissions by the superintendent of defendant's mine, supporting plaintiff's contention as to the location of a boundary line in controversy, were inadmissible to bind defendant, in the absence of proof that the superintendent was authorized to make them apart from the fact that he was in charge of defendant's property, and this, though the witness asserted an interest in the adjoining mine claimed by plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 893–907.]

2. Same — Admissions Against Interest — Predecessor in Title.

Under Code Civ. Proc. § 1849, providing that, where one derives title to real property from another, the declaration, act, or omission of the latter while holding the title in relation to the property is evidence against the former, declarations made by a grantor after having parted with his title are inadmissible against the grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 840–851, 1126.]

3. Appeal—Review—Prejudicial Error.

The erroneous admission of declarations of defendant's agent not within the scope of his authority directly supporting plaintiff's contention was prejudicial to defendant and ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153–4186.]

4. Evidence — Records — Justice of the Peace—Docket Entries.

Since, under Code Civ. Proc. § 911, specifying the matters required to be entered in a justice docket, the justice is not required to enter the fact of the service of the summons, a docket entry showing the mode of service was not prima facie evidence of the facts stated, under section 912, declaring that the entries required to be made in a justice's docket are prima facie evidence of the facts stated therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 462.]

5. Justices of the Peace — Jurisdiction — Presumption—Burden of Proof.

Since the law presumes nothing in favor of a justice's jurisdiction, the burden is on the party claiming under a justice's judgment to show affirmatively that the justice had jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 216.]

6. SAME—EVIDENCE.

In order to show that a justice had jurisdiction to render the judgment relied on, it is necessary to show that the summons had been issued and served as required by law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 216.]

7. SAME—PROCESS—SERVICE OUTSIDE COUNTY—CERTIFICATE OF COUNTY CLERK.

Where a justice's judgment was based on a summons served outside the county, the burden was on a party claiming under such judgment to prove that there was attached to the summons a certificate of the county clerk that the person issuing the summons was at that date an acting justice of the peace, as required by Code Civ. Proc. § 849.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 216.]

Department 1. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Thomas Ferguson and others against the Basin Consolidated Mines. From a judgment for plaintiffs, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

Myrick & Deering and F. P. Tuttle (Henry G. Tardy and T. W. Hubbard, of counsel), for appellant. L. L. Chamberlain and John M. Fulweiler, for respondents.

SLOSS, J. The plaintiffs, claiming to be the owners and entitled to the possession of an undivided three-fourths of a placer mining claim in Placer county, brought this action to recover damages from the defendant, which, it is alleged, unlawfully entered upon plaintiffs' ground, and took therefrom gold-bearing earth and gravel of the value of $5,000. The complaint asks judgment for $3,750, three-fourths of the value of the earth and gravel so taken. The cause was tried without a jury, and the court, finding in favor of the plaintiffs' ownership as alleged, and that the defendant had entered and taken away earth and gravel of the value of $3,573.83, gave plaintiffs judgment for $2,679.77. The defendant appeals from the judgment and from an order denying its motion for a new trial.

1. The property claimed by plaintiffs is known as the "Harkness claim." The defendant was in possession of ground lying to the north of the Harkness claim. Certain ground had been worked by the defendant, and the dispute between the parties was whether this ground lay north or south of the northerly boundary line of the Harkness claim. The contention of the plaintiffs was that their northerly boundary line ran north of the ground worked by the defendant, and that this ground was therefore included within their claim. The plaintiffs, after showing that one Whitney was superintendent of defendant's mine, were allowed to show, over proper objection by the defendant, that Whitney had made statements and admissions tending to support plaintiffs' contention as to the location of the boundary line. This was error. There was no showing of the extent of Whitney's authority beyond the fact that he was in charge of the defendant's property. An agent cannot bind his principal by declarations against the principal's interest, unless the making of such declarations is within the scope of the agent's authority. As superintendent in charge of a mine, Whitney had no authority to make any statements regarding the extent of the ground claimed or owned by his principal, and any such statements, if made by him, were not binding upon the appellant. Walrath v. Champion Mining Co., 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170; Hartford Iron M. Co. v. Cambria M. Co., 80 Mich. 491, 45 N. W. 351. See O'Hara v. O'Brien, 107 Cal. 309, 40 Pac. 423. The question is not affected by the fact that Whitney asserted an interest in the Harkness mine, which was claimed not by his employer but by the plaintiffs. Such interest was, in relation to the present controversy, adverse to defendant, and certainly could not authorize Whitney to bind his employer by declarations in his own favor and against the interest of the appellant. Nor are the statements of Whitney rendered admissible by reason of evidence that the defendant had acquired its title by conveyance from him. To be admissible against his grantee, the declarations of a predecessor in interest must have been made by him while holding the title (Code Civ. Proc. § 1849), and here the declarations of Whitney appear to have been made after his conveyance. Since these declarations went to support the contention of the respondent upon the very point in controversy—i. e., whether the ground worked by the appellant was located within its claim or within that of the respondents—it is clear that the admission of this testimony was prejudicial to the appellant, and that the error so committed necessitates a new trial.

2. In view of the necessity for another trial, a point discussed by counsel may be briefly referred to. The plaintiffs offered evidence tending to show that in 1894 the title to the Harkness claim was in Harkness Gold Mining Company, a corporation. To deraign their title, the plaintiffs relied upon an execution sale following a judgment in the justice court of township No. 6 of Placer county against Harkness Gold Mining Company. The sale was to Spencer and Sellier, who conveyed to one Cusick, under whom the plaintiffs claim. It is urged by appellant that the court erred in admitting in evidence the certificate of sale and the deed issued by the constable to Spencer and Sellier pursuant to the execution sale, for the reason that the plaintiffs had failed to show that the justice court had acquired jurisdiction to render the judgment upon which the execution was based. It appears that all of the original papers in that action had been lost or destroyed. Plaintiffs offered in evidence the entries in the justice's docket, which were, as the court stated, "admitted only for the purpose of showing those matters that may lawfully be

entered in the justice's docket." The entry with reference to return of summons reads as follows: "1894, June 15. Summons returned as served in San Francisco, California, on the seventh day of June, 1894, by J. J. McDade, Sheriff of San Francisco Co., California, by J. J. Tiernan, Deputy Sheriff, on W. S. Chapman, President of the Harkness Gold Mining Co., the defendant therein named, by delivering to him personally, in the City and County of San Francisco, State of California, a copy of said summons attached to a copy of the complaint in said action." No appearance having been made, judgment by default was rendered on the 28th day of June, 1894.

The entries required to be made in a justice's docket are prima facie evidence of the facts stated. Code Civ. Proc. § 912. But the fact of the service of summons is not one of the matters required to be so entered (Code Civ. Proc. § 911), and the entry above quoted is therefore no evidence that the justice ever acquired jurisdiction to render the judgment upon which the execution was issued. Fisk v. Mitchell, 124 Cal. 359, 57 Pac. 149. The burden was upon plaintiffs, claiming under the judgment, to show that the justice had acquired jurisdiction. "The jurisdiction of justices' courts being special and limited, the law presumes nothing in favor of their jurisdiction, and a party who asserts a right under a judgment rendered in such court must show affirmatively every fact necessary to confer such jurisdiction." Rowley v. Howard, 23 Cal. 401; Lowe v. Alexander, 15 Cal. 296; Jolley v. Foltz, 34 Cal. 321; Kane v. Desmond, 63 Cal. 464. It was necessary, therefore, for the plaintiffs, who were founding their claim of title upon this judgment, to show affirmatively that the court had acquired jurisdiction to render the judgment. To do this it was necessary to show that the summons had been issued and served as required by law; and, if the summons was served outside of the county in which it was issued, it was necessary to show that there was attached to the summons the certificate of the county clerk that the person issuing the summons was, at its date, an acting justice of the peace. Code Civ. Proc. § 849. Without such certificate no valid service out of the county could be made. Since in this case the only service attempted to be shown was one out of the county, the plaintiffs, in order to sustain the burden imposed upon them of proving every fact necessary to confer jurisdiction, were bound to show that such certificate had been attached to the summons. It is argued that the testimony of Mr. Lardner, who had been the attorney for the plaintiffs in the action in the justice's court, is sufficient to show that the summons as served complied with this requirement of the law. It is further contended by the respondents that even if this proof was not made, the appellant did not make a sufficiently specific objection to the admission in evidence of the certificate of sale and the execution deed based upon the judgment in question. Neither of these propositions need be discussed, since they are not likely to arise upon a new trial. What has been said on the subject is mentioned merely for the purpose of indicating to counsel that upon such new trial the plaintiffs, if they rely upon a judgment of the justice's court, must, as a part of their case, show that that court acquired jurisdiction over the defendant in the action.

It is unnecessary to consider the other points made.

The judgment and order appealed from are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.

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152 Cal. 645

CITY OF LOS ANGELES v. LOS ANGELES FARMING & MILLING CO. (L. A. 1,952.)*

(Supreme Court of California. Jan. 23, 1908.)

1. TRIAL—TRIAL BY COURT—SUBMISSION ON STIPULATED FACTS—EFFECT OF FINDINGS BY COURT.

Where a case is submitted on a stipulated statement of facts, findings by the court are unnecessary, but, where they do not materially change the facts as stipulated, they are not reversible error.

2. PUBLIC LANDS—SETTLEMENT OF MEXICAN GRANTS—PROCEEDINGS—SCOPE AND EFFECT—WATER RIGHTS.

Act Cong. March 3, 1851, c. 41, 9 Stat. 631, to ascertain and settle private land claims in California, was intended to segregate private from public land, and did not contemplate presentation of claims to anything but "land"; and hence, where a city filed a petition with the board of land commissioners for an adjudication of its claim to lands, founded upon a grant to its predecessor, it was not necessary to present therein its claim to water rights pertaining thereto, and its claim to the water rights of its predecessor was not adversely adjudicated by a decision that it was not entitled to all the land claimed.

3. SAME — EXTENT OF PATENTEE'S RIGHT — "LAND."

The word "land," as a conveyance, carries every kind of property, right, and appurtenance which is legally embraced in that word, but what rights go to a patentee of land depend, not upon any supposed adjudication contained in the patent, but upon the general law of the state where the land is situated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 317, 318.

For other definitions, see Words and Phrases, vol. 5, pp. 3975-3984; vol. 8, pp. 7700-7701.]

4. WATERS AND WATER COURSES—RIGHTS OF RIPARIAN OWNERS — EXTENT OF RIGHT — STATE LAWS.

While the patentee of land situated on a natural water course in a state where the common-law doctrine of riparian ownership prevails would be entitled to have the water of the stream flow down to his land without any material diminution in quantity, no such right would accrue to a patentee of land in an arid region, where irrigation is necessary to successful agriculture, and where the state law allows a riparian owner to divert a reasonable amount of the water to irrigate his riparian land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 27-33.]

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*For opinion on petition to rehear, see 93 Pac. 1135.

5. SAME.

The right of a riparian owner in fee of land to the use of natural water running through it is subordinate to any paramount right to the use of such water existing under the general law in some other person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 33-37.]

6. SAME—RIGHTS OF SUCCESSOR TO MEXICAN PUEBLO.

Under Mexican law a pueblo, as a quasi public corporation, had power to distribute to the common lands and to its inhabitants the waters of an unnavigable river on which the pueblo was situated, and a riparian owner could not appropriate water so as to interfere with the common use or destiny which a pueblo on the stream had given to the water, and a city which is the successor of a pueblo holds the lands and water rights of its predecessor in trust for its inhabitants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 266.]

7. QUIETING TITLE — SCOPE OF RELIEF — INJUNCTION—COMPLAINT—GENERAL PRAYER.

A general prayer in a complaint in an action to quiet title is sufficient to support an injunction where the facts alleged warrant it.

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the city of Los Angeles against the Los Angeles Farming & Milling Company. From a judgment for plaintiff and certain orders denying motions by defendant, defendant appeals. Affirmed.

R. M. Widney, for appellant. W. B. Mathews, H. T. Lee, and J. R. Scott, for respondent.

McFARLAND, J. The plaintiff is a municipal corporation. Its corporate territory is situated on the Los Angeles river, an unnavigable stream which rises in the San Fernando valley several miles above and northerly of the city, and flows southerly until it reaches the northern corporate boundaries of the city. The defendant is the owner in fee of land on and riparian to said river and situated about 10 miles above the city. The plaintiff claims, as successor of a Spanish and Mexican pueblo, the prior and paramount ownership of the use of the water of the river from its source to the city and from the surface to bed rock, so far as the same may be necessary to give an adequate supply of water for the use of its inhabitants, and for municipal and public uses and purposes of plaintiff. Defendant denies that plaintiff has any such asserted ownership, and claims that as owner in fee of the said land, and as part and parcel thereof, it has the riparian right to the use of the water of the river as it flows through its land. This action was brought to quiet plaintiff's title and ownership of the use of said water as above stated, and to have it adjudicated that any right which the defendant may have to the use of the water is subordinate and subject to plaintiff's said ownership. The case was tried without a jury, and judgment was rendered for plaintiff as prayed for, and defendant appeals from the judgment. It also appealed from several orders denying certain motions made by defendant; but these appeals do not present any question substantially different from those presented by the appeal from the judgment, and, if the judgment should be affirmed, so also should be the orders.

The case was submitted on a stipulated statement of facts. The court, however, made a few additional findings, and appellant contends that it was error to make these findings, and that for this reason the judgment should be reversed. The making of these additional findings was unnecessary, and perhaps improper and erroneous; but it does not follow that for this reason the judgment should be reversed. So far as the findings may be considered as findings of fact, they do not materially change the facts as stipulated; and, if the stipulated facts warrant a judgment, it should stand. Higgins v. San Diego Sav. Bank, 129 Cal. 184, 61 Pac. 943; McMenomy v. White, 115 Cal. 339, 47 Pac. 109. It is not necessary to recite here in any great detail the facts as stipulated. Indeed, the situation of the city of Los Angeles with respect to the Los Angeles river, and its claim to the use of the water of the river, have been quite fully stated in former opinions of this court and are familiar facts. Vernon Irr. Co. v. Los Angeles, 106 Cal. 237, 39 Pac. 762; City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585. For the purposes of this appeal, it is necessary to state only the following facts: In the year 1781, under Spanish rule, the pueblo of Nuestra Senora Reina de Los Angeles was established, embracing four square leagues of land which is included in and is part of the present city of Los Angeles. This pueblo continued in existence under Spanish and Mexican dominion until after the acquisition of California by the United States in February, 1848, under the treaty of Guadalupe Hidalgo. It is stipulated that, "under the laws of the Kingdom of Spain, said pueblo upon its foundation, by virtue of a grant under such laws, had the paramount right, claimed by the plaintiff in the present case, to use all the water of the river, and such paramount right continued to exist under that government, and the Mexican government, until the acquisition of California by the United States." The plaintiff was first organized as a municipal corporation on April 4, 1850, by an act of the Legislature of California, and, with various changes in its charter, has continuously been a municipal corporation ever since. On October 26, 1852, it filed a petition with the board of land commissioners created by the well-known act of Congress of March 3, 1851 (9 Stat. 631, c. 41), entitled, "An act to ascertain and settle the private land claims in the state of California." In this proceeding it claimed title in fee to a "tract of land" known as the "pueblo lands" of the pueblo of Los Angeles founded upon the Spanish grant of 1781, and alleged to contain 16 square leagues. The commissioners rendered a decision in which they held that the city was entitled to said pueblo lands, but that they embraced only 4 square leagues, and the claim of the city to the other part of the alleged 16 leagues was rejected. In accordance with this decision a patent of the United States was afterwards, on August 9, 1866, issued to plaintiff for the four square leagues. The land owned by appellant, the Los Angeles Farming & Milling Company, was granted by the Mexican government to the predecessors of appellant in 1846, and was presented to the said board of land commissioners, and after proper proceedings regularly taken a patent of the United States was on June 8, 1873, duly issued to said predecessors for a tract of land through a part of which the Los Angeles river flows, so that the land is riparian to said river. The patent does not contain on its face any reservation or exception.

Appellant contends that the above two proceedings before the land commissioners and the patents which followed constitute final adjudications: First, that the city had only title to four square leagues of land with such appurtenances as regularly belonged to the ownership in fee of lands, but had not any ownership in the use of the water above the limits of the land granted, such as is alleged to have belonged to the old pueblo; and, second, that the patent to appellant's predecessors finally adjudicated that they were the riparian owners of the use of the waters of the river running through the land, as part and parcel of their estate. This contention is not maintainable. The act of March 3d was intended to segregate private from public lands. No word designating property is used in it other than "land." Appellant contends that the city, in its petition to the commissioners, should have set up its claim to the pueblo claim to the water; but the act does not contemplate presentation of a claim to anything but "land." The city was no more called upon to set up its water rights as successors to the pueblo than were appellant's predecessors called upon to set up the riparian rights of the owners of the land claimed by them. Of course, the word "land" as a conveyance, carried every kind of property, right, and appurtenance which is legally embraced in that word; but what rights go to a patentee of land depend, not upon any supposed adjudication contained in the patent, but upon the general law of the state where the land is situated, and those rights may be essentially different in different localities. For instance, if a piece of patented land is in a state or territory where the English common law doctrine of riparian ownership prevails to the full extent, the patentee of the land, if it is situated on a natural water course, would have the right to have the water of the stream flow down to his land without any material diminution in quantity, and could have the upper riparian proprietor enjoined from diverting the water in any way or for any purpose which would materially diminish the flow; but such right would not accrue to a patentee of land in an arid region of a western state where irrigation is necessary to successful agriculture, and where the original rule as to riparian ownership has been modified by the state law, so as to allow a riparian proprietor to divert a reasonable amount of the water of a stream and use it to irrigate his riparian land, although a material part of the water would be absorbed and prevented from flowing down to the lower proprietor. It is quite clear that the rights which are embraced in the word "land" are determined by the law of the country where the land is situated. In Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428, the Supreme Court of the United States say: "In our judgment the grants of the government of land bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie." The right of a riparian owner in fee of land to the use of natural water running through it is subordinate to any paramount right to the use of such water existing under the general law in some other person.

The only question in the case, therefore, is whether under the general law of the locality the old pueblo of Los Angeles, and the respondent herein, as its successor, had and have, as against appellant, the prior and paramount ownership of the use of so much of the water of the Los Angeles river as is necessary for its inhabitants and for general municipal purposes; and this question need not be discussed as an original one, for it has been answered in the affirmative by former decisions of this court.—In Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674, the whole subject of water rights in California, both before and after American dominion, was involved, and extensively discussed. The law on the subject under Spanish and Mexican rule was very fully considered. As to pueblo rights the court says: "The laws of Mexico relating to pueblos conferred on the town authorities the power of distributing, to the common lands and to its inhabitants, the waters of an unnavigable river on which the pueblo was situated. It is not necessary to say that the property of the nation in the river, as such, was transferred to the pueblo, but it would seem that a species of right to the use of all its waters necessary to supply the domestic wants of the pobladores, the irrigible lands and the mills and manufactories within the general limits were vested in the pueblo authorities, subject to the trust of distributing them for the benefit of the settlers." It is further said: "Each pueblo was quasi a public corporation. By the scheme of the Mexican law it was treated as an entity or person, having a right as such, and by reason of its title to the four leagues of land, to the use of the water of the river on which it is situated, while as a political body, it was vested with power, by ordinance, to provide for a distribution of the waters to those for whose benefit the right and power were conferred." And it is further said: "From the foregoing it appears that the riparian proprietor could not appropriate water in such manner as should interfere with the common use or destiny which a pueblo on the stream should have given to the water; and semble that the pueblos had a preference or prior right to consume the waters even as against an upper riparian proprietor." In Vernon Irrigation Company v. City of Los Angeles et al., the present plaintiff was a defendant, and the rights of the old pueblos and of the present city as its successor were directly involved. The opinion of the court delivered by the late Justice Temple, then commissioner, contained an exhaustive review of the Spanish and Mexican law on the subject. The views expressed in Lux v. Haggin as to the rights of the pueblo in the waters of the river are approved. The opinion is very lengthy, and we will quote only an expression or two from it. It is said: "Our courts have determined that the successors of these pueblos hold the public lands in trust for the inhabitants, and that the Legislature can control the execution of the trust; and that the United States has, in accordance with the decisions, confirmed the lands to the successors of the pueblos." And it is further said: "I am satisfied with the conclusion reached in Lux v. Haggin, supra, that pueblos had a right to the water which had been appropriated to the use of the inhabitants similar to that which it had in the pueblo lands, and that the right of its successor, the city, to the water, for its inhabitants and for municipal purposes, is superior to the rights of plaintiff as a riparian owner." City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585, is another case in which the right of the old pueblo and the present plaintiff to the waters of the river was immediately involved. An exhaustive opinion is also written in this case by the chief justice, speaking for the court, and, the conclusion reached in Vernon Irrigation Company is approved, the court saying. "But the appellants go still further, and contend that, when the land in controversy was granted to their predecessors, there was no pueblo of Los Angeles, and consequently no pueblo right to which any of their rights could be subordinated. * * * This question, however, ought to be considered closed by the previous decisions of this court in the Vernon Irrigation Company Case and others. All of the laws and public documents upon which its solution depends are within the judicial cognizance of the courts, and, whether they were actually noticed or not in previous decisions, they must be deemed to have been considered and allowed their due weight. The question is one of law, rather than of fact, and its decision in one case is a precedent in others." The foregoing decisions are determinative of the prior and paramount right of the pueblo, and of plaintiff as a successor, to the use of the water of the river necessary for its inhabitants and for ordinary municipal purposes. The questions as to what extent this right goes, a question somewhat considered in the Pomeroy Case—that is, for the use of the inhabitants of what territory, and for what municipal purposes can the water be taken as against a riparian owner—does not arise, and need not be considered in the case at bar. Appellant's case is presented in the record as resting upon the proposition that neither the pueblo nor the plaintiff has or had any right whatever to use water of the river that is prior or paramount to appellant's right as a riparian proprietor; and the present decision would not be authority in a case, if any such case should ever arise, where the question would be as to the extent of plaintiff's prior and paramount right, and not as to the existence of that right to any extent.

The judgment not only quiets plaintiff's title, but also enjoins appellant from doing certain acts; and appellant contends that the injunction was erroneous because no injunction was prayed for in the complaint, and no facts are alleged which would support an injunction. So far as the prayer is concerned, the general prayer for relief is sufficient, and the facts alleged warranted an injunction, so that this contention cannot be maintained. Moreover, the injunction is of very little importance, and it cannot be prejudicial to appellant. It does not enjoin appellant from interfering with any particular amount of water, but merely restrains it "from claiming or asserting any right to the water, except in subordination and subject to the said paramount right of said plaintiff." This is merely in accord with the part of the judgment which quiets the title, and adds nothing of consequence to it.

The judgment and orders appealed from are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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152 Cal. 688

SUTTER COUNTY v. NICOLS. (Sac. 1,453.)

(Supreme Court of California. Jan. 23, 1908.)

1. WATERS AND WATER COURSES — OBSTRUCTION—NUISANCE—DISCHARGING DÉBRIS INTO RIVER.

The discharging of tailings and débris from a mine into rivers, whereby the beds are filled up and the waters caused to overflow lands and approaches to bridges, and carry the débris onto the lands, injuring them and threatening the bridges with destruction, constitutes a nuisance unless authorized by law.

2. TAXATION—POWER OF LEGISLATURE—EMINENT DOMAIN—PRIVATE PURPOSE.

The legislative power does not extend to the raising of local taxes to pay for improvements for private benefit or profit, nor to the taking or damaging of the private property of one person for the private benefit of another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 51.]

3. EMINENT DOMAIN — PURPOSES — MINING PURPOSES.

The business of mining for the benefit of the mine owner is a private enterprise, and the right of eminent domain cannot be invoked in aid of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 79.]

4. MINES AND MINERALS—STATUTORY REGULATION—POWER.

While laws may be enacted in the exercise of the police power, requiring the owner of a hydraulic mine to use all reasonable precautions to prevent injury to others or the obstruction of navigable streams from the discharge of mining débris into them, and to ascertain the means best adapted to that end, the law cannot declare that the observance of such means or precautions shall exonerate the mine owner from liability if, notwithstanding their use, injury is caused to others by such discharge.

5. SAME—HYDRAULIC MINING—CONSTRUCTION OF STATUTE.

Act Cong. March 1, 1893, c. 183, 27 Stat. 507 [U. S. Comp. St. 1901, p. 3553], provides for the appointment of the California débris commission. Persons desiring to operate mines by hydraulic process must file a verified petition with the commission and a release to the United States of the right to regulate the manner in which débris from the mines shall be restrained, and the amount of débris that may be produced. A notice specifying the contents of the petition must be published, and a hearing is provided for at which claims of all interested persons may be heard, if the commission find in favor of the petitioner it makes an order specifying the method of operating the mine, building restraining works, etc. *Held* that, while the purpose of the act was to prevent injuries from the discharge of débris from hydraulic mines, it was not intended to exonerate the miner from liability therefor, nor to limit the powers of the state courts to protect private property from threatened injury, and to redress inflicted injury thereto from the operation of hydraulic mines, though carried on under a permit and in strict compliance with the plans of the commission.

6. SAME.

The provisions of the act directing notice to be given and authorizing a hearing at which all persons interested may appear were not intended to conclude and estop the owners of lands below with respect to subsequent injuries that might be inflicted, but were designated to enable the commission in reaching its decision to obtain all aid which it could derive from the suggestions of all interested persons.

In Bank. Appeal from Superior Court, Sutter County; Edwin A. Davis, Judge.

Action by the county of Sutter against William Nicols. From a judgment for plaintiff, an order denying a new trial, and an order refusing to vacate the judgment and give judgment in his favor, defendant appeals. Affirmed.

W. H. Carlin, Tuttle & Tuttle, and Solinsky & Wehe, for appellant. Lawrence Schillig, Dist. Atty., and Devlin & Devlin, for respondent.

SHAW, J. The record herein presents appeals by the defendant from the judgment from an order denying his motion for a new trial, and from an order denying his motion, under sections 663 and 663½ of the Code of Civil Procedure, to vacate the judgment given, and render judgment in his favor. Each of the three appeals presents the same question.

The complaint states a cause of action by the county of Sutter, as owner of the lands in Yuba City, upon which the county courthouse and hall of records stand, also of a bridge across Feather river between Yuba City and Marysville, and a half interest in two other bridges over Bear river, to enjoin the defendant from dumping or discharging into said rivers the tailings and débris of his mines, to the injury of said property. It was alleged, in substance, that by the discharge thereof into said rivers the said débris and refuse from defendant's mines had filled up the beds of the rivers and caused the waters thereof to overflow to and upon the said lands and the approaches to said bridges, and to carry said débris and refuse to and deposit them upon said lands, whereby said lands are greatly injured and said bridges are threatened with destruction, and that, if continued, great damage to plaintiff's said property will ensue, and said bridges will be destroyed. The court found the facts in accordance with these allegations of the complaint, and gave judgment accordingly. Unless the facts stated in the special defense pleaded in the answer, and found to be true by the court, legalizes the nuisance complained of and authorizes the defendant to continue the same, regardless of the injury it may cause to private property, the judgment is admitted to be correct and fully sustained by the evidence and by the decisions in County of Yuba v. Kate Hayes M. Co., 141 Cal. 360, 74 Pac. 1049, and Woodruff v. North Bloomfield G. M. Co. (C. C.) 9 Sawy. 441, 18 Fed. 753.

The special defense was that the defendant was engaged in mining upon a claim, known as the "Polar Star Mine," had erected below the same a dam for impounding the débris coming from such mine, had obtained from the California débris commission, under the authority of the act of Congress approved March 1, 1893 (27 Stat. 507, c. 183 [U. S. Comp. St. 1901, p. 3553]), a permit to operate his mines upon said claim by hydraulic process, that all the mining done by him and all the débris discharged therefrom, was done solely in strict compliance with and obedience to said permit, and that he did not intend or threaten to operate said mines or discharge such débris, except in compliance therewith and under the authority thereof. The court found these allegations to be true, but also found that the dam so constructed was insufficient to prevent, and did not prevent, said débris from being carried down to and upon plaintiff's property, to its injury, that it is not a permanent structure, but is liable to be carried away by the forces of nature, and that said permit was no bar to the action. The latter is really a conclusion, and its accuracy presents the sole question in the case. The act of Congress provides for the appointment of three army engineers to be known as the "California Débris Commission." Its jurisdiction, so far as it affects hydraulic mining, extends to the territory drained by the Sacramento and San Joaquin rivers. Hydraulic mining directly or indirectly injuring the navigability of said river systems, except as permitted under the provisions of the act, is prohibited. The commission is directed to adopt plans to prevent damage from débris resulting from mining operations, with a view of restoring the navigability of said rivers to the condition existing in 1860, and of permitting hydraulic mining, so far as it can be done "without injury to the navigability of said rivers or the lands adjacent thereto." Any person or persons who desire to operate a mine, or mines, by hydraulic process, must file with the commission a verified petition and a release or surrender to the United States, of the right or privilege to regulate the manner in which the débris from such mines shall be restrained and the amount of débris that may be produced from such mines. Thereupon a notice, specifying the contents of the petition and fixing a time previous to which all proofs are to submitted, is to be published in a daily paper, or in three issues of a weekly paper. On or before the time fixed "all parties interested, either as petitioners or contestants, whether miners or agriculturists, may file affidavits, plans and maps, in support of their respective claims. Further hearings, upon notice to all parties of record, may be granted by the comsion when necessary." If "within thirty days after the time so fixed" a majority of the commission decide in favor of the petitioner, the commission must thereupon make an order specifying in detail the method and manner of operating such mine, the restraining works to be built, the location and material thereof, and such further safeguards "as will protect public interests and prevent injury to the navigable rivers, and the lands adjacent thereto," all to be done at the expense of the miner. The mine owner must then construct the prescribed works, under the supervision of the commission, and upon the completion thereof "permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations subject to the conditions of said order and the provisions of this act." The order may be modified from time to time, and the permission may be suspended, as conditions may demand. The act contains many other provisions relating to the administrative duties and powers of the board, which are not important to the question.

It is the contention of the appellant that the act empowers the commission to act as a judicial tribunal by which, in the prescribed proceeding, all persons liable to injury may have their rights ascertained and their property protected from the effects of débris by the adoption and enforcement of a plan appropriate and sufficient for that purpose, and that the decision and orders of this tribunal are binding and conclusive upon all parties affected by the mining operations authorized by the permit granted, even if it should turn out that the plan adopted was wholly inadequate and ineffective to prevent injury. There are instances wherein, for the purpose of apportioning, to the persons specially interested and benefited, the cost of a local public improvement, or, for the purpose of fixing the amounts to be paid for private property taken for or damaged by such public improvements, special tribunals have been established, with power to make a conclusive determination in a special proceeding upon constructive notice to all parties interested. The proceedings before city councils for the improvement or opening of public streets are familiar examples. But it is essential in all such cases that the thing to be accomplished shall be a matter of public concern and for the public benefit. The legislative power does not extend to the raising of local taxes to pay for improvements for private benefit or profit, nor to the taking or damaging of the private property of one person for the private use and benefit of others. The business of mining for the benefit of the mine owner is as much a private affair as that of the farm or factory, and the right of eminent domain cannot be invoked in aid of it. Con. C. Co. v. S. P. R. R. Co., 51 Cal. 271; Lorenz v. Jacob, 63 Cal. 73; Dower v. Richards, 73 Cal. 480, 15 Pac. 105; Amador, etc., Co. v. De Witt, 73 Cal. 485, 15 Pac. 74. The mine of the defendant was carried on solely for his own personal profit. Laws could be enacted, in the exercise of the police power, requiring him to use all reasonable precautions and means to prevent injury to others, or the obstruction of navigable streams, from the discharge of mining débris into the streams and to ascertain and devise the means and plans best adapted to that end. But the law is powerless to declare that the observance of such means or precautions shall exonerate him from liability if, notwithstanding their use, injury is caused to other persons by such discharge of débris. This proposition appears to be conceded in the argument in this court. Appellant here contends that the main objects and purposes of the act are to encourage the production of gold with a view to the maintenance of the gold standard, and to preserve and improve the navigability of the rivers, both of which subjects it is argued are within the scope of the legislative powers of the United States; that by this law the hydraulic miners are made the public agents of the United States to carry out the plans adopted by the commission for the accomplishment of the said purposes and objects; that these are public purposes designed to promote the general welfare; that the powers of Congress, in providing for public improvements within its sphere of action, are limited only by the provisions of the Constitution of the United States, which, unlike that of this state, does not provide that private property cannot be taken or damaged for public use, without compensation, but only that it cannot be taken for public use without compensation; that the injury to the plaintiff from the débris in question does not constitute a taking of its property, but only a damage thereto; and hence that the depositing of such débris by mining, in pursuance of the permit is a lawful act, and the resulting injury damnum absque injuria. The production of sufficient gold to maintain the gold standard may be a matter of public importance, and it may be within the power of Congress to encourage it by appropriate legislation. It probably has the same power with regard to any other industry tending to increase the wealth of the nation. It cannot be admitted, however, that the mining of gold to be applied wholly to the private use of the miner, to whatever extent it may increase the general output, is a public purpose in behalf of which the power of eminent domain may be resorted to, or for which the private property of others may be taken, or its injury lawfully authorized.

The preservation and improvement of the navigability of navigable rivers is no doubt a proper subject of congressional legislation. The act in question is intended to promote those objects by providing for the regulation, restriction, and supervision of hydraulic mining upon the headwaters of those rivers. It does not purport to make the miners the agents of the United States to preserve the rivers below in their present state, or restore them to a former condition. Its provisions are calculated to so control and restrict the operations of the mines as to prevent the further clogging of the navigable streams by mining débris which otherwise would occur, and to devise plans and means whereby hydraulic mining, so controlled and restricted, may be carried on without injury to other persons. They were never intended to give such miners full license, in case the plans proved ineffectual to prevent it, either to fill up the river channels or to commit injuries to private property, by discharging débris into the streams. The commission is given power to revoke the permit, or to modify the plans. That is perhaps sufficient to protect and preserve the navigable streams. At all events, that is a public matter, and the public authorities alone are authorized to act. But no power is given to the commission to redress private injuries, if any should occur. It is unnecessary to decide whether the injury here committed and threatened constitutes a taking of private property for public use or not. We are of the opinion that, while it was the purpose of the act in question to prevent such injuries, if possible, it was not intended to exonerate the miner from liability therefor, or, in any respect, to limit or restrict the powers of the state courts to protect private property from threatened injury and to redress inflicted injury thereto from the operation of hydraulic mines, though carried on under a permit and in strict compliance with the plans and directions of the commission, and that the act does not have that effect. The provisions of the act directing notice to be given and authorizing a hearing at which all parties interested may appear were not intended to conclude and estop the owners of lands below with respect to subsequent injuries that might be inflicted, but were designed to enable the commission to obtain all aid which it could derive from the suggestions of all interested persons, including those who might believe their property to be in danger, in order that it would be better advised as to the means and plans necessary to prevent injury.

The judgment and orders appealed from are affirmed.

We concur: ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.

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152 Cal. 705

MARRIOTT v. WILLIAMS et al. (S. F. 4,215.)

(Supreme Court of California. Jan. 23, 1908. Rehearing Denied Feb. 20, 1908.)

1. Appeal—Review—Harmless Error—Admission of Evidence.

In an action for personal injuries inflicted by defendants, it appeared that defendant went to plaintiff's house to demand a retraction of a published article, and that, after a scuffle, plaintiff started upstairs. Defendant testified that plaintiff made a movement as though he was going to draw a revolver, and thereupon defendant shot plaintiff, who afterward crawled upstairs. Plaintiff and his wife were permitted to testify that, after reaching his bedroom, plaintiff asked his wife to come into the room and lock the hall door of a room opening into the bedroom and the door of the bedroom. *Held* that, if the admission of the testimony was error, it was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153–4160].

2. Same.

In an action for personal injuries inflicted by defendant, plaintiff testified on cross-examination that he was the prosecuting witness in a criminal prosecution for the same assault, but the court refused to allow proof of defendant's acquittal on the criminal charge. *Held*, that the evidence could only be admissible to show plaintiff's bias for impeaching purposes, and where plaintiff's intensity of feeling was freely admitted and manifested throughout the case the rejection of the evidence was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4170.]

3. Assault and Battery—Damages—Exemplary Damages—Admission of Evidence—Wealth of Defendant at Time of Trial.

In an action for injuries, where malice is alleged and exemplary damages asked, evidence of defendant's wealth is admissible to enable the jury to determine what amount of punishment would be inflicted by compelling defendant to pay a given sum of money, hence, it is proper to show defendant's wealth at the time of the trial instead of at the time of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 46.]

4. SAME—DEFENSES—PROVOCATION.

In an action for injuries, the publication of an alleged defamatory article by plaintiff cannot be considered in reduction of the actual damages, but only in reduction of, or set-off against, exemplary damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 48.]

5. SAME—SELF-DEFENSE.

In an action for personal injuries, self-defense is an affirmative defense, and the burden of proving it is upon defendant, for there is no presumption that a bodily injury is justifiable, and the justification must be proved by the one asserting it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 36.]

6. TORTS—JOINT LIABILITY—VERDICT—DIFFERENT DEFENDANTS.

In an action against two or more persons for a single tort, there cannot be different verdicts for different sums against different defendants upon the same trial, for all who are guilty at all are liable for the whole amount of the actual damages, irrespective of the degree of culpability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Torts, §§ 29, 38.]

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by Frederick Marriott against Thomas H. Williams and another. From a judgment against Williams and from an order denying a new trial, he appeals. Affirmed.

H. T. Creswell and P. F. Dunne, for appellant. Hiram W. Johnson and Albert M. Johnson, for respondent.

SHAW, J. This is an action to recover damages for personal injuries inflicted upon the plaintiff by defendants. The jury rendered a verdict against the defendant Williams alone, and judgment was entered accordingly. The appeal is by the defendant Williams from an order denying his motion for a new trial.

The complaint alleges that the defendants entered plaintiff's home and there assaulted, beat, and wounded him, shooting him twice in the leg, breaking both bones below the knee, and piercing the fleshy part of the thigh, and bruising and cutting his head and hand. The answer admits that Beale inflicted the cuts and bruises on the head and hand, and that Williams shot plaintiff in the leg, but alleges that it was all done in necessary self-defense. Upon the trial, there was practically no controversy over the fact that Beale cut and bruised the plaintiff's head and hand by beating him with a pistol, and that Williams shot plaintiff in the thigh and below the knee, breaking the bones as alleged.

The plaintiff was the publisher of a weekly paper called the "News Letter." The defendants went to his house for the avowed purpose of demanding and procuring from him a retraction of a statement published in the paper. Upon entering the hallway of the house, the plaintiff asked them for their hats, and took Beale's hat and started toward the rear of the hall to hang it on the hat rack. Before, or immediately after, this was done, Beale demanded of Marriott the retraction, and almost immediately struck the blows on the hand and head, while the two were engaged in a scuffle. Marriott broke away and started to run up the stairway, which was on the left side of the hallway. There were 20 steps in the stairway and about the fourteenth step from the bottom it made a quarter turn to the left to reach the floor above. When he had gone perhaps a little more than half way up, Williams shot at him three times, hitting him twice, as alleged. Upon receiving the shot which broke his leg, the plaintiff fell forward upon the upper steps and crawled to the upper floor and into his bedroom. Almost immediately his wife came into the room from the upper part of the stairway where, as she testified, she witnessed a part of the shooting. The defendants did not pursue Marriott, but stood on the lower floor during the altercation and shooting and until Marriott had disappeared, and then left the house.

Over the objection of the defendant, the plaintiff and his wife were allowed to testify that immediately after the shooting and upon his arrival in the bedroom he asked her to come in where he lay and lock the door of that room, and also to lock the hall door of another room which opened into the bedroom, and that she immediately did so. The objection to this evidence was that it was immaterial and incompetent. This ruling is assigned as error. It may be conceded that these acts and declarations were not part of the res gestæ of the shooting. They occurred after the injury was done, and not in the sight or hearing of the defendants. They tended to prove no fact material to the case, except the physical condition and mental state of the plaintiff after he was shot. They would tend to show the plaintiff's fear that the defendants would follow him and inflict more injury, or annoy him or his wife in some way, and that he was himself unable to take the precautions requested. We may concede that the evidence was incompetent to prove his physical condition, but its effect on that part of the case would be so trivial and inconsequential that it could not produce injury. So far as they tended to show that the defendant was at that time in fear, if we concede that they were not part of the res gestæ on that point, they were immaterial. The ruling, then, was perhaps technically erroneous. The inquiry arises whether the proof of said acts and declarations was substantially prejudicial to the case of the defendant.

Counsel contends with much earnestness that it was very prejudicial because of its bearing upon the issue of self-defense. The defendant Williams testified that Marriott, as he was running up the stairway, turned his side around to the left, at the same time making a motion for his hip pocket, and that thereupon he (Williams), believing that Marriott intended to draw a pistol to shoot him, drew his own pistol, and fired three times at Marriott as fast as he could. Beale also testified that he saw the threatening motion of Marriott. This motion of Marriott constitutes the sole basis of the claim of self-defense on the part of Williams. He took no part in the assault on the lower floor of the hall. The argument in regard to the effect of the evidence about the locking of the doors runs thus: The motion towards the hip pocket was prompted by courage and a spirit of combat. The locking of the doors was requested because Marriott was then in fear and desired protection. Proof of the manifestation of the latter feeling, so soon after the manifestation of the former, tended to throw doubt on the existence of the former, and, to that extent, tended to disprove the making of the hip-pocket motion. This argument is not of great force, at best, and what little strength it has is much impaired when we consider that, in the meantime, Marriott had received two severe wounds, one of them dangerous, had had his leg broken by one of them, and that at the time he requested the locking of the doors he was lying on the floor of his bedroom suffering indescribable agonies from his wounds, as he testifies. Such intervening circumstances and such condition would probably unnerve the most courageous person, or at least remove all desire to attack, and substitute therefor the desire for protection. There are, however, other facts which show that the evidence could have had no substantial prejudicial effect. It was proven, without contradiction, that Marriott did not have a pistol, or other weapon, upon his person. The fact was established. Not having any pistol to draw, he could not have made the motion with the intent to draw it. There was, therefore, no real danger to Williams, no necessity for him to shoot in self-defense, nothing, at most, but a mere appearance of danger. If the suspicious motion was made, as claimed, it must have been one of those involuntary movements of the arms which many people make in running, which Williams, in his combative spirit, mistook for a motion to draw a pistol, or it may have been a pretense of such motion, made by Marriott to intimidate the defendants and prevent their further pursuit or gain time to reach a place of safety. If it was the latter, it would be entirely consistent with the feeling of fear and the desire for protection manifested in the bedroom, and proof of the existence of one would not tend to disprove the other. If it was the mere accidental and unconscious motion made in running, it would have no significance at all with respect to his state of mind and the proof of the subsequent fear and desire for protection would be proof of an immaterial fact. In either case the evidence objected to could have produced no injury to the defendants' case.

With regard to the blows, inasmuch as the verdict was in favor of Beale, who alone inflicted them, we must assume that the jury held them to be justified, and hence, the effect of the evidence of locking the doors on this part of the case was not injurious.

What has been said is also applicable to the objection to the admission of similar evidence, introduced in rebuttal, in connection with proof of declarations by Mrs. Marriott, inconsistent with her testimony as a witness for plaintiff, and nothing further need be said with regard thereto.

The defendants had been acquitted upon a criminal prosecution for the assault upon Marriott. On cross-examination Marriott testified, in answer to the defendants' questions, that he was the prosecuting witness in that case. The court refused to allow proof of the fact of acquittal of the criminal charge. The evidence was pertinent only to show his feeling and bias against the defendants and thereby to impeach his credibility as a witness. Even if we concede that natural chagrin at the defeat of the criminal prosecution might have added to the intensity of his feeling, and that, in general, the proof would be admissible for that purpose, solely, it would be harmless error here, where the feeling was freely admitted and was manifest throughout the case, and where the circumstances were such that it would have been inferred by the jury, even if there had been no proof or exhibition of it.

The complaint alleged malice on the part of the defendants and asked exemplary damages. It was therefore proper to allow evidence of the defendants' wealth. Sloan v. Edwards, 61 Md. 100; Webb v. Gilman, 80 Me. 177, 13 Atl. 688; Draper v. Baker, 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143; Brown v. Evans (C. C.) 17 Fed. 912; 3 Cyc. 1095; 2 Am. & Eng. Ency. of Law, 997; 1 Ency. Ev. 1004. Such evidence is admitted to enable the jury to determine what amout of punishment would be inflicted upon the defendant by compelling him to pay a given sum of money. Hence it is proper to show his wealth at the time of the trial, as was done here, instead of at the time of the injury. In mitigation of damages the defendants pleaded the publication of the articles above referred to, which, as they allege, were defamatory, and gave them just cause for great indignation. The court instructed the jury that these matters could not be considered in reduction of the actual damages accruing from his pain, physical injuries, loss of time, and moneys expended, or any other element of actual damages, but only in reduction of, or set-off against, the exemplary damages. That this was a correct exposition of the law is well settled. Goldsmith v. Joy, 61 Vt. 488, 17 Atl. 1010, 4 L. R. A. 500, 15 Am. St. Rep. 923; Badostain v. Grazide, 115 Cal. 429, 47 Pac. 118; Fenelon v. Butts, 53 Wis. 351, 10 N. W. 501; Corcoran v. Harran, 55 Wis. 122, 12 N. W. 468; Donnelly v. Harris, 41 Ill. 128. The assault and injury to the plaintiff were admitted. The answer that they were inflicted in self-defense was an affirmative defense, which it was necessary for the defendants to establish by a preponderance of the evidence. A person who sues for a personal injury at the hands of another is not bound to prove, in the first instance, that he was not the aggressor and that the defendant did not act in self-defense. He must prove the assault and the injury, if they are denied. In so doing, he may incidentally bring out facts tending to support a plea of self-defense, and if so the defendant will be entitled to the benefit of such evidence. But the burden of proof to establish the self-defense remains with the defendant. There is no presumption that a bodily injury is justifiable, and the justification must be proven by him who asserts it. The instructions of the court embodying these propositions were properly given. Sellman v. Wheeler, 95 Md. 751, 54 Atl. 515; Gizler v. Witzel, 82 Ill. 326; Johnson v. Strong, 58 S. W. 430, 22 Ky. Law Rep. 577; Phillips v. Mann, 44 S. W. 379, 19 Ky. Law Rep. 1705; Rhinehart v. Whitehead, 64 Wis. 42, 24 N. W. 401.

In actions against two or more persons for a single tort, there cannot be two verdicts for different sums against different defendants upon the same trial. There can be but one verdict for a single sum against all who are found guilty of the tort. All who are guilty at all are liable for the whole amount of the actual damages arising from the injury inflicted, irrespective of the degree of culpability. Huddleson v. Borough, 111 Pa. 110, 2 Atl. 200; McCool v. Mahoney, 54 Cal. 492; Nichols v. Dunphy, 58 Cal. 607; Everrord v. Gabbert, 83 Ind. 492; Carney v. Reed, 11 Ind. 417; Cooley on Torts, p. 136; 1 Suth. Dam. § 140. The court did not err in instructing the jury to this effect.

There are some other objections to the charge to the jury, and there are other rulings in the admission of evidence which are questioned, but they are all either covered by what we have said, or they are too trivial to require notice.

The order is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.; ANGELLOTTI, J.; BEATTY, C. J.

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152 Cal. 731

PEOPLE ex inf. BOARD OF HARBOR COM'RS FOR SAN DIEGO BAY v. KERBER et al. (L. A. 1,983.)

(Supreme Court of California. Jan. 24, 1908. Rehearing Denied Feb. 20, 1908.)

1. Navigable Waters—Tide Lands—What Constitute.

Land lying between the lines of the ordinary high and low tides, and covered and uncovered successively by the ebb and flow thereof, constitutes tide lands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 180-187.]

2. Same—Title.

Tide lands fronting on navigable waters vest in the state by virtue of its sovereignty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 180-187.]

3. Same—Private Title—No Acquisition by Prescription.

Tide lands fronting on a navigable bay constitute property devoted to a public use, of which private persons cannot obtain title by prescription, founded upon adverse occupancy for the period prescribed by the statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 180-193; vol. 1, Adverse Possession, §§ 24-57.]

4. Same—Abandonment of Public Use.

Though the public use in tide lands fronting on a navigable bay may, by some lawful act of public authority, be abandoned, and if the state then holds the title it will thereafter hold it as a proprietor, if the statute of limitations can run against the state respecting the lands, it will only begin from the date when the public use ceased.

5. Same—Constitutional Law.

Const. 1879, art. 15, § 3, provides that all tide lands within two miles of any city or town and fronting on a navigable bay, etc., shall be withheld from grant or sale to individuals, etc., and article 4, § 31, prohibits the gift of state property by the Legislature. Article 22, § 1, repeals all laws inconsistent with the Constitution. *Held* that, so long as such tide lands remain subject to navigation, they cannot be alienated by the state except for navigation purposes, and title thereto may not be acquired by individuals by prescription; so far as Code Civ. Proc. § 315, limiting actions by the people to sue for land, and Civ. Code, § 1007, providing that occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar suit to recover property confers prescriptive title thereto, would enable title to such lands to be acquired, they were repealed by the Constitution.

6. Same—Sea-Wall Line—Establishment—Effect.

The establishment of a sea-wall line by the San Diego harbor commissioners, under authority of Pol. Code, §§ 2587, 2588, does not constitute an abandonment of the public use in tide lands between that line and the shore, where no wall has been built nor projected, and no obstruction to navigation has been placed on the line, since, under sections 2579, 2588 and 2590 the line may be changed before the wall is built so as to cause such lands to remain in the part of the bay reserved for navigation.

7. Same—Alcalde Grant Effect.

A purported conveyance by the alcalde of the pueblo of San Diego on March 18, 1850, of tide lands passed no title, since at that time title had accrued to the United States as sovereign; St. 1850, p. 121, c. 46, incorporating San Diego, not validating alcalde grants, and Act May 14, 1861 (St. 1861, p. 363, c. 356), confirming such grants near Oakland, San Francisco, and San Quentin prison, not ratifying such conveyance.

8. Statutes—Affecting State's Title—Construction.

Statutes depriving the state of its property must be construed favorably to the state, or, at least, not strictly against it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 319.]

Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by the people of the state of California, by the State Board of Harbor Commissioners for San Diego Bay, against H. Kerber and others. From the judgment, defendants appeal. Affirmed.

Stearns & Sweet and Haines & Haines, for appellants. Shaw & Winnek and Victor E. Shaw, for respondent.

SHAW, J. This action is prosecuted under the authority of section 2578 of the Political

Code, to recover possession of certain premises alleged to constitute a part of the tide lands of the bay of San Diego. Plaintiff had judgment for part of the land sued for, and the defendants appeal from that part of the judgment. The defendants denied ownership of the lands by the state, and pleaded, as a defense, the 10-year statute of limitations, as set forth in section 315 of the Code of Civil Procedure. The court found that the defendants have been in adverse occupancy of the land for more than 10 years next before the action was begun. The evidence shows that their occupancy began on January 1, 1887, and has continued ever since that time. The claim of the defendants is that the action is barred by the statute, and that, under the provisions of section 1007 of the Civil Code, they have acquired title to the land by prescription.

The land in question lies between the lines of the ordinary high and low tides and is covered and uncovered successively by the ebb and flow thereof. It is, unquestionably, tide land, in the usual meaning of that term. People v. Davidson, 30 Cal. 386; Rondell v. Fay, 32 Cal. 364; Oakland v. Oakland Water F. Co., 118 Cal. 182, 50 Pac. 277. It is situated next to the shore line at ordinary high tide and constitutes a strip of land 40 feet in width, running from the line of Atlantic street on the west to the line of California street on the east, assuming that those streets extend into the bay. The said shore line at that point is 10 feet south of the south line of H street in the city of San Diego. The land extends 40 feet into the water at ordinary high tide, and, under the existing natural conditions, it is not disputed that it fronts on the waters of San Diego Bay, and constitutes a portion of the waters thereof used for navigation. It either adjoins or is within the city of San Diego. Tide lands of this character vest in and belong to the state by virtue of its sovereignty. Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; Farish v. Coon, 40 Cal. 57; People v. Morrill, 26 Cal. 337; Ward v. Mulford, 32 Cal. 365. And when such tide lands are situated in a navigable bay, and constitute a part of the water front thereof, as is the case here, they constitute property devoted to a public use, of which private persons cannot obtain title by prescription, founded upon adverse occupancy for the period prescribed by the statute of limitations. In Ward v. Mulford, supra, on page 372 of 32 Cal., the court says on this subject: "Such land is held in trust for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them, her grantee takes them upon the same terms upon which she holds them, and, of course, subject to the public rights above mentioned." See, also, Oakland v. Oakland W. F. Co., page 184 of 118 Cal., page 286 of 50 Pac., where the same passage is quoted with approval. Property thus held by the state in trust for public use cannot be gained by adverse possession, and the statute of limitations does not apply to an action by the state or its agents to recover such property from one using it for private purposes not consistent with the public use. This is the settled rule in this state, with respect to all properties so devoted to public use, and tide lands—underlying waters forming part of the waters of a navigable bay used for navigation—are not, in this respect, to be distinguished from property used for other public purposes. Upon this point the rule is thus stated: "It is immaterial where the title—that is, the record title—is held, whether by the state at large, or by a county, or by some municipal department or other official body. There can be no adverse holding of such land which will deprive the public of the right thereto, or give title to the adverse claimant, or create a title by virtue of the statute of limitations. The rule is universal in its application to all property set apart or reserved for public use, and the public use for which it is appropriated is immaterial. The same principles which govern the adverse holding of a street, a public square, a quay, a wharf, a common, apply to the adverse holding of a schoolhouse. The public is not to lose its rights through the negligence of its agents, nor because it has not chosen to resist an encroachment by one of its own number, whose duty it was, as much as that of every other citizen, to protect the state in its rights." This rule has been often repeated in the opinions of this court. Hoadley v. San Francisco, 50 Cal. 275; People v. Pope, 53 Cal. 437; Visalia v. Jacobs, 65 Cal. 434, 4 Pac. 433, 52 Am. Rep. 303; San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405; Yolo Co. v. Barney, 79 Cal. 378, 21 Pac. 833, 12 Am. St. Rep. 152; Mills v. Los Angeles, 90 Cal. 522, 27 Pac. 354; Orena v. Santa Barbara, 91 Cal. 621, 28 Pac. 268; San Francisco v. Bradbury, 92 Cal. 418, 28 Pac. 803; Archer v. Salinas, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; Ames v. San Diego, 101 Cal. 394, 35 Pac. 1005; Home v. San Francisco, 119 Cal. 537, 51 Pac. 950; Holladay v. San Francisco, 124 Cal. 358, 57 Pac. 146; San Francisco v. Sharp, 125 Cal. 536, 58 Pac. 173; S. P. Co. v. Hyatt, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522.

It is true that the public use may, by some lawful act of public authority, be discontinued or abandoned, and that, in that event, the property may thereupon cease to be protected by this rule. If the title is at that time held by the state, it will thereafter hold it as a proprietor and not as a public agent or sovereign in charge of a public use. If an adverse possession can be maintained, or if the statute of limitations can run against the state, in regard to such proprietary property, it will begin from the date when the public use ceased and not before. If the power is left to the Legislature, it may then provide for the sale of such property, and order that it may become the subject of private ownership. But, as was said in Yolo Co. v. Barney, supra, the fact that the public authorities in charge of the property have power to discontinue or abandon the public use and sell the property for private use does not affect the rule above cited, nor enable an occupant to gain it by adverse possession before that event occurs, or to invoke the statute of limitations to protect his possession against the state. This was the rule applicable to such property, so held and used, before the adoption of the Constitution of 1879. To make such tide lands more secure against unwise disposition by the Legislature to the detriment or destruction of the public rights, the following provision was inserted therein: "All tide lands within two miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay, or inlet, used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships or corporations." Article 15, § 3. Other constitutional provisions prevent the gift of any state property by the Legislature. Article 4, § 31. So long, therefore, as property of this character remains subject to use for the purposes of navigation, it cannot, without an amendment of the Constitution, be disposed of by the state in any manner, except in furtherance of the purposes of navigation to which it is dedicated. The provisions of the Constitution are of higher force than the statute of limitations, or the statute defining the manner of acquiring title to property by adverse occupancy. If the state is without power to dispose of this land for private use at all, its officers and agents must be without power to make a virtual disposition of it by their neglect in permitting private persons to occupy it for a period of 10 years, under claim of ownership, and thus giving such persons an opportunity to invoke for their benefit a legislative declaration that such occupancy will bar the state of its title. So far as the statutes referred to may have had that effect before the adoption of the Constitution, they must be considered as having ceased to exist when the Constitution took effect. The Constitution declares that all laws inconsistent with its provisions shall cease upon its adoption. Article 22, § 1. In this view of the case, it is immaterial whether title by prescription under the Code is, or is not, founded upon the presumption that the possession was originally taken under a grant which had been lost in the lapse of time, as was the case at common law, even if it were conceded that the rule that there can be no adverse possession of property devoted to public use did not apply to this land.

It is claimed that the land in controversy is not now devoted to public use for navigation; that, by lawful action of the harbor board, the public use has been discontinued and abandoned, and the land made available for sale to private use, and thus has become proprietary in character; that this occurred more than 10 years before the action was begun; and hence, that the statute of limitations has barred the action, and the defendants have acquired title. This theory is based on the fact that on March 17, 1890, the board of harbor commissioners of San Diego, under the provisions of sections 2587 and 2588 of the Political Code, established a line for the location of a sea-wall or a harbor embankment to be thereafter erected, and that this land is between that line and the shore, and some 150 feet distant from the sea-wall line. It may be admitted that when a sea-wall shall be constructed on this line, and the water between it and the shore is thereby excluded from use for navigation, the land between the wall and ordinary high-tide line, not abutting on the wall, nor lying so near it as to be reasonably necessary for purposes incidental to and in furtherance of navigation, may become proprietary lands, which, like ordinary public land, may be sold by the state to private persons for private use not connected with navigation. Perhaps, before such wall is constructed, land within the sea-wall line, and so remote therefrom that its use for private purposes would not be detrimental to the public use or the public right, might be disposed of to private persons in connection with and in aid of the building of such wall, and its adaptation to purposes of navigation and commerce, as, for instance, to raise funds wherewith to build the wall. We are not called upon here to express any opinion on these questions. No such case is presented. No such disposition of the land has been made to the defendants, or to any person. No sea-wall has been built or projected. No barrier or obstruction to navigation has been placed on the line. For all practical purposes the bay is open to navigation to the actual shore line of high tide over the land in question as fully and freely as before the line was so located. It still remains, in fact, a part of the bay of San Diego, which, by section 2579 of the Political Code, is placed in the possession and control of the harbor commissioners, with all the rights, privileges, easements, and appurtenances connected therewith. They may, at any time, change the location of the line. Pol. Code, §§ 2579, 2588, 2593. Before a sea-wall is constructed, and before private rights accrue from such construction, it would seem that their power to make such change is unlimited. It may therefore be changed so as to include this land within the waters of the bay set apart exclusively to navigation. In People v. Williams, 64 Cal. 499, 2 Pac. 393, the court says: "The mere establishment of a harbor line does not deprive the state of the right to control and regulate the water within the line." We think the establishment of the sea-wall line has no effect whatever upon the character of the waters and tide lands between it and the shore as property devoted to use for navigation, at least, until some further action is taken looking to the erection of the wall, or the abandonment of the public use of the waters between it and the shore.

On March 18, 1850, the alcalde of the pueblo of San Diego, in consideration of the building of a wharf by the grantees, executed a deed purporting to convey to Jose Aguirre and others 15 acres of land, including the land in controversy. The defendants claim under this deed, and deraign title therefrom by a regular chain of conveyances. The wharf was built, but is gone. Defendants do not claim that they ever maintained any wharf. San Diego was incorporated on March 27, 1850, nine days after the execution of this deed. St. 1850, p. 121, c. 46. This conveyance could not have been of any force or effect to pass the title. At that time the title had accrued to the United States as sovereign. The community which afterward became the city of San Diego was then a mere unincorporated village, or, at most, a Mexican pueblo, exercising some powers in that capacity. Whatever powers it may have possessed over this land as a Mexican pueblo before the cession of the territory to the United States, those powers had ceased when the cession took place, and the sole power and authority to dispose of such lands was thereupon transferred to the United States, and was by it transmitted to the state of California at the time of its admission as a state on September 9, 1850. There is nothing in the incorporating act creating the city of San Diego, that purports to validate the previous grants of tide lands made by the alcalde. The act of May 14, 1861, refers only to marsh and tide lands within 5 miles of the city of Oakland and San Francisco, or within 1½ miles of San Quentin prison. The proviso in that act declares that no sales of such land within those limits shall be confirmed by the act, "excepting alcalde grants which are hereby ratified and confirmed." St. 1861, p. 363, c. 356. Statutes which operate to deprive the state of its property are to be construed favorably to the state, or, at all events, are not to be construed strictly against it. Under any theory of interpretation applicable thereto, this statute should not be deemed a ratification of previous alcalde grants of tide lands in or adjacent to San Diego.

We have said nothing so far upon the question whether or not the provisions of section 315 of the Code of Civil Procedure do, in fact, apply to actions by the state for the recovery of possession of these tide lands, aside from their exemption under the Constitution, or as lands devoted to public use. For the purposes of the discussion we have assumed that they would apply but for such exemption, and that their effect was similar to that of section 318 respecting private property, except as to the length of the period of limitations. The language of the two sections, however, is materially different. Section 318 declares the action barred, unless the plaintiff, or his privies, were "seised or possessed of the property in question within five years before the commencement of the action." Section 315 is as follows: "The people of this state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless: 1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or, 2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof within the space of ten years."

The title of the state to lands lying between high and low tide accrued upon the admission of the state to the Union. If all actions to recover such lands are barred under subdivision 1, § 315, if begun more than 10 years after the title of the state accrued, it would follow that the state could not, at this time, maintain any action for possession thereof against a trespasser, in any case, regardless of the time the unlawful possession had continued. In view of this absurd result it may be doubted if section 315 is applicable at all to actions to recover possession of such tide lands. A doubt on this subject is expressed in Farish v. Coon, 40 Cal. 57, but the point was not decided. It is not necessary to decide it here. We have noticed it to this extent, merely to explain that we do not decide that the statute was intended to apply in any case.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(152 Cal. 618)

POMONA LAND & WATER CO. et al. v. SAN ANTONIO WATER CO. et al.

(L. A. 1,817.)

(Supreme Court of California. Jan. 17, 1908. Rehearing Denied in Bank Feb. 16, 1908.)

1. WATERS AND WATER COURSES—IRRIGATION—SALVAGE AND DEVELOPED WATER—RIGHT TO.

Where, under a contract with defendant, plaintiffs were only entitled to one-half of the natural flow of a stream as it reached a dam, any water defendant saved by impounding the water above and bringing it to the dam by pipe line, thus saving the water otherwise lost by seepage, etc., above the dam, and any water developed from the bed of the stream, are essentially new waters, and the right to use and distribute them belongs to defendant, under the principle that, where one is entitled to use a given amount of water at a given point, he may not complain of any prior use made of the water not impairing the quantity or quality to which he is entitled, and that he may not claim any excess of water over the amount to which he is entitled however it may be produced.

2. Same—Contracts.

The only covenants binding those who do not personally incur the obligation are those running with land, and under Civ. Code, § 1462, the only covenants running with land are those contained in a grant of an estate in realty and made for the direct benefit of the property or some part of it then in existence, and hence, where parties in 1877 agreed that the waters of a stream should be divided at a dam for the use of owners on both sides of the stream, and that the parties should at their joint expense develop the waters from their source to the dam, and that the development work should proceed with reasonable diligence until completed, and their successors, plaintiff and defendant, in 1897 agreed that the natural flow of the stream should be divided at a dam, defendant is bound only by the last contract, and is not deprived by the terms of the first of the exclusive right to water saved by it by impounding the waters of the stream above and bringing it to the dam, thus saving the water otherwise lost by seepage, etc., above the dam, and water developed from the bed of the stream; the development work being done 30 years after the first contract was made.

3. Same—Finding.

Where defendant is entitled to water saved and developed by it above the natural flow of a stream, the court must determine with such exactness as possible how much water is saved and developed.

4. Same.

Where a contract provided plaintiff and defendant should divide the natural flow of a stream, subject to the water right of another, established by a judgment against plaintiff and defendant's predecessor, defendant could acquire such right for its own use, within the limitations of such judgment.

5. Judgment — Interpretation — Resort to Pleadings.

Resort may be had to the pleadings in a case and the issues joined thereunder to explain and to limit the language of a judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 969.]

6. Waters and Water Courses—Action to Establish Rights—Judgment.

Where one only claimed a right to use 20 inches of water of a stream for domestic purposes and to irrigate his land, a judgment awarding him that amount, but not showing the purpose for which it might be used, did not entitle him nor his successor to transport water beyond the watershed for other uses.

7. Same — Water Rights — Acquisition by Prescription.

Where plaintiff and defendant water companies agreed upon a division of the natural flow of a stream at a dam, subject to the right of another to use 20 inches for a specific purpose, and defendant acquired such right, though it did not have a right to use water thereunder for another purpose, where for a long time it openly, notoriously, and under a claim of right diverted the water for another purpose to a point near the dam and did not allow it to flow over it for division, it acquired a prescriptive title to the quantity used.

In Bank. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by the Pomona Land & Water Company and others against the San Antonio Water Company and others. From the judgment both parties appeal. Plaintiffs' appeal denied; judgment partly reversed with directions on defendants' appeal and defendants' appeal partly denied.

Rehearing denied in bank; BEATTY, C. J., dissenting.

A. P. Nichols, J. S. Chapman, and Stephens & Stephens, for plaintiffs. Otis, Gregg & Surr and H. W. O'Melveny, for defendants.

HENSHAW, J. This is an action in form for an injunction to restrain the defendants from their alleged unlawful diversion of the waters of the San Antonio creek. In its essence the action is to determine the conflicting claims of plaintiffs and of defendants to certain of these waters. The Pomona Land & Water Company represents the users of water to the west of San Antonio creek—the "Pomona people." The San Antonio Water Company represents and supplies the lands and people to the east side of the creek—the "Ontario people." At a fixed point upon the stream a dam had been erected, and at this dam the waters which flowed thereto had, under agreement, been divided between the Pomona people and the Ontario people as follows: When the water which reached the dam amounted to or was less than 624 miner's inches, the supply was equally divided between the west side and east side users. When it exceeded 624 inches the west side users were entitled to 312 inches and the east side users to all of the rest. Over this there is no controversy. By contract and deed between the Pomona Land & Water Company and the San Antonio Water Company the water rights of the former were conveyed to the latter, and the latter company agreed in effect to make distribution of the waters in the proportions above set forth.

The defendant the Ontario Power Company is a corporation created for the purpose of generating power. The San Antonio Water Company owns the lands riparian to the San Antonio creek above the division dam, and granted permission by lease to the Ontario Power Company to do certain work and erect necessary structures, to the end of developing power from the waters of San Antonio creek above the division dam and before such waters reached the dam. Measurements of the natural flow of the stream were taken by these defendant corporations at a point 2½ miles above the division dam and again at the division dam, from which they became satisfied that from the upper point of measurement the stream was a losing stream, and that 19 per cent. of its surface flow was lost by seepage, percolation, and evaporation between that point and the division dam. In the belief, therefore, that its duty to plaintiffs was only to distribute to them their proportion of the natural flow of the water as it reached the division dam, the defendants held that any excess over the natural flow which they could save by impounding the waters 2½ miles above the division dam in a pipe line, and bringing it thus down to the division dam without waste, would be salvage water, rescued water, or developed water, the rightful use of which would be theirs absolutely. This then in fact is what was done. The Ontario Power Company impounded all the waters of the stream in a 30-inch pipe line, and carried them down to their power house above the dam. They leased, in turn, to the defendant San Antonio Water Company the salvage water, estimated at 19 per cent. of this natural flow. By plaintiffs and respondents it is insisted upon this appeal that the Ontario Power Company is a mere agency in this regard of the San Antonio Water Company, and that its rights to this salvage water are no greater than are the rights of the San Antonio Water Company. The next contention is that it was the legal duty of the San Antonio Water Company under certain agreements and contracts, hereinafter to be considered, to divide this salvage water with plaintiffs equally with the rest of the water of the stream at all times when the total amount of that water did not exceed 624 inches.

For convenience, the Ontario Power Company may be dropped from the case, and the questions may be considered from the point of view for which plaintiffs and respondents contend; that is to say, from the point of view of the rights and duties of the San Antonio Water Company. The right to this salvage water, estimated by the San Antonio Water Company to be 19 per cent. of the natural flow, is the first matter in controversy between these parties. The amount of the water so saved, the court expressed itself unable to determine from the evidence. Under its view, however, that whatever the amount might be it should be divided under the contention of plaintiffs, it was unnecessary to determine the amount. If, however, the position of the defendant the San Antonio Water Company is correct—if it is entitled to this water—then an accurate finding upon this question becomes of extreme importance to all of the litigants.

After the natural flow of the stream had, as above described, been impounded in a pipe line and carried down to the division dam, leaving the bed of the creek dry, the San Antonio Water Company undertook certain development work in the bed of the creek, laying a pipe line in the saturated gravels, and thus rescuing, impounding, and using from 25 to 50 inches of water. As to this water its position is the same as that which it takes with regard to the salvage water. It argues that, as it is delivering to plaintiffs all of their proportion of the natural flow to which alone they are entitled, all other waters which it may save or develop belong to it; that, as it is giving to plaintiffs all of their proportion of the natural flow which by any possibility could reach the division dam, this water so rescued from the bed of the creek cannot be part of that, and although it comes from the creek is newly developed water, and their property. Upon this the court took plaintiffs' view that, under the agreements above adverted to, one-half of this water belonged to plaintiffs whenever the total flow was less than 624 inches, but that plaintiffs should bear one-half of the cost of the development, estimated at $750. From the conclusion reached by the court upon both these matters and expressed in its judgment, the defendants appeal.

Still a third matter of controversy exists between the parties, to which consideration must now be paid. One Dexter asserted the right to 20 inches of water for use upon his lands upon the east side of the creek, and in fact his right to this water was embodied in a judgment in litigation growing out of these very questions, a judgment to which all the parties to this action, their predecessors or representatives in interest were parties. In the contract between the Pomona Land & Water Company and the San Antonio Water Company, to which reference has heretofore been made, it is "agreed between the parties hereto that all the waters of San Antonio creek, except the twenty inches of water owned by Richard Gird and known as the Dexter claim, have been for more than fifteen years last past owned and used equally in common by certain parties on the Ontario and Pomona sides of the San Antonio creek," etc. And, further, it is declared "that after the execution of this agreement and of the deeds hereinafter mentioned all the waters of San Antonio creek and its tributaries, excepting the so-called Dexter claim of twenty inches above referred to, shall be allowed to flow undiminished to said point of diversion" (the division dam). Dexter sold his land and water right to Gird. Gird in turn, after the execution of this contract, sold both to the San Antonio Water Company. The San Antonio Water Company insists upon its right to take the Dexter 20 inches of water, which it will be remembered, was water which for years had been diverted from the stream above the division dam. Respondents, upon the other hand, contend still by force of certain contracts, to which reference has been made, that upon the acquisition by the San Antonio Water Company of this Dexter claim it became that corporation's duty to permit that 20 inches to flow to the dam and there to be divided. The court upon this found generally with the plaintiffs, to the effect that such was their right, but it found moreover that by adverse use for sufficient time the San Antonio Water Company had acquired a new title by prescription to 18 inches of this water, and for that amount gave them judgment. Upon this so-called Dexter claim there are cross-appeals, appeals by the plaintiffs from the judgment in favor of the defendants for the 18 inches, and from the court's order denying its motion for a new trial, and upon the part of the defendants, who insist upon their title to the full 20 inches awarded to Dexter by the judgment above referred to.

1. Salvage and Developed Water. It may not successfully be disputed that if, in fact, all the water to which plaintiffs were entitled was the one-half of the natural flow of the

stream as it reached the division dam, and that if in fact they receive this water, then the 19 or any other percentage, which was saved by the economical method of impounding the water above, and the 25 inches, more or less, which were rescued as developed water from the bed of the stream, were essentially new waters, the right to use and distribute which belonged to defendant. This principle has been enunciated by this court as early as Butte Company v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, and has been reaffirmed, however varying the forms may have been, whenever it has been presented. The principle in brief is this: That where one is entitled to the use of a given amount of water at a given point, he may not complain of any prior use made of the water which does not impair the quality or quantity to which he is entitled, and, upon the other hand, he may not lay claim to any excess of water over the amount to which he is entitled, however it may be produced. In the Vaughn Case, supra, the question turned upon the prior use. In Creighton v. Kaweah Irrigating Company, 67 Cal. 222, 7 Pac. 659, it is said: "At best, the plaintiffs would be entitled only to have the defendant enjoined from obstructing the flow of that which would have naturally flowed unaided by artificial means, with which the plaintiff is not connected." In Wiggins v. Muscupiabe L. & W. Co., 113 Cal. 195, 45 Pac. 164, 32 L. R. A. 667, 54 Am. St. Rep. 337, this whole question is elaborately considered, and full recognition is accorded of the right to water of one who saves as well as of one who develops it. It there appeared that 100 inches of water were naturally lost by absorption and evaporation in passing through the natural channel from the dam and ditch of an upper riparian owner to the land of a lower owner. It was held that a court of equity in dividing the flow of the stream might allow the upper owner to provide artificial means for carrying all the waters of the stream in excess of the 100 inches to the land of the lower owner, and permit the upper owner to use so much of the 100 inches as he could save by such artificial means, and, quoting from the opinion, it is said: "The plaintiff could under no circumstances be entitled to the use of more water than would reach his land by the natural flow of the stream, and, if he receives this flow upon the land, it is immaterial to him whether it is received by means of the natural course of the stream or by artificial means. On the other hand, if the defendant is enabled by artificial means to give to the plaintiff all of the water he is entitled to receive, no reason can be assigned why it should not be permitted to divert from the stream where it enters its land and preserve and utilize the one hundred inches which would otherwise be lost by absorption." This same doctrine is recognized by all the courts which have been called upon to consider it. Platte Irrigation Co. v. Buckers Irrigation, Milling & Improvement Company, 25 Colo. 77, 53 Pac. 335; Herriman Irrigation Co. v. Butterfield Mining Co., 19 Utah, 453, 57 Pac. 541, 51 L. R. A. 930; Farnham on Waters, § 672. Indeed, as we read plaintiffs' brief, we are led to believe that this doctrine is not disputed, but that, because of defendants' contractual obligations, it is insisted that plaintiffs are entitled to their share of this salvage and developed water. A consideration of these agreements is thus imposed.

At the outset it should perhaps be stated that none of these waters are used in virtue of riparian rights upon lands riparian to the stream, but are either diverted and consumed upon lands without its watershed, or used solely under claims by appropriation. In 1877, Loop and Meserve, owners of lands upon the west side of the stream and claiming water rights in the stream, entered into an agreement with the Cucamonga Water Company, claiming water rights in the stream for the use of lands and people on the east side thereof. At the time of this agreement each of the contracting parties claimed by pre-existing rights and titles. The substance of the agreement was that at the division dam the water should be divided equally between the parties; that the parties should, at their joint expense, develop the waters of the stream from their source to the division dam; that the development work should proceed with reasonable diligence until completed. Each party to the contract agreed to supply out of his moiety such water as any other person upon his side of the stream was entitled to.

In August, 1882, Loop and Meserve, the west side users, entered into a contract with Mills and Wicks, the substance of which agreement is that Loop and Meserve, reserving to themselves 1 miner's inch of water for every 8 acres of their lands, which water Mills and Wicks agreed to deliver to them, conveyed to Mills and Wicks any excess water over that amount. Mills and Wicks agreed to do development work for the purpose of increasing the flow of the water. This, obviously, it was for the interest of Mills and Wicks to do, since the excess over the amount which was to go to Loop and Meserve was their own. It is to be remembered, however, that this agreement affected only the waters to which the west side users were entitled, and in no way affected the waters of the east side users. Moreover, time was made of the essence of the contract as to the work of development. A deed in consummation of the agreement was placed in escrow to be delivered upon the performance by Mills and Wicks of their part of the contract. The deed was placed in escrow and was delivered to Mills and Wicks in April, 1885, whereby it was established, as between the parties, that the covenants, the performance of which Mills and Wicks had undertaken, had been fully complied with, and thus Mills and Wicks were relieved from any obligation of making any further water developments. And, finally, there is established not only this complete performance by Mills and Wicks, but the contract does not attempt to impose the duty of any further or future developments upon the assigns of Mills and Wicks. The Chaffeys had succeeded to the interest of the Cucamonga Water Company, and consequently to such transitive rights and duties as were imposed under the contract of 1877 with Loop and Meserve. In 1882 the Chaffeys in turn made an agreement with Mills and Wicks, by which contract it was agreed that all the waters of the stream were to be allowed to run undisturbed to the division dam, where the waters were to be divided into two equal parts, which parts were to be taken by the respective parties to the contract. "At said dam all waters flowing into or over said dam shall be divided into two equal parts," etc. It was further agreed that all development of the canyon was to be at the joint and equal expense of the parties in accordance with their plans first agreed upon. Subsequently, in December, 1882, Mills and Wicks conveyed their rights to the plaintiff the Pomona Land & Water Company, while the defendant the San Antonio Water Company succeeded to all the rights of the Chaffeys. Then, finally, upon April 23, 1897, the plaintiff the Pomona Land & Water Company entered into an agreement with the defendant the San Antonio Water Company and in pursuance of that agreement conveyed its rights in the waters of the stream to the San Antonio Water Company. Thus the defendant the San Antonio Water Company has come to be the owner of all the rights in the waters formerly belonging to Mills and Wicks, the Chaffeys, and the San Antonio Water Company. (It also acquired the Dexter right, as has been above stated, but that right is a matter for separate consideration.)

The agreement of the San Antonio Water Company with the Pomona Land & Water Company is the only agreement to which it is directly a party, and by which it can be legally bound. Of course, in taking the rights of the Pomona Company, as in taking the Chaffeys' rights, it took cum onere and subject to all the legal burdens which, by the express terms of the preceding contracts or by necessary implication of law, devolved upon it; and the especial obligation which plaintiffs insist was thus cast upon the San Antonio Company is that of the duty to do work of development to increase the flow of the water, which increased flow should be for the mutual benefit of the west side and east side users. Or that, if it were not the duty of the defendant to do such development work, still, if it did do it, the result is the same, and the plaintiffs acquire a right in the new water. But, if this is so, since the defendant the San Antonio Water Company was not a party to any of the earlier contracts, and since no such obligation is in terms imposed upon it by its contract with the Pomona Land & Water Company, it must follow that these earlier contracts contained a covenant carrying with it the transitive quality of binding those who did not personally incur the obligation. But the covenants, and the only covenants which bear this quality, are covenants which run with the land, and the only covenants which run with the land are those which are found in section 1462 et seq. of the Civil Code. "Every covenant contained in a grant of an estate in real property which is made for the direct benefit of the property, or some part of it then in existence, runs with the land." Civ. Code, § 1462. Clearly, none of these earlier contracts contain any such covenant. Fresno Canal Co. v. Rowell, 80 Cal. 118, 22 Pac. 53, 13 Am. St. Rep. 112. There is no privity of estate or tenure here. There is no grant of an estate. Thus, says Erle, J., in Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611: "There is a wide difference between the transfer of the burden of a covenant running with the land and the benefit of the covenant, or, in other words, of the liability to fulfill the covenant, and the right to exact the fulfillment. The benefit will pass with the land to which it is incident; but the burden or liability will be confined to the original covenantor, unless the relation of privity of estate or tenure exists or is created between the covenantor and the covenantee at the time when the covenant is made." "The obligation of all contracts is ordinarily limited to those by whom they are made, and if privity of contract be dispensed with, its absence must be supplied by privity of estate." 1 Smith's Leading Cases, p. 178, note. The covenants then touching this matter were not founded in grant, so there was no privity of estate between the parties at the time the covenants were made. They were merely personal covenants binding only upon the covenantors. In the contract of December, 1877, the provision as to development work was that it should be done at the joint expense of the parties, and should proceed with reasonable diligence until completed. It cannot be said that such an agreement binds the defendant who was not a party nor privy to the contract, and whose development work was done 30 years after. So, too, as to the agreement made by the west side users with Mills and Wicks. The development which Mills and Wicks were called upon by their contract to do they had done, and it was not incumbent upon them to do anything more. In short, the rights and duties of the San Antonio Water Company are governed in this regard entirely by the contract which it made with the Pomona Land & Water Company. That agreement makes provision for the 312 inches which is to be diverted to the Pomona side under the conditions above stated (that is to say, no more than that, under any circumstances, and one-half of the flow when the amount shall be less than 624 inches); provides, after expressly excepting the Dexter claim of 20 inches, that "all the waters of San Antonio creek and its tributaries shall be allowed to flow undiminished to said point of diversion"; provides that the San Antonio Water Company shall be entitled to all water in excess of the 312 inches which is to be diverted to the Pomona side; contains the covenant upon the part of the San Antonio Water Company that it will "never by any development or works which it may or shall make or do in the San Antonio canyon, or any of its tributaries, diminish the flow of water to said users below the said amount of 312 inches which they are now and long have been entitled to receive"; provides that the waters shall be permitted to flow to said users as they are now and have been long permitted to flow, and nothing in the agreement shall enlarge or abridge the rights of the users of water; and San Antonio Water Company shall be under no higher or greater obligations to the users of water (represented by the Pomona Land & Water Company) under or by virtue of this agreement than it has been in the past, except to deliver water into the said Pomona conduit as herein directed. Then, finally, it declares that "it is further understood and agreed between the parties hereto that if in future the party of the second part [the San Antonio Water Company] shall construct a pipe line in said San Antonio canyon, in such event said party of the second part herein shall deliver to the users of water hereinbefore referred to the water which said users of water are now, under and by virtue of said deeds and agreements, entitled to at the intake, where now such users of water receive the water to which they are entitled from the San Antonio creek at the point known as the division dam." Having in mind the fact that the parties were, and for years had been, using the surface flow of the stream, and that surface flow only as and when it reached the division dam, that the contract provides for the uninterrupted or rather undiminished flow to the division dam, and that the water which is to be divided is the water then flowing at this point of division, the conclusion is irresistible that the plaintiffs' rights have become fixed, and are measured by their proportion of the natural flow of the stream when that flow reaches, without hindrance or diminution, the division dam. But this is a very different proposition from that contended for by plaintiffs, wherein they insist upon their proportionate share of any water over and above that natural flow which may be developed or saved. To such water we are of opinion that they show no right at all. There is not here involved any question of impairment of quality or quantity by the use of the pipe line. The facts then stand that by use of this pipe line defendant brings down and delivers to plaintiffs the one-half of the surface flow at the division dam to which they are entitled, and the circumstance that, in addition, the defendant rescues and devotes to beneficial use an additional quantity of water affords no grievance to the plaintiffs, so long as that additional quantity is determined with the nicest exactness possible.

We thus come to the question of how much water was actually saved by the pipe line; that is to say, how much water in excess of that which would reach the division dam does the pipe line carry, for to that excess defendant is clearly entitled. The defendant contends for 19 per cent., and put in evidence the elaborate measurements which it made by clock work, covering a period of some four months, and the testimony of competent engineers in explanation and support of those measurements. Upon this question the court found that the defendants have not saved 19 per cent. of the water; that the average measurement showed a saving of 19 per cent.; that the measurements did not show any uniform percentage of loss, but by many it appeared that the loss was greater than 19 and by others that it was less, and that the percentages claimed to be saved varied from 13 per cent. to 22 per cent., and that no fixed percentage would fairly represent the so-called salvage; and that to determine the amount saved at all the various stages of water in different seasons, and different times in the same season, could only be ascertained by constant measurements every year and throughout the year. This finding amounts to a mere negation, but in the view which the court took, that whatever water was saved belonged in equal portions to plaintiffs and defendants, an exact finding as to the amount saved was immaterial. Under the view here expressed, that defendant is entitled to the water saved, it becomes necessary for the court to find specifically upon this matter. The difficulty which the court experienced in arriving at the facts is not an unusual one, but it is one which nevertheless must always be met. As was said in the early case of Butte v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769: "There may be some difficulty in cases like the present, in determining with exactness the quantity of which parties are entitled to divert. Similar difficulty exists in the case of a mixture of wheat and corn. The quantity to be taken by each owner must be a matter of evidence. The courts do not, however, refuse the consideration of such subjects because of the complicated and embarrassing character of the questions to which they give rise. If exact justice cannot be obtained, an approximation to it must be sought, care being taken that no injury is done to the innocent party." It will, therefore, be the duty of the trial court, upon a rehearing of this matter, with the evidence before it, to determine with such exactness as may be possible the percentage of salvage water.

What has been said as to the salvage water is equally applicable to the water developed and carried by the pipe line along the bed of the creek. This pipe line, the court finds, collects and preserves an amount of water varying from 25 to 50 inches. The court finds as to this water that, under the changed mode of diversion by the Ontario pipe line, none of it reaches the dam, but if the old system of natural flow prevailed, then this water would flow to the division dam, or would go to support and sustain the surface stream to the extent that the waters filled the soil and gravel beneath the surface stream. All this may be quite true, and yet afford no argument to support plaintiffs' claim to this water, nor yet any reason why there should be a return to the older system of diversion. It might be that it required 1,000 inches of water to fill the voids and to support a surface flow of 50 inches. Yet, as in the Muscupiabe Case, if the owner of the 50 inches received that amount of water, he could not assert any title to the 1,000 inches of water which, by a change in the mode of delivery, not to his injury was preserved from waste. So here, if plaintiffs get the one-half of the natural flow to which they are entitled delivered, unimpaired in quantity and quality, through a pipe line, they are not injured by the fact that other water, which otherwise would go to waste, as merely supporting the surface flow, was rescued. Nor can they lay claim to any of the water so saved.

2. The Dexter Claim. The origin and history of this claim has already been set forth, together with the disposition which the court made of it. Plaintiffs, as appellants upon this matter, insist that under the agreement of 1877 between Loop and Meserve and the Cucamonga Water Company, it was the duty of the Cucamonga Water Company to protect the predecessors of plaintiffs, and consequently plaintiffs themselves, against this Dexter claim, which was against the waters of the east side; that the same duty devolved upon the defendant; and that in the acquisition of this Dexter claim it was but performing the duty cast upon it by the contract of 1877; consequently that the Dexter water should come out of the moiety due to the east side users without impairment of the full one-half to which plaintiffs are entitled. But Dexter had obtained a judgment against plaintiff the Pomona Land & Water Company representing the parties to whom the west side water was distributed, and the Chaffeys, who then held the title to the east side water, which judgment was a consent judgment, and was acquiesced in by all concerned. Moreover, in the contract between the Pomona Land & Water Company, as has been repeatedly pointed out, the Dexter 20 inches is recognized as an existing outstanding water right, and the division of the waters contemplated is repeatedly declared to be all the water at the division dam, excepting the Dexter claim to 20 inches. There can be no doubt, therefore, not only of the right of the defendant to acquire this outstanding and hostile water right, but, after acquiring it, to use the water as its own, within the limitations of the judgment which established the right. Herein it is contended by defendant that the judgment awarded to Dexter an absolute right to 20 inches, to be used wheresoever and in whatsoever way he deemed fit, and reference for a parallel judgment is made to the case of S. C. Investment Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767. The judgment in the case at bar, after reciting that a stipulation had been filed and signed by the parties that judgment by consent "be entered in favor of defendant for twenty inches of water under a four inch pressure," etc., states: "It is therefore ordered, adjudged, and decreed that plaintiffs are entitled to the use, enjoyment, and control of all the water of San Antonio creek described in their complaint, save and except the amount of twenty inches, * * * and the defendant be and is hereby perpetually enjoined from diverting from said San Antonio creek any greater or larger amount than the twenty inches hereinabove described." It is well settled that resort may be had to the pleadings and issues joined thereunder to explain and to limit the language of a judgment. 23 Cyc. 1101; Van Fleet, Former Ad. § 376 et seq. In the Dexter Case it appears, by an inspection of the pleadings, that the action was for an injunction to restrain Dexter from diverting any of the waters of the stream. Dexter made answer that he was not interfering with the waters of the stream nor with any of plaintiffs' rights therein, saving as in his answer afterwards set forth, and in that answer he alleged ownership of riparian land and that he was using, and that there was necessary for use upon his land for irrigation and for domestic purposes, a perpetual flow of 80 inches of water. Under this condition of the pleadings, it was that the Dexter judgment was entered, and thus it clearly appears that Dexter's sole claim was 20 inches of water as riparian owner for domestic use and for purposes of irrigation upon the land which he owned. The estoppel of this judgment can go no further. Therefore the entire change in use made by defendants whereby none of the water is used upon the Dexter land, but all of it is transported to land without the watershed, is clearly a use not countenanced by the judgment, and one which, as the court finds, is injurious to plaintiffs. Because under the original use upon the riparian lands a large percentage of the water found its way back to the stream and so to the division dam, thus increasing the amount to which plaintiffs were entitled. The use of the defendants wholly eliminated this water. It follows, therefore, that the use of the water now made by defendants does not derive support from the Dexter judgment, nor yet

from the subsequent use of Gird, Dexter's grantee, who used the water as Dexter had used it. But the defendants for a long time had openly and notoriously, and under this claim of right, diverted the water by flume at a point immediately above the division dam, and had not allowed the water to flow over that dam for division and distribution. To the extent of 18 inches the court finds that the defendants thus had acquired a prescriptive title, and the findings to this effect are fully supported by the evidence. It follows, therefore, that as to the Dexter claim the defendants are entitled to 18 inches of water and no more.

For these reasons it is ordered that the appeals of plaintiffs be denied; that such part of the judgment as is appealed from by defendants touching their claim to the salvage water and to the water impounded by the pipe line in the bed of the creek be reversed, with directions to the trial court to determine the percentage or amount of water so saved or developed, which said amount, with the 18 inches to which defendant (San Antonio Water Company) has acquired prescriptive title growing out of the Dexter claim, may first be taken by defendant, after which the remaining waters are to be divided as in the judgment provided. The defendants' appeal from that portion of the judgment affecting the Dexter claim is also denied. Defendants will recover their costs upon appeal.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; McFARLAND, J.

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7 Cal. App. 98

SAN FRANCISCO SULPHUR CO. v. ÆTNA INDEMNITY CO. (Civ. 369.)

(Court of Appeal, First District, California. Dec. 9, 1907. Rehearing Denied Jan. 6, 1908.)

Attachment — Undertakings — Actions — Pleading.

In an action on an undertaking to procure the release of an attachment, a complaint which fails to allege that defendant executed or delivered the undertaking is bad on demurrer.

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the San Francisco Sulphur Company against the Ætna Indemnity Company. From a judgment overruling a demurrer to the complaint, defendant appeals. Reversed, with directions.

Geo. F. Hatton and H. F. Peart (Franklin P. Nutting, of counsel), for appellant. Wm. J. Herrin, for respondent.

COOPER, P. J. This action was brought to recover upon an undertaking given to the sheriff of the city and county of San Francisco in order to procure the release of an attachment. A demurrer was interposed to the complaint, upon the ground that it does not state facts sufficient to constitute a cause of action, and the same was overruled.

It is claimed that there is no allegation that defendant ever made, executed, or delivered the undertaking attached to the complaint as an exhibit, and that for this reason the judgment is erroneous, and the demurrer should have been sustained. Upon examination, we can find no allegation in the complaint that defendant ever made, executed, or delivered the contract upon which recovery is sought. It is elementary that, in order to state a cause of action against a surety upon an undertaking, the complaint must in some way allege or show that the defendant executed or delivered the undertaking. Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156; Petty v. Church, 70 Ind. 290. The demurrer to the complaint should have been sustained.

The judgment and order are reversed, and the trial court is directed to allow the plaintiff a reasonable time in which to amend its complaint, if so advised.

We concur: KERRIGAN, J.; HALL, J.

SAN FRANCISCO SULPHUR CO. v. ÆTNA INDEMNITY CO. (Civ. 371.)

(Court of Appeal, First District, California. Dec. 9, 1907. Rehearing Denied Jan. 6, 1908.)

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by the San Francisco Sulphur Company, a corporation, against the Ætna Indemnity Company, a corporation. From a judgment overruling a demurrer to the complaint, defendant appeals. Reversed, with directions.

Geo. F. Hatton and H. F. Peart (Franklin P. Nutting, of counsel), for appellant. Wm. J. Herrin, for respondent.

PER CURIAM. It having been stipulated that the judgment in this case shall follow that of the same entitled case, No. 369 (this day decided) supra, the order denying defendant's motion for a new trial is therefore reversed, and the trial court is directed to allow the plaintiff a reasonable time in which to amend its complaint if so advised.

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7 Cal. App. 112

MYERS v. KENYON et al. (Civ. 400.)

(Court of Appeal, First District, California. Dec. 12, 1907.)

1. Dedication—Estoppel to Deny Dedication.

One who platted a block into lots with an alleyway through the center thereof, sold lots with reference to a map on which the alleyway is marked, and received the price, was estopped from asserting title to the alleyway and closing it as a right of way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 34–47.]

2. Vendor and Purchaser—Bona Fide Purchaser—Notice.

A purchaser of land covered by an alleyway through the center of a block, on each side of which was a line of houses with gates opening into it, was not an innocent purchaser, and acquired the land subject to the burden imposed on it by the vendor who platted the block into lots with an alleyway through the center thereof, and who conveyed lots with reference to the alleyway.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 488, 545–547.]

3. Easements — Suit to Quiet Title — Evidence.

Where, in a suit to quiet title to a right of way over a strip through the center of a block, the legal title to which was in defendant, plaintiff claimed that the right of way was based on the act of the grantor of defendant in platting the block into lots with an alleyway through the center thereof, and conveying the lots with reference to the alleyway, evidence of the acts of the grantor with reference to buildings on the lots, gates opening on the alleyway, and statements to intending purchasers of lots was admissible.

4. Evidence—Documentary Evidence—Identification of Document.

Where a book of maps containing a map of a block platted by the deceased owner was delivered by the widow of the deceased to the attorney for his estate, it was proper to receive the testimony of the attorney for the purpose of identifying the book; the fact that the map existed, and that it was a map delivered to the attorney by the widow, going to its identity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1656.]

5. Witnesses — Privileged Communications —Attorney and Client.

The delivery by the widow of a deceased owner of a map of a block platted by the deceased to the attorney for the estate of the deceased was not a privileged communication from client to attorney.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 759–762.]

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action to quiet title by C. E. Myers against Silas T. Kenyon and others. From an order denying a motion for a new trial after judgment for plaintiff, defendants appeal. Affirmed.

Stoney, Rouleau & Stoney, H. B. Montague, and A. S. Newburgh, for appellants. Edward F. Treadwell, for respondent.

COOPER, P. J. This action was brought to quiet the plaintiff's title to a right of way over a strip of land 18 feet in width, the fee of which is in defendants. Defendants deny that the plaintiff is the owner of the right of way, and ask to have their title quieted as against the plaintiff. Findings were filed, upon which judgment was entered for plaintiff. This appeal is from an order denying the defendants' motion for a new trial.

The question is as to whether or not the plaintiff is the owner of the alleged right of way. The court finds in effect that the defendants' predecessors and grantors dedicated the said strip of land as an alleyway about the year 1883, and that ever since the plaintiff has openly, notoriously, continuously, and peaceably, under a claim of right so to do, and adversely, used said strip of land as an alleyway for ingress and egress to and from the lot of land owned by plaintiff and particularly described in the complaint. The findings are fully supported by the evidence, which we do not deem necessary to state in detail.

Prior to the year 1883 one Comerford was the owner of Horner's addition block 94, in the city and county of San Francisco, bounded by Duncan and Twenty-Seventh, Church and Sanchez streets, and was engaged in the business of building houses and selling them. He subdivided this block into lots fronting on Duncan and Twenty-Seventh streets 105 feet deep, which left a strip of land running through the block from Church to Sanchez street 18 feet wide, cutting the block in the center, the lots on the north side of the alley fronting on Twenty-Seventh street, and those on the south side fronting on Duncan street. Comerford built houses on the block, the back fences of the lots being on the line of the alleyway, with gates opening thereon. Each house so built covered the entire width of its lot, and had a back gate for an exit into the alleyway, or for an entrance from the alleyway. Comerford sold the lots with reference to this alleyway after he had so laid out the lots with the alleyway 18 feet wide, and stated to purchasers of the lots that the alleyway would be convenient for the owners. When plaintiff purchased his lot, he was shown a map in Comerford's office, on which the alleyway was laid out and platted. Comerford had a book in which he had all his property in San Francisco platted, and in which this block was platted with the alleyway laid out and marked "Comerford street." The alleyway, after being so opened, laid out, and platted, was at all times used, and has up to the present time been used, continuously by plaintiff and by all the other residents of the block as an open alleyway, without let or hindrance, and with no objection from Comerford during his lifetime. The owner of the block of land, having subdivided it into 50 lots, leaving an alleyway through the center, 25 lots on each side of it, and having sold the lots with reference to the map and alleyway, and received the money therefor from the purchasers of the lots, would be estopped from afterwards asserting title to the alleyway and closing it up as a right of way. Having left it open and upon the map while selling the lots, and receiving the money, he must continue to leave it open afterwards. Common honesty would require of such owner that he should not deceive or mislead any purchaser or sell him a lot under false pretenses. If, after the lots were sold, the owner could change his mind and close the ends of the alley, and use it as a stock corral, the owners of the lots would find their back gates opening into the corral. The law will compel the owner to keep the alleyway open for the use of the owners of the lots in such case. It must follow that all subsequent purchasers would purchase with notice. One cannot purchase the land covered by such alleyway, with a line of houses on each side of it, and gates opening into it, it being in continual use every day, without opening his eyes and looking. In such case he cannot claim to be an innocent purchaser. He would get the title in fee to the land, but subject to the burden imposed upon it by the former owner. It needs no citation of authorities to sustain the principles here stated.

The defendants claim that the court erred in the admission of certain evidence referred to in exceptions 2 to 9, inclusive. The evidence related to the acts and conduct of Comerford in 1883 with reference to buildings upon the lots, back gates, maps, and statements to intending purchasers. The evidence was admissible, and went to the very essence of the plaintiff's case.

It was not error to receive the evidence of the witness Drum, for the purpose of identifying a book of maps in his possession as attorney for the estate of Comerford, deceased. The book contained the map of the block on which the alleyway was marked and laid out by Comerford in his lifetime. The fact that the map existed, that it was a map delivered to the witness by the widow of the deceased, went to its identity, and the "delivery of the map was not a privileged communication from client to attorney." It would be a strange doctrine that a client could deliver a map, deed, contract, or other document into the hands of his attorney, and then prevent such map or other document from ever being brought to light or produced, for the reason that such delivery was a privileged communication.

No other question is raised that merits discussion.

The order is affirmed.

We concur: KERRIGAN, J.; HALL, J.

7 Cal. App. 120

PEOPLE v. MALTAIS. (Cr. 55.)

(Court of Appeal, Third District, California. Dec. 13, 1907.)

LARCENY—EVIDENCE—SUFFICIENCY.

In a prosecution for grand larceny, evidence *held* sufficient to sustain a conviction.

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Harry Maltais was convicted of grand larceny, and appeals. Affirmed.

B. K. Collier, for appellant. U. S. Webb, Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was accused by information of having on January 5, 1907, at the county of Siskiyou, unlawfully and feloniously stolen $80, lawful money of the United States, then and there the personal property of one J. Root, contrary, etc. He was found guilty of grand larceny and sentenced to four years' imprisonment in the state prison at San Quentin.

Defendant appeals from the judgment and from the order denying his motion for a new trial. He urges as grounds of appeal: First, that the evidence is insufficient, generally, to sustain the verdict; second, that the evidence is insufficient particularly, because the venue was not proven; third, that the court erred in overruling the objection made to a certain question asked by the prosecution of witness Ladue on cross-examination.

There is evidence tending to establish the following facts: Root, the complaining witness, came to the town of Dunsmuir from a lumber camp where he had been working, about midnight, or later, of January 4, 1905. He had come by way of Castella, where he had been drinking intoxicants to some extent. Arriving at Dunsmuir, he went to the Palm saloon, which was a rooming house as well as a saloon, and resumed his drinking and remained there at times most of the night. He went across the street during the night to the Weed restaurant, and had supper, and there met defendant, whom he had not before known or seen. He returned to the Palm saloon and defendant followed him. Root treated defendant and others several times, and finally toward the morning of January 5th asked for a room. He brought with him something over $100 in $20 gold pieces and some silver. When treating in the saloon, he displayed his purse and its contents in a way to apprise defendant of what money he had. When he asked for a room, defendant offered to show him to it, and did so, taking the key and unlocking the door. As Root was about starting to his room, he again made known his possession of the money in the hearing of defendant. On reaching the room, defendant returned to the saloon and got a couple of drinks, and took them to the room, where he and Root drank them. Root had meanwhile undressed and got in bed, placing his trousers under the pillow, leaving their legs hanging out. After drinking defendant left the room and Root went to sleep, not locking the door. He arose about 11 o'clock of that forenoon, and went down to the saloon, called for a drink, and, upon getting his purse, discovered that all the $20 gold pieces were gone. He found in his coat pocket a $10 bill which had been given him in part as change for a $20 gold piece during his drinking carousal and some small silver. There was evidence that he had at least four $20 pieces when he went to bed. Some time near noon of January 5th defendant deposited in the Dunsmuir State Bank four $20 gold pieces, and it was the only time he had ever deposited any money there or transacted any business with the bank. At the time he remarked to the cashier, "You won't say anything about this on the outside, will you?" There was evidence that defendant was working in the Weed restaurant at $1.25 per day and board, and that he had been seen previously by persons who knew him and that he appeared to have no money except some small change. He cashed his certificate of deposit at the Weed Hotel on January 7th. Mr. Weed testified that he had known defendant as Moltin, and he had so signed his name and Weed called his attention to the name in the certificate as Maltais, to which defendant replied that it was a mistake though he had so signed his name at the bank. When Root started to go to his room, defendant said he knew about the rooms and would show him where to go, and there was evidence tending to show that defendant had never roomed there.

Defendant introduced some testimony tending to show that about Christmas he had one or two $20 pieces, part of which he spent in saloons about that time, and that on December 31st defendant had drawn a chance at a raffle calling for $1.25, but he "said he didn't have the money. Said he would pay for it that evening. He was working at the Weed lunch counter then. He came back that evening and paid it." Defendant testified that when he came to Dunsmuir he had about $100, part of which he spent at saloons, but that the money deposited by him was his own which he had brought with him to that town. He explained that he deposited the money "so as not to gamble it away." He explained that he told the cashier not to mention the deposit because "parties would borrow it" if they knew he had it. He also testified: "I never before that time made a deposit of money in Dunsmuir. I never had enough at a time when I was there before to make a deposit." He had arrived at Dunsmuir with this and other money, amounting to over $100, according to his testimony, on December 22d, but he did not explain why he had not deposited the money before the morning of January 5th. It is not necessary to further notice the testimony. It is chiefly circumstantial, and not strongly inculpatory, but we cannot say that it was wholly insufficient to justify the verdict of guilty. People v. Wong Chong Suey, 110 Cal. 117, 42 Pac. 420. The venue was distinctly proved. The testimony upon the point was doubtless overlooked by defendant's attorney in preparing his brief.

A witness had testified to defendant's having two $20 gold pieces when he came into witness' saloon; that he had spent $5 or $6 there at that time. On cross-examination he was asked: "And he may have spent that much or more in every saloon in town that day, so far as you know?" The record shows that, while the court overruled defendant's objection to the question, the witness made no answer.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

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7 Cal. App. 103

PEOPLE v. TRASK. (Cr. 105.)

(Court of Appeal, First District, California. Dec. 11, 1907.)

1. Criminal Law—Appeal—Exceptions—Examination of Jurors.

The course of the court relative to the examination of jurors cannot be reviewed in the absence of exceptions reserved thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2658-2661.]

2. Jury—Peremptory Challenges—Preliminary Examination.

Defendant may not put questions to jurors simply to gain information as to the advisability of exercising peremptory challenges.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 561-581.]

3. Same—Actual Bias—Questions.

The questions to a juror: (1) Have you ever served as a juror on a charge of robbery? (2) how long have you served as a juror in this department of the court? (3) how many men have you ever convicted of robbery? and (4) what is your age?—are irrelevant and immaterial on the matter of actual bias.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 561-581.]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Grant Trask was convicted of robbery, and appeals. Affirmed.

Wm. M. Gibson, for appellant. Attorney General Webb and W. H. Langdon, Dist. Atty., for the People.

HALL, J. This is an appeal from a judgment convicting defendant of the crime of robbery, and also from the order denying his motion for a new trial.

The only reasons suggested why the judgment and order should be reversed grow out of the method adopted by the trial court for the impanelment of the jury to try defendant. Immediately after the first 12 names had been drawn, and the persons so drawn had been sworn to answer questions, the judge of the court examined each of them as to his qualifications, and each by his answers showed himself possessed of all the statutory qualifications, and each answered that he had never heard of the case, did not know any of the parties, counsel, or witnesses, and had no opinion as to the guilt or innocence of the defendant, and had never expressed any such opinion. The judge thereupon announced that all of the jurors appeared prima facie to be qualified jurors, but that either counsel could challenge either one or all of the jurors for any statutory cause, and, if such challenge was not denied by opposing counsel, the challenge would be allowed, and the juror excused without further examination; but that, if the challenge was denied by opposing counsel, then, on the issue so made, the juror challenged could be questioned and examined by counsel on both sides. The judge further gave at some length his reasons for the course thus adopted, making it quite clear that he did not consider that counsel had any right to examine a juror on the voir dire in advance of a challenge to such juror.

The brief of appellant is almost entirely devoted to a discussion of what he claims to be error in this action of the court. But he nowhere points out where the bill of exceptions shows that he either objected or excepted to this action of the court, and after a diligent examination of the bill of exceptions we have not been able to find any such objection or exception noted therein. Nowhere do we find that defendant's counsel objected to the court examining the jurors, or that he expressed any wish to examine them as to their qualifications before challenging, except that he did ask to be allowed to put three stated questions to each juror "solely for the purpose of determining whether he should exercise peremptory challenges." Defendant having reserved no exception to the action of the court above set forth, we are not called upon to determine whether the course adopted by the court was erroneous or not.

Defendant asked permission to ask of each juror, before challenging either of them for cause, three questions, viz.: Where do you live? What is your business? Are you a man of family? "solely for the purpose of determining whether he should exercise his peremptory challenges," as he himself stated. The court refused to allow such questions to be put by counsel, or to put them himself, but stated that counsel could ask them subsequently should they become relevant or material to any challenge that might be interposed. To this ruling defendant reserved an exception. The court, however, did not err in so ruling. Defendant is not entitled to put questions simply for the purpose of gaining information as to the advisability of exercising peremptory challenges. People v. Hamilton, 62 Cal. 382; People v. Brittan, 118 Cal. 409, 50 Pac. 664. Defendant successively challenged each of the jurors "under subdivision 2 of section 1073 of the Penal Code," that is, for actual bias and, each of said challenges being denied by the district attorney, defendant asked each of said jurors the following questions, and no others, viz.: (1) Have you ever served as a juror on a charge of robbery? (2) how long have you served as a juror in this department of the superior court? (3) how many men have you ever convicted for robbery? and (4) what is your age? The court sustained the objection made by the district attorney that the questions were incompetent, irrelevant, and immaterial to the issue being tried, and the defendant excepted. An answer to any of the above questions could not have tended to show the state of mind of the juror with reference to the case or to either of the parties. The questions were therefore irrelevant and immaterial to the question then being tried, and the objections were properly overruled. People v. Brittan, 118 Cal. 409, 50 Pac. 664. No other evidence being offered, the court properly overruled the challenge to each of said jurors.

There being no other reasons suggested why the judgment or order should be reversed, both judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

(7 Cal. App. 81)

WEST v. WILL C. PRATHER & CO.

(Civ. 459.)

(Court of Appeal, Second District, California. Dec. 4, 1907.)

1. CORPORATIONS — CONTRACTS — EXECUTION—REPUDIATION—ESTOPPEL.

Plaintiff, having a lease of a hotel from defendant, agreed with its president to cancel the same and surrender possession to defendant in consideration of its guaranteeing to pay certain sums specified in the contract, and furnish plaintiff board and room in the hotel for a year, or at his option pay him $25 per month in lieu thereof. Plaintiff delivered possession, canceled the lease, and defendant immediately leased the property to another. Plaintiff remained at the hotel for 10 days, when defendant paid for his board and room up to that time, and denied further obligation under the contract. *Held*, that though the contract was defectively executed, so that the acceptance and retention of benefits would not constitute a ratification as provided by Civ. Code, §§ 2309, 2310, the facts constituted an estoppel precluding the corporation from repudiating the contract.

2. SAME—OFFICERS—AUTHORITY OF PRESIDENT—EVIDENCE.

In an action for breach of a corporation's contract executed between plaintiff and its president, plaintiff having testified that he called at the company's office on two occasions where he talked with such president, the question as to who was operating the business there was admissible to show the president's implied powers, and that he was its managing agent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1735.]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by L. M. West against Will C. Prather & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

Thornton Alexander, for appellant. Jones & Drake, for respondent.

SHAW, J. Judgment was rendered herein for plaintiff, from which defendant appeals upon a bill of exceptions.

The action is based upon a contract alleged to have been made between the parties, whereby plaintiff, who was in possession of a hotel under a lease thereof, agreed to cancel said lease and surrender possession of the property, with certain furnishings, to defendant, who agreed to guarantee payment of certain sums specified in said contract and furnish plaintiff room and board in said hotel for a period of one year; or, at its option, pay him at the rate of $25 per month in lieu thereof. Plaintiff alleges that, pursuant to the terms of the contract, he canceled the lease and delivered possession of the hotel and other property mentioned in the contract to defendant, who immediately leased the same to another party. Plaintiff remained at the hotel for 10 days, when defendant paid the proprietor the sum of $8.33, covering the cost of his room and board for such time, and denied any further obligation under said contract.

Defendant is a corporation and the transaction is admittedly within its powers. No corporate seal was attached to the contract, but it was signed: "Will C. Prather & Co., Will C. Prather, Prest." The defense is that said Prather as president of said company had no authority to execute the contract on its behalf, and therefore the court erred in receiving said contract in evidence unaccompanied as it was by a copy of the resolution authorizing its execution. The uncontradicted evidence shows that plaintiff delivered the property to the corporation, and that it, within a few hours after the execution of the contract, placed another party in possession of the premises under a new lease, from whom it collected rent. Prather, on behalf of the company, had charge of all the negotiations relating to the transaction, and subsequent lease of the hotel. Having by virtue of this contract obtained a cancellation of plaintiff's lease, the transfer of certain personal property, and ousted plaintiff from possession of the hotel, which it leases to another party, the defendant by its counsel solemnly avers that the act of its president in executing the contract on its behalf was unauthorized. The evidence is sufficient to show that Prather was held out by the corporation as possessing the authority which he assumed. Crowley v. Genesee Mining Co., 55 Cal. 273; Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527. The company, with full knowledge of all the facts involved, imparted through its president acting in its behalf, accepted and retained the benefits of the transaction. Conceding the contract to be one required to be in writing, and defectively executed by reason whereof such acceptance and retention of benefits would not constitute a ratification (sections 2309, 2310, Civ. Code), the facts nevertheless constitute an estoppel against the attempted repudiation of the contract on the part of the corporation (Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749; Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252).

It is also contended that the court erred in overruling defendant's objection to the question put to the plaintiff, as follows: "Who was operating the business there?" Plaintiff had testified to calling at the office of the company upon two occasions, where he had talked with Prather. Appellant admits the purpose of the question was to elicit evidence tending to show Prather's implied powers and that he was managing agent of the company. Such being its purpose, the ruling of the court upon the objection was not error.

Our views render it unnecessary to discuss the ruling of the court in denying defendant's motion for a nonsuit.

Judgment affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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7 Cal. App. 124

BRAY v. COHN. (Civ. 417.)

(Court of Appeal, Third District, California. Dec. 14, 1907.)

1. PRINCIPAL AND SURETY — PAYMENT BY SURETY—EFFECT.

Notwithstanding Civ. Code, §§ 2848, 2849, providing that a surety on satisfying the obligation is entitled to enforce every remedy and to the benefit of every security which the creditor has against the principal, payment of a note by the surety thereof extinguishes the obligation, and his remedy is on the implied obligation of the principal to reimburse him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 524.]

2. LIMITATIONS OF ACTIONS—ACTIONS ON IMPLIED OBLIGATIONS.

The remedy on the implied obligation of the principal debtor to reimburse the surety paying the debt is barred in two years after the return to the state of the principal debtor after the payment of the debt by the surety.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by M. G. Bray against D. S. Cohn. From a judgment for defendant on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

R. H. Countryman, for appellant. Charles W. Slack and T. M. McNamara, for respondent.

HART, J. A demurrer to the complaint upon the ground that this action was barred by the provisions of section 339, subd. 1, Code Civ. Proc., was sustained, without leave to amend, and thereafter judgment entered in favor of respondent. From said judgment, this appeal is taken.

On the 30th day of January, 1899, the respondent, Cohn, executed and delivered to the Bank of British Columbia, at the city of San Francisco, his promissory note for the sum of $3,000, with interest at the rate of 7 per cent. per annum, said note being payable one day after date. At the request of Cohn, and for the purpose of enabling him to secure said money, and "as part of the same transaction," one Moses Samuel, in writing, promised and agreed with said Bank of British Columbia "that, if said defendant did not pay said promissory note, he [said Samuel] would pay the same." On or about the 30th day of January, 1899, Cohn departed from the state of California, and did not return until about the 23d day of July, 1901, and defendant during the period between the said 30th day of January, 1899, and the said 23d day of July, 1901, was absent from the state. Shortly after Cohn's departure from the state, the Bank of British Columbia made a demand on Samuel for payment of accrued interest upon the note, which interest was paid by him, and the said Samuel continued, upon the demand of said bank, to pay the interest accruing from time to time on said note until the 7th day of August, 1900, when, written demand having previously been made upon him by the bank for its payment, Samuel paid the principal and the unpaid interest upon said note. Thereupon, the complaint alleges, the bank surrendered and delivered said note to said Moses Samuel. Thereafter Samuel assigned the note to the plaintiff, who filed his complaint, declaring upon said note, on the 15th day of June, 1905, a little less than four years after the return of the defendant to the state.

The contention of the appellant is that the payment by his assignor of the note and the surrender and delivery to him of the same by the bank amounted to an assignment thereof, and that, therefore, he was subrogated to all the rights exercisable by the original payee thereunder. Upon this assumption (and if well founded his contention would be true) he claims that he was entitled to institute suit for recovery upon the note at any time within four years from the date of the return of the defendant to this state. In support of this position, appellant relies upon section 2848 of the Civil Code, and insists that section 1473 of said Code has no application to sureties. The respondent, on the other hand, maintains that section 1473 of the Civil Code does govern the rights of sureties in a case like the present one, and that consequently the payment of the note by Samuel, who was a surety, extinguished its obligation, and that his only remedy against the principal obligor was by an action upon an implied obligation; that is, in assumpsit for money expended for and in behalf of the defendant. The question presented by the demurrer is no longer an open one in this state. Section 2848 of the Civil Code provides that a surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and section 2849 of the same Code declares that a "surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards," etc. Those sections are construed by the appellant as having the effect of perpetuating the life of the obligation after the debt has been paid, and passes for enforcement to the surety, who has made payment. But our appellate courts have, in some comparatively late cases, given those sections an interpretation which does not harmonize with the views of the appellant. Yule v. Bishop, 133 Cal. 578, 65 Pac. 1094. In that case, in which the point under discussion is elaborately and exhaustively considered, it is said: "In this state, as early as 1862, in the case of Chipman v. Morrill, 20 Cal. 130, it was decided, in effect, that by the surety's payment the principal obligation was extinguished, and that the action of the surety was upon the assumpsit which the law implies where a surety is compelled to advance money for his principal. That there might be no room for controversy, with the enactment of the Code the question was laid at rest in this state by the declaration that the full performance of the obligation by any person on behalf of the principal with his assent, if accepted by the creditor, extinguishes the obligation"—citing section 1473 of the Civil Code.

The more recent case of Crystal v. Hutton, 1 Cal. App. 251, 81 Pac. 1115, reaffirms the rule as declared in Yule v. Bishop, supra, and cites a large number of California cases to the same effect. In that case the appellate court, speaking through Presiding Justice Chipman, says: "However the question may be regarded elsewhere, we think the rule firmly settled in this state that payment by the surety of the obligation evidenced by a promissory note under the circumstances shown in the complaint extinguishes the obligation, and that the remedy given the surety in such case is upon the implied obligation of the principal debtor to reimburse the surety 'what he has expended.'"

The remedy of the plaintiff being, therefore, upon the implied obligation, it was his duty, in order to have preserved his right of action, to have brought his suit within two years from the date of the return of the defendant to the state. Having failed to do this, the demurrer was properly sustained upon the ground that his right of action was barred.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

7 Cal. App. 140

LINDLEY v. BLUMBERG et al. (Civ. 426.)

(Court of Appeal, Second District, California. Dec. 18, 1907. Rehearing Denied Jan. 17, 1908; Denied by Supreme Court Feb. 13, 1908.)

1. EVIDENCE — SUFFICIENCY — INCONSISTENT TESTIMONY.

Positive testimony on direct examination, though inconsistent with that given on cross-examination, is sufficient to suport a finding of the trial court.

2. TRUSTS—RESULTING TRUST—PART PAYMENT OF CONSIDERATION — RELATION BETWEEN PARTIES.

Where a wife contributes $800 to a $1,750 payment on land purchased in her husband's name and a mortgage is given for the balance, a resulting trust arises in favor of the wife for sixteen thirty-fifths of the property and in favor of the community for the balance.

3. VENDOR AND PURCHASER—BONA FIDE PURCHASER—EVIDENCE.

Evidence *held* sufficient to sustain a finding that a conveyance by a husband to his wife was for a valuable consideration.

4. CONTRACTS—"VALUABLE CONSIDERATION."

Valuable consideration is such as money or the like, and the adequacy or inadequacy of the amount or its disproportion to the actual value of the property does not affect the question of the kind of consideration, since the adequacy of consideration is merely an element of good faith, and has no bearing upon whether the consideration is a valuable or good one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 222 232.

For other definitions, see Words and Phrases, vol. 8, pp. 7271-7273.]

5. VENDOR AND PURCHASER—PURCHASE PRICE —PAYMENT.

Plaintiff leased premises for five years, with the privilege of buying at any time during the life of the lease. He built a barn upon the premises, and paid the rent for three years, and then sought specific performance of the option to purchase. *Held*, that the rent paid and the cost of the barn were not payments on the purchase price of the property, but, considered most favorably to plaintiff, were merely payments for the right to buy at a specified price within a certain time.

6. SAME—BONA FIDE PURCHASER—NOTICE.

To entitle a party to protection as a subsequent purchaser in good faith and for value, as against the title of a grantee under a prior unrecorded deed, he must aver and prove the possession of his grantor, purchase of the premises, the payment of the purchase money in good faith, without notice, actual or constructive, prior to and down to the time of its payment. Hence, where one holding an option to purchase land had notice of a prior unrecorded deed, before he exercised the option or paid the purchase price he is not a bona fide purchaser, and cannot recover.

7. SPECIFIC PERFORMANCE—RELATION—RECOVERY OF PART PAYMENT.

If plaintiff made a payment under an option to purchase land belonging to defendant under a prior unrecorded deed, of which he had no notice, and both plaintiff and defendant acted in good faith, plaintiff could recover from defendant only the amount actually paid before notice of defendant's rights, since he is protected only to the extent that he is hurt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 412–419.]

8. VENDOR AND PURCHASER—BONA FIDE PURCHASER—STATUTORY PROVISIONS.

Civ. Code, § 1214, provides that a conveyance of real property is void as against a subsequent purchaser in good faith for a valuable consideration whose conveyance is first duly recorded. Plaintiff rented land for the term of five years, with an option to purchase during the life of the lease. Defendant held a prior unrecorded deed from plaintiff's lessor, which deed was not recorded until after the recording of the lease and option. Plaintiff built a barn on the premises and paid the rent, but did not offer to exercise the option until after the recording of defendant's deed. *Held*, that plaintiff was not a subsequent purchaser in good faith for a valuable consideration within the meaning of the section.

9. SAME—DEFENSES—ESTOPPEL.

In an action for specific performance of an option to purchase land during the life of a five-year lease which contained the option, it appeared that defendant held a prior deed, which was not recorded until after the record of the lease and option; that defendant knew of the execution of the lease by her husband, who was her grantor, but did not know of the option it contained; and that plaintiff erected a barn on the premises in question, but there was no showing as to the time the barn was built and no attempt to exercise the option until after defendant's deed was recorded. *Held*, that defendant was not estopped to assert her title against plaintiff's option, there being no act or failure to act on her part which resulted in injury to plaintiff or which by unfair means gave her an advantage over him.

10. SPECIFIC PERFORMANCE—ALTERNATIVE RELIEF—DAMAGES—PRESUMPTION.

Where the court, in an action for specific performance of an option to purchase land during the life of a five-year lease which contained the option, found the value of the property at the time of making the lease and at the time of the trial, but there was no evidence or finding as to any value at any intervening time, it must be presumed that there was no increase in value from the time of making the lease up to the time plaintiff attempted to exercise his option, at which time he had constructive notice of defendant's prior deed from the lessor, and hence plaintiff could recover no damages for failure to convey.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 412–422.]

11. TRIAL—TRIAL BY COURT—FINDINGS—MATTERS ALLEGED BUT NOT PROVED.

In the absence of evidence to support an allegation necessary to be proved, the finding upon the issue raised thereby should be against the person making and failing to prove the allegation.

12. VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE.

Though defendant asserts a claim to property, if no knowledge of the claim is brought home to plaintiff, he will not be affected by the assertion to others of the claim.

13. SPECIFIC PERFORMANCE—REMEDY AGAINST GRANTEE UNDER OR BY UNRECORDED DEED.

Where both parties acted in good faith, one holding possession of land under a lease and option to purchase which has been recorded is not entitled to compel specific performance of the option by the grantee claiming under a prior unrecorded deed from the same person.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by S. K. Lindley against Mrs. F. H. Blumberg and others. From a judgment for defendant Dina E. Simpson, and an order denying a new trial, plaintiff appeals. Affirmed.

J. S. Chapman and Ward Chapman, for appellant. C. L. Shinn and McNutt & Hannon, for respondents.

TAGGART, J. This is an action to compel specific performance of an option to purchase real estate. The option is contained in a lease of the premises, which are the subject of the option. Judgment was for defendant Dina E. Simpson, and plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

On the 17th day of January, 1901, William Simpson made a lease to plaintiff of the premises in dispute for the term of five years from that date, at a monthly rental of $10, payable quarterly in advance. The lease contained an option in the words and figures following, to wit: "The party of the first part hereby gives to the party of the second part, his heirs and assigns, the exclusive right to purchase said property for eighty ($80) dollars per front foot cash during the life of this lease, and upon payment of said amount agrees to furnish a good deed and unlimited certificate of title from Title Insurance & Trust Company, or Title Guarantee & Trust Company, of Los Angeles, showing said property clear of all incumbrance." This instrument was regularly recorded in the records of leases of Los Angeles county on January 28, 1901. On August 20, 1902, William Simpson died testate, and letters testamentary issued to the defendant Dina E. Simpson, his widow, as executrix, on the 24th day of September, 1902, and she thereupon qualified as such executrix. On September 23, 1902, the Union Bank of Savings, which had been the designated agent to receive the rent for said property, refused to receive the rent for the quarter beginning October, 1902, claiming to act upon notice given by Dina E. Simpson, both individually and as executrix. On October 2, 1902, Mrs. Simpson notified plaintiff that she was the owner in fee of the leased premises by virtue of a conveyance thereof to her by William Simpson by deed dated October 20, 1896. This deed was not recorded in the office of the recorder of Los Angeles county until August 22, 1902.

By a decree of distribution entered in the estate of William Simpson, deceased, on the 15th day of February, 1904, the whole of said estate was distributed to the defendant Dina E. Simpson, but the lot here in question was not described in said decree. On the 23d day of February, 1904, plaintiff, claiming to exercise his right of purchase under said option, offered to pay to defendant the purchase price for the lot in gold coin, as provided in the option given by William Simpson, but she refused to accept the same or to convey the property to plaintiff. Plaintiff paid all rent due to the time the above notice was given, and has regularly tendered that falling due since then, at the times specified in the lease, but defendant Simpson refused to receive such rent either as executrix or individually. A number of defenses, based upon allegations of weakness of mind of William Simpson, and acts of fraud and undue influence perpetrated in procuring the execution of the option, were presented by defendants' answer to the complaint; but, these were eliminated from consideration here by the rulings of the court upon the demurrer to the answer, and its findings of good faith upon the part of plaintiff in all transactions connected with the execution of the lease and option.

The court found that a valuable and adequate consideration was given for the lease and the option contained therein; that the property leased had no rental value in the market, and the premises were of the value of only $50 per front foot at the time of the execution of the writing containing the lease and option; that plaintiff erected a barn on said premises at a cost of $300 after said instrument was executed; that he would not have rented said premises or constructed said barn but for the option in said lease; that this fact was known to the lessor at the time the lease was made; that said contract was fair and just to the lessor; that plaintiff paid the rent to William Simpson up to the time of his death, and that the defendant Dina E. Simpson knew, or could have learned, that said payments were being made in pursuance of said lease; that she had knowledge of the making of the lease on the day it was executed, but did not know any of its terms until after its execution, and did not know that it contained the option until 10 days later; that plaintiff had no notice or information at the time of the execution of the lease that Dina E. Simpson had any right, title, or interest in the property. The findings upon which the judgment in favor of the defendant rests may be summarized as follows: She was not personally present at the time the lease was executed, and did not know its contents until 10 days thereafter. It is not true that the lease or option was given with her full knowledge or consent or acquiescence, and it is not true that at the time of the execution of said instrument, nor at any other time until the 2d of October, 1902, she did not assert or claim any right, title, or interest in said property, or make any objection to said lease or option, but she did not make any such objections to plaintiff until that date. The deed from William Simpson to her was for a valuable consideration and conveyed the title to the leased premises, and she was the owner of said property from the date of that deed. The market value of the premises have greatly increased since January 17, 1901, and the premises, at the time of the trial, were worth about $29,000. Plaintiff has received in rents from said premises more than sufficient to compensate him for the rents paid by him and the cost of the improvements placed on the property by him, and has been fully reimbursed and recouped for all expenditures made by him under said lease and option. The conclusions of the trial court from the facts found are that plaintiff is not a purchaser or incumbrancer in good faith so as to entitle him to a specific performance of his contract against the defendant Dina E. Simpson, and that she is not estopped from asserting her title against the option of plaintiff. Appellant contends that the judgment is not supported by the findings; but, if the court so contrues the findings as to sustain the judgment, it should nevertheless reverse the judgment and order a new trial, because the evidence is insufficient to support the findings.

The finding that the defendant Dina E. Simpson acquired the premises from her husband in 1896 for a valuable consideration is attacked by appellant upon his motion for a new trial as not being supported by the evidence in two respects—first, that the deed was not delivered; and, second, that a valuable consideration was not shown. In regard to the first matter, the testimony of the witness Samson, who drew the deed, is: "I drew it up, and I made it (the deed), and he signed it and delivered it to his wife, and she delivered it to me and wanted I should take care of it." It is contended that on cross-examination the testimony of the witness was inconsistent with his statement on direct examination. Assuming this to be true, the trial court might elect which, if either statement, it would believe, and the finding indicates which it accepted as true; but we do not think the two statements are necessarily inconsistent. The evidence shows that the lot was purchased in the name of Wm. Simpson in 1895 for $3,750—$1,750 in cash, and the balance secured by mortgage on the property. Eight hundred dollars of the defendant's money "went into the property." There is no showing whether this was a loan to William Simpson or a contribution to the cash paid for the property. If the former, the property became community property and William Simpson owed defendant $800; if the latter was the case, a resulting trust arose in favor of defendant to the extent of sixteen thirty-fifths and in favor of the community for the other nineteen thirty-fifths of the property. If William Simpson made the deed of October 20, 1896, to defendant in payment of an existing debt of $800 due to her from him, the consideration was a valuable one, and if he conveyed to her as trustee of a resulting trust she took sixteen thirty-fifths in execution of the trust and the rest, or community portion of the property, passed to her for the consideration mentioned in the deed—$1 and love and affection. If it were necessary to sustain the finding that the conveyance was for a valuable consideration, there is evidence sufficient to do so. Hussey v. Castle, 41 Cal. 241. A valuable consideration is such as money or the like and the adequacy or inadequacy of the amount, or its disproportion to the actual value of the property, does not affect the question of the kind of consideration. The adequacy of the consideration is an element of the good faith of the transaction, and has no bearing upon whether the consideration is a valuable or a good one. Frey v. Clifford, 44 Cal. 342; Clark v. Troy, 20 Cal. 224. Mrs. Simpson, then, was the owner of the property at the time the premises were leased to the plaintiff, and when the latter purchased the option. Under the findings, these two contracts must be considered as one. The court found the property had no rental value at the time the lease was made. In the absence of any finding that it subsequently acquired a rental value, we may assume that the entire promise to pay $10 per month for five years was in consideration for the option. The erection of the $300 barn may also be attributed to plaintiff's desire to procure the option and as a part payment therefor. Taken in the the most favorable light for the appellant, he paid $900 for the option, $300 in building a barn upon the premises, and the $600 which he obligated himself to pay at the rate of $10 per month, quarterly in advance, for five years.

This price paid and to be paid for the right to purchase within five years should not be confused with the purchase price of the property. The latter was to be $80 per front foot, whether the right was exercised the day following the execution of the option or the last day of the five years; so that the $900 was no part of the purchase price of the property. The option was purely executory in its character, and on October 2, 1902, when defendant notified appellant of her title to the property, no part of the purchase price of the lot had been paid, and plaintiff had not become a purchaser of the property. All his transactions were conducted in good faith, and for all that he had received he had given an adequate and valuable consideration, and the agreed price for the property was adequate at the time the option was given, and this was sufficient against the maker of the option; but he had not purchased the property. He did not exercise his right to do so under the option until February, 1904, one year and four months after he had notice of defendant's unrecorded deed.

To entitle a party to protection as a subsequent purchaser in good faith and for value against the title of a grantee under a prior unrecorded deed, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment; for if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser. Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641; Wilhoit v. Lyons, 98 Cal. 413, 33 Pac. 325; Beattie v. Crewdson, 124 Cal. 579, 57 Pac. 463; Kenniff v. Caulfield, 140 Cal. 45, 73 Pac. 803. If it were conceded that the entire $900 were paid, and agreed to be paid, as part of the purchase price for the property (only the rent from January, 1901, to October, 1902, actually was paid), defendant would only be required to refund to plaintiff the amount paid by him before receiving notice of her right in order to enforce her claim to the property. Plaintiff is entitled to be protected only to the extent that he is hurt. Davis v. Ward, 109 Cal. 191, 41 Pac. 1010, 50 Am. St. Rep. 29; Combination Land Co. v. Morgan, 95 Cal. 552, 30 Pac. 1102. The finding of the court that he has been fully reimbursed and recouped for expenditures made by him under the lease and option recognizes his right to protection pro tanto. The conclusion of the trial court that plaintiff was not a subsequent purchaser in good faith and for a valuable consideration, as those terms are used in section 1214 of the Civil Code, is sustained by the record.

We are likewise unable to agree with appellant's contention that the conclusion of the trial court that respondent is not estopped from asserting her title against plaintiff's option is unsupported by the findings. In order that she should be estopped it is necessary that some act or failure to act upon her part should have resulted in injury to plaintiff, or in her acquiring some advantage over him by unfair means. In other words, to quote from appellant's brief: "To raise an equitable estoppel, the party estopped must by his declaration or conduct (or silence) mislead another to his prejudice so that it would be a fraud upon him to allow the true state of facts to be proved (Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365), and the representations or conduct must either have been done with intent to deceive, or with such carelessness or culpable negligence as to amount to a constructive fraud (Griffeth v. Brown, 76 Cal. 260, 18 Pac. 372). The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." Dickerson v. Colgrove, 100 U. S. 580, 25 L. Ed. 618.

The question whether respondent is estopped by her acts or silence to set up her prior title against appellant's depends upon her knowledge of her husband's acts in relation to the leased property. At the time the lease was made respondent knew that her husband was going to lease the property. The same day, when her husband came home, she learned that the lease had been executed, and that he had leased it for a term of five years. She had no other knowledge of the contents of the lease or the option until 10 days thereafter. There is no evidence and no finding as to when the barn was erected upon the premises. It might have been and probably was built within 10 days after the execution of the lease and before respondent had knowledge of the option. Had she known of its construction, she would have been justified in assuming that it was built in order that plaintiff might use the premises to advantage under the lease. In the absence of evidence and finding, the presumption must be in support of the judgment. As respondent had no knowledge that the barn was constructed by reason of the option, no estoppel can be imputed to her on this account.

Plaintiff's status was not changed from that time until October 2, 1902, except by the payment of the $10 per month rent. The court finds the value of the property was $50 per front foot at the time of the making of the lease, and the value of the lot at the time of the trial (October, 1905) to be in gross $29,000. There is neither evidence nor finding to show value at any intervening time. There is nothing by which it can be determined how long the market value of the property continued at $50 per front foot. If, as appellant contends, he was prejudiced by being prevented from buying other property in the neighborhood at $50 or $80 per front foot and holding it until its value increased to $376 per front foot, this was not because of any act of respondent. In the absence of evidence or finding as to intermediate values, it will be presumed in support of the trial court's finding that respondent was not estopped, and that $50 per foot continued to be the value of the property until after appellant had notice of respondent's title and claim. Having had this notice before the rise in values, appellant cannot successfully contend that any loss or injury of this kind was due to the act of respondent. He was under no obligation to carry out the option or pay any part of the $80 per front foot purchase price, and could have released himself from the option by simply withdrawing at any time.

All the obligations entered into by appellant so far as the option was concerned were without knowledge of the respondent at the time the obligations were assumed. The appreciation in value of the property was after appellant had notice of respondent's title and information that she intended to maintain her rights against the option. It cannot therefore be said that appellant suffered any loss or injury on account of disappointing expectations for which respondent was responsible.

Finding 10 is attacked by appellant as unsupported by the evidence. This finding merely negatives certain allegations of the complaint, and when considered with finding 14 distinguishes between the knowledge upon the part of the respondent that the lease had been made and knowledge of its contents. The testimony of the respondent is that she and her husband had talked about leasing the property for three years, and that the agent who drew the lease called and asked her if she was willing to the leasing of Main street and she answered, "Certainly." When her husband came home that evening he told her he had leased for five years. She negatives all other knowledge of the contents until several days after, when her husband told her that he had given the option. There is a direct conflict between her evidence and that of the agent in this respect, but the evidence supports the inference that neither the lease nor the option were given with full knowledge, consent, or acquiescence on her part. There is an absence of evidence in respect to the other part of finding 10, which is assailed, to wit, that "it is not true that at the time of the execution of said instrument, nor at any other time until the 2d day of October, 1902, said defendant did not assert or claim any right, title, or interest in said property, nor make any objection to said lease or option." This was a negative allegation of the complaint which was denied by the answer. In the absence of evidence to support an allegation necessary to be proven, the finding upon the issue raised thereby should be against the person alleging and failing to prove it. This rule was followed by the trial court; but we do not think the finding material, as it is immediately followed by the further finding that she made no claim or objection to the plaintiff until October 2, 1902. If no knowledge of her claim was brought home to the plaintiff, he would not be affected by such assertion to others. The point that the evidence is insufficient to support the finding of a delivery of the deed of October 20, 1896, has heretofore been considered, as has also the evidence in relation to the purchase of the property in 1895 by William Simpson and respondent's contribution to the purchase price in that transaction. The weak-nesses and inconsistencies and conflicts in the evidence which supports the findings to which our attention has been called by appellant are apparent; but it is not necessary that the trial court accept and act upon the testimony that appeals most strongly to us in order to sustain its findings against an attack for insufficiency of the evidence. There is evidence, and the trial court has accepted and acted upon it.

The good faith of all parties is declared by the decision of the trial court, and the question, is a party holding possession of real property under a lease and option to purchase, which has been recorded, entitled to compel a specific performance of the option by a grantee claiming under a prior unrecorded deed from the same person? was answered by denying specific performance. There is evidence in support of the inference of fact, and the conclusion of law is correct.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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7 Cal. App. 116

HERZOG v. HEMPHILL et al. (Civ. 388.)

(Court of Appeal, First District, California. Dec. 12, 1907.)

1. NEGLIGENCE—CONDITION OF BUILDINGS—DUTY OF OCCUPANT TO LICENSEE.

Deceased entered defendants' tamale stand with another, by the license and permission of defendants, and volunteered to show his companion the way to the urinal, often used by customers, and always pointed out by defendants, when requested, and permission to use which was always granted by them. The route thereto lay through an adjoining room to a stair landing, with two flights of stairs; the one to the left going above, and that to the right going down to the urinal in the basement. The landing was not lighted, and because of that deceased fell into a hole to the left of the left-hand stairway, and received the injuries from which he died. The urinal was not designed for the use of patrons of the stand, nor was it designed for use or used as a part of the business conducted on the premises. *Held*, that deceased was a mere licensee, so that defendants assumed no duty to him except not to inflict any wanton or willful injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 41–47.]

2. SAME—PERSONS INVITED—WHAT IS INVITATION.

The owner or occupier of lands or buildings must exercise ordinary care to render the premises reasonably safe to persons whom he induces to come thereon by invitation, express or implied, which invitation may be manifested by the arrangement of the premises or the conduct of the owner; but mere permission, or a habit of an owner in allowing people to enter and use a certain portion of his premises, is not indicative of an invitation, but a license.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 41–47.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Joseph Herzog, administrator, against Lizzie J. Hemphill and another. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

William R. Daingerfield and James A. Ballentine, for appellant. Garber, Creswell & Garber and Morrison & Cope, for respondents

KERRIGAN, J. This is an action for damages for the death of plaintiff's intestate alleged to have been caused by the defendants' negligence. The appeal is from the judgment entered in favor of the defendants upon the sustaining of their demurrer to the complaint, the plaintiff having declined to amend it.

The complaint in substance alleges that the defendants were in possession of certain premises in San Francisco, and had the sole management and control thereof, including a tamale stand, at which stand tamales were sold to the public; that Alfred N. Herzog, the deceased, entered the premises June 6, 1901, at about 10 o'clock in the evening to purchase tamales, and that he was accompanied by a friend, Miller. The complaint alleges that the deceased and his friend entered said premises by license and permission of the defendants; that while there Miller expressed the desire to visit the urinal on the premises, and the deceased volunteered to show him the way thereto, deceased knowing its location, and Miller never having visited it; that prior to the time of this accident the urinal had often been used by patrons of the premises by license and permission of the defendants, and its location was shown or told by all and any of said defendants to any of said customers whenever requested, and said patrons and their friends were at all times allowed to and did use the same; that the route from the tamale stand to the urinal was through a door adjoining the tamale stand into an open room, thence across said room to a stair landing, wherefrom two sets of stairs proceeded, the one at the left upward to the second story, the one at the right downward to the basement and urinal; that within two feet of said door, and at the left of said left-hand stairway there was a "stair landing, recess, or cul-de-sac, about two feet square, terminating in an abrupt precipice, or death trap, wholly unfenced, unprotected, and unlighted"; that deceased went with his friend through said door into said room, and that "said stair-landing, precipice, death trap, and stairway" were not sufficiently lighted to enable a person to reach the urinal in safety, and on visiting the urinal he would be likely to step off said precipice and fall into said death trap and be killed, or seriously injured; that defendants well knew of the unprotected and unlighted condition of said death trap, but that deceased was ignorant thereof; that by reason of defendants' failure to fence and guard said recess, cul-de-sac, and death trap the same was dangerous to all persons going to said urinal or near the same; that the deceased, in guiding Miller to said urinal, attempted to follow said route; that by reason of the defendants' negligence in the premises deceased fell into said death trap, sustaining injuries from which he subsequently died, and to recover damages for which this action is commenced.

The complaint was demurred to upon the ground that it states no cause of action, and we think the ruling of the trial court in sustaining the demurrer was correct. The complaint does not show that the deceased was more than a mere licensee as to the portion of the premises where the accident occurred. It is a well-settled rule of law that the owner or occupier of lands or buildings who, by invitation, express or implied, induces persons to come upon his premises, is under a duty to exercise ordinary care to render the premises reasonably safe; but he assumes no duty to one who is on his premises by permission only, and as a mere licensee, except that while on the premises no wanton or willful injury shall be inflicted upon him. Means v. Southern Cal. Ry. Co., 144 Cal. 473, 77 Pac. 1001; Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580. In the latter case, which in many respects is similar to the one at bar, the defendant kept a saloon, and a customer, who had purchased beer, inquired the way to the urinal, apparently ignorant of the location thereof. The defendant pointed the way. In the direction indicated there was a stairway leading to the urinal, and also a door leading upon a porch, from which the stairway led into the back yard. This latter route the plaintiff followed, and, when returning to the saloon, instead of coming back through the door by which he had passed out, he passed into the other, leading into the private portion of the house, where the floor had been taken up, leaving an open space, into which he fell and was injured. It was held that the obligation of the owner of the premises was to keep the access or passageway thereto in such condition as to avoid injury to persons who have been "induced by the invitation or allurement of the owner, express or implied, to enter therein." We quote from this case: "The keeper of a public place of business is bound to keep his premises and the passageways to and from it in safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises on business. But this rule applies only to such parts of the building as are a part of, or used to gain access to, or constitute a passageway to and from, the business portion of the building, and not to such parts of the building as are used for the private purposes of the owner, unless the party injured has been induced by the invitation or allurement of the owner, express or implied, to enter therein. * * * Conceding that the respondent was not wrongfully in the place where the accident occurred, and giving the most liberal construction to the evidence, he was there by the mere license of the appellant, and for that reason the appellant owed him no duty, and he went there subject to all the risks attending his going."

There is no doubt that an invitation may be manifested by the arrangement of the premises, or by the conduct of the owner. Sweeny v. Old Colony & Newport Ry. Co., 10 Allen (Mass.) 373, 87 Am. Dec. 644; Redigan v. Boston & Maine R. R., 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520; Rooney v. Woolworth, 74 Conn. 720, 52 Atl. 411; Ivay v. Hedges, L. R. 9 Q. B. Div. 80; Benson v. Baltimore Traction Co., 77 Md. 535, 26 Atl. 973, 20 L. R. A. 714, 39 Am. St. Rep. 436; Phillips v. Library Co., 55 N. J. Law, 307, 27 Atl. 478. Mere permission, or a habit, however, of an owner of allowing people to enter and use a certain portion of his premises, is indicative of a license merely, and not of an invitation. Redigan v. Boston, etc., R. R. Co., supra; Phillips v. Library Co., supra; Rooney v. Woolworth, supra. In the last case the plaintiff had been in the defendant's store as a customer. After making a purchase she left the store by a rear door, and was injured by falling into an unguarded excavation on defendant's premises in a dark alley just outside the door. The plaintiff had frequently used the rear door, under express permission from one of the clerks, and it was customary for people other than those connected with the store to use this entrance. The court held that the arrangement of the store was such as to indicate that the rear entrance was intended for use by expressmen and deliverymen, and not for the use of customers, and that therefore, in spite of the fact that it was actually used by people other than expressmen and deliverymen, when it suited their convenience, the plaintiff should be treated as having used the door merely as a licensee and not upon an implied invitation. There is no allegation that the urinal was designed or maintained for the use of patrons of the store; nor any allegation that it was designed for use or used as a part of the business conducted on the premises.

From what has been said, it follows that the judgment should be affirmed. It is so ordered.

We concur: COOPER, P. J.; HALL, J.

7 Cal. App. 106

GARDNER et al. v. SAN GABRIEL VALLEY BANK. (Civ. 422.)

(Court of Appeal, Second District, California. Dec. 11, 1907. Rehearing Denied Jan. 10, 1908.)

1. TRIAL—FINDINGS— QUESTIONS OF LAW OR FACT—OWNERSHIP.

While ownership may be pleaded and found as an ultimate fact, it may also be pleaded as a conclusion of law, and may be determined by the court as such.

2. APPEAL — REVIEW — RECORD NECESSARY—OWNERSHIP.

Where ownership is purely a question of fact, it can only be considered on a record bringing up the evidence from which the ultimate fact was deduced, or upon a judgment roll from which it appears that ownership was found as an inference of fact entirely from other facts found; but, if the court must determine ownership by the construction of a writing or mere application of legal principles to facts found by the court, it is a question of law, which may be determined from the judgment roll alone.

3. TRIAL—TRIAL BY COURT—QUESTIONS OF LAW OR FACT—OWNERSHIP.

Whether a finding of ownership in a particular case is the finding of an ultimate fact or a conclusion of law must depend on the issues to be tried, and in an action to quiet title to an easement in a certain stairway, where plaintiffs claim by virtue of a reservation in a certain deed from their grantor to defendant, and the answer admits whatever right was created in the grantor by the instrument, but denies that it granted the privileges claimed by plaintiffs, or that plaintiffs succeeded to the rights, and plead an extinguishment of the servitude by nonuser, and the court found that defendant had not otherwise than as expressed in the deed acquiesced and consented to the use by plaintiffs of the privileges claimed, that no use of the stairway was made by plaintiffs prior to the erection of a second story to plaintiff's property subsequent to the deed, and that plaintiffs are not the owners of the right or easement of using the stairway, etc., the question of ownership was determined by a construction of the deed upon the theory that the admitted reservation was an easement in gross and not one which would pass as appurtenant by the grant to plaintiffs; and hence the court on appeal may consider and determine the questions presented from the record which includes the deed containing the reservation in question.

4. EASEMENTS — RESERVATION — CONSTRUCTION—APPURTENANT EASEMENT—STATUTORY PROVISIONS.

Defendant received a conveyance of the north 75 feet of a certain lot containing a reservation of a stairway at the south end, to be perpetually maintained such as should give access therefrom to the second story of the brick building now owned by the grantor, that the grantor should have the right to use the stairway wholly at the cost of the grantee for erection and maintenance, and that, whenever said brick building of the grantor should be built so as to have two or more stories, the owner thereof should have the right of support therefrom in the adjoining wall of said bank building so high as the bank building wall should have been erected, etc. The second story of the brick building was not built until after the south part of the lot subsequently came into plaintiffs' hands. *Held*, that the reservation was intended for the benefit of the south part of the original lot, that the easement in the stairway, etc., passed as appurtenant, for the contract in providing for support of the second story declared the right to be exercised in the future, though created presently, and an easement is presumed to be appurtenant rather than in gross, and especially in view of Civ. Code, § 1069, providing that a reservation in a grant is to be interpreted in favor of the grantor and Code Civ. Proc. § 1864, providing that when different constructions of a provision of a contract are equally proper, that is to be taken which is most favorable to the party in whose favor the provision is made, since an appurtenant servitude would be assignable, and tend to increase the value of the dominant estate.

5. SAME — EFFECT OF NONUSER — EASEMENTS ACQUIRED BY DEED.

No length of time of mere nonuser will operate to impair or defeat the right to an easement acquired by deed, and this is especially true in view of Civ. Code, § 806, providing that the extent of a servitude is determined by the terms of the grant, and section 811, relating to extinguishment of servitudes, which provides under subdivision 4 for extinguishment by disuse only in case of servitudes acquired by enjoyment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 77-79.]

6. SAME—TRANSFER—INCIDENTAL RIGHTS.

Under Civ. Code, § 1104, providing that a transfer of real property passes all easements attached thereto, and section 1084, providing that the transfer of a thing transfers also all its incidents unless expressly excepted, the right to use an adjoining stairway in defendant's building which is appurtenant to certain real estate passes with the conveyance of the real estate, and carries with it such other incidental rights as are necessary to the full enjoyment of the servitude imposed upon defendant's building by the reservation creating the easement.

7. SAME — DETERMINATION OF INCIDENTAL RIGHTS.

Where a deed to certain property reserved the right to use a stairway in the premises conveyed for access to the second story of adjoining premises not conveyed, the rights incident to the enjoyment of the servitude must be determined from the evidence as to custom, usage, and the conditions surrounding the parties at the time the servitude was created.

8. SAME—STAIRWAY—DOOR.

Where an easement in the use of a stairway for the purpose of access to the second story of a building on grantor's property is reserved in a deed of the adjoining property, no custom or usage can sustain the maintenance of a door at the entrance of the stairway which would interfere with the convenient use of the stairway by the grantees of the original owner of the easement and their tenants; for otherwise the easement itself would be destroyed.

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by Miriam Gardner and another against the San Gabriel Valley Bank, a corporation. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

Frank James, Craig & Wood, and Volney H. Craig, for appellants. Wright, Bell & Ward, for respondent.

TAGGART, J. This is an action to quiet plaintiffs' title to an easement, and to restrain defendant from interfering with the use by plaintiffs and their tenants of a stairway in the rear of defendant's building and the maintenance by said tenants of their professional and business signs in the passageway and entrance to said stairway; such right being claimed under an easement alleged to have been created by deed. Judgment was for defendant, and plaintiffs appeal from the judgment.

From the findings it appears that during the year 1886 one Chas. A. Gardner, who was the owner of a lot numbered 1 on a certain subdivision of lands situate in the city of Pasadena (said lot being located at the southeast corner of Colorado street and Fair Oaks avenue of that city), entered into an agreement to sell to Bates and Janes the north 75 feet of said lot. Bates and Janes in September, 1886, conveyed to defendant their interest in the lot acquired under the agreement. On April 9, 1887, Gardner made a conveyance of the 75 feet to defendant by a deed, a copy of which is attached to the complaint and marked "Exhibit A," and contains the following reservation: "Reserving the following specified rights in the granted premises to the grantor, his heirs, executors, administrators and assigns, against the grantee, its successors and assigns: (1) Whereas, the said grantee has erected on the premises hereby conveyed a brick building with a stairway four feet and six inches wide at the south end thereof (being the south end of the premises hereby conveyed and facing on Fair Oaks avenue), it is agreed and understood that said stairway shall be perpetually maintained as shall give access therefrom to the second floor or story of the said brick building now owned by the party of the first part and said first party shall have the right to use said stairway wholly at the cost of the grantee for erection and maintenance thereof. And it is a condition of this conveyance that if said stairway shall cease to exist, and shall not be restored immediately, the grantor shall be entitled to build and maintain in the place and instead thereof a stairway of equal width and size, or less if he prefer, for his exclusive use until said destroyed stairway shall be restored by the grantee for use on the conditions now existing as to the present stairway. (2) Provided, further, and upon condition that whenever said brick building of the grantor shall be built so as to have two or more stories, the owner thereof shall have the right of support therefrom in the adjoining wall of said bank building, so high as said bank building wall shall have been erected, such support to be made or obtained in good workmanlike manner without injury to the building used." Prior to the date of that deed, and while holding possession under the agreement, the defendant erected upon the said north 75 feet a two-story brick building, a part of the first floor of which was to be used for its banking business. At the south end of, and within said building, a stairway leading from Fair Oaks avenue to the second floor of the bank building was constructed. Before making the deed to the defendant, Gardner had built the one-story building, mentioned in the reservation in the deed, on the remaining portion of lot 1, the north wall of which building joined the south wall of the bank building. On September 27, 1894, Gardner and his wife granted and conveyed to Katherine Gardner, one of the plaintiffs, and Edith M. Gardner, the south 50 feet of lot 1 with the one-story building thereon, and on April 1, 1904, Edith M. Gardner granted to the other plaintiff, Miriam Gardner, all her estate in said south 50 feet of lot 1. During the month of July, 1904, plaintiffs erected a second story on their said one-story building, and constructed thereon five offices or rooms for rent to tenants, and caused an opening to be cut through the south wall of defendant's building to serve as a passageway to the stairway in defendant's building, and since the completion of plaintiffs' second story their tenants have used defendant's stairway and said opening as a way to and from said second story of plaintiffs' building. Plaintiffs' tenants placed signs in defendant's stairway, indicating their offices and business, which were removed by defendant because the latter claimed that neither plaintiffs nor their tenants had any right to the use of said stairway for any purpose. Defendant also placed doors at the entrance of said stairway. The court further finds "that defendant has not at all times up to the 21st day of July, 1904, or at all (otherwise than as expressed in said deed 'Exhibit A'), acquiesced and consented to the use by plaintiffs and their tenants of all the rights, privileges and easements so claimed by plaintiffs, or any of them"; that no use of said stairway was made by plaintiffs or their tenants prior to the erection of their said second story; and "that the plaintiffs are not and have not been since the deeds of conveyance to them as aforesaid, the owners of the right, privilege, or easement of using said entrance to defendant's bank building and said stairway and landing, for the purpose of reaching the second story of plaintiffs' said building, or otherwise."

Respondent contends that the finding that plaintiffs are not the owners of the easement is of an ultimate fact and cannot be modified by the other findings which are characterized as findings of probative facts. Smith v. Acker, 52 Cal. 217; Perry v. Quackenbush, 105 Cal. 299, 38 Pac. 740. It is true that ownership may be pleaded and found as an ultimate fact, but it is equally true that it may be pleaded as a conclusion of law, and may be determined by the court as such a conclusion and not a fact. Levins v. Rovegno, 71 Cal. 273, 12 Pac. 161. In a case where ownership is purely a question of fact it can, of course, be considered only upon a record bringing up the evidence from which the ultimate fact was deduced, or upon a judgment roll from which it appears that ownership was found as an inference of fact entirely from the other facts found. Geer v. Sibley, 83 Cal. 4, 23 Pac. 220. But it is also the case that, if the court must determine the ownership by the construction of a writing or the mere application of the proper legal principles to the facts already found by the court, it is a question of law and may be determined from the judgment roll alone. Savings & Loan Soc. v. Burnett, 106 Cal. 539, 39 Pac. 922. Whether a finding of ownership in a particular case be the finding of an ultimate fact or of a conclusion of law, then, must depend upon the issues to be tried. Plaintiffs claim a right of passage over defendant's stairway by virtue of the reservation in "Exhibit A." The answer admits whatever right was created in Charles A. Gardner by that instrument, but denies that that deed granted to Gardner, his heirs and assigns, the rights and privileges which plaintiffs claim exist thereunder, or that plaintiffs succeeded to such rights. Defendant also pleads an extinguishment by nonuser of the servitude imposed upon its property by the deed, "Exhibit A."

Taking all the findings together, it is apparent that the question of ownership in this case was determined by the trial court by a construction of the deed, and upon the theory that the admitted reservation in the deed created an easement in gross, and not one which was appurtenant to the 50 feet of lot 1, which was retained by Gardner when he conveyed the other 75 feet to the defendant. There is no doubt, then, that this court can consider the questions presented on this appeal, and determine them from the record presented. Examining the deed of April 9, 1887, and the circumstances surrounding its execution, it is clear that the reservation therein was intended to be for the benefit of the south 50 feet of lot 1. No reason or motive for the reservation of a servitude in gross is apparent, and the instrument itself, by its very terms, contemplates the use of the stairway in connection with the building of Gardner (then but one story) adjoining defendant's building to the south. The clause in the instrument reserving the right to support from defendant's south wall "whenever said brick building of the grantor shall be built so as to have two or more stories" establishes a state of facts which render inapplicable the authorities cited by respondent to support the position that an easement does not pass as an appurtenance, unless it was actually appurtenant at the time of the conveyance. The parties themselves by their contract have declared the easement created to be a right to be exercised in the future, though created presently. An easement is never presumed to be attached to the person of the grantor when it can fairly be construed to be appurtenant to some other estate. Hopper v. Barnes, 113 Cal. 639, 45 Pac. 874. This rule is strengthened in its application to this case by the statutory provision that a reservation in a grant is to be interpreted in favor of the grantor (Civ. Code, § 1069; Code Civ. Proc. § 1864), as the appurtenant servitude is assignable, and tends to increase the value of the estate to which attached.

The easement having been acquired by deed, no length of time of mere nonuser will operate to impair or defeat the right. Washburn on Easements, 640. This is consonant with the rule of our Code which provides for the extinguishment of servitudes by "disuse" only when acquired by enjoyment. Civ. Code, §§ 806, 811, subd. 4; Smith v. Worn, 93 Cal. 212, 28 Pac. 944. The right to use the stairway, being appurtenant to the south 50 feet of lot 1, passed to the plaintiffs with the conveyance of that property to them. Civ. Code, § 1104. It carried with it also such other and incidental rights as were necessary to the full enjoyment of the servitude imposed upon defendant's building by the reservation in the Gardner deed. Civ. Code, § 1084.

As the case must go back for retrial, the trial court must determine from the evidence before it what incidents were to be implied from custom, usage, and the conditions surrounding the parties to the contract at the time it was made. No custom or usage, however, could sustain the erection or maintenance of a door at the entrance to the stairway which would be a barricade or interfere with the free and convenient use of the stairway by plaintiffs and their tenants. Teachout v. Capital Lodge, etc., 128 Iowa, 380, 104 N. W. 442. This would destroy the easement itself. The question of what is a reasonable protection of the entrance to the stairway is a matter for the trial court to consider in the light of the evidence introduced.

Judgment reversed, and cause remanded for a new trial.

We concur: ALLEN, P. J.; SHAW, J.

152 Cal. 765

CITY OF LOS ANGELES v. LOS ANGELES INDEPENDENT GAS CO. (L. A. 1,935.)

(Supreme Court of California. Jan. 24, 1908.)

1. LICENSES — MUNICIPAL ORDINANCES — GAS COMPANIES—CONSTITUTIONAL LAW.

A Los Angeles ordinance requiring gas companies to pay $100 a month as a license tax is not invalid within the charter provision (St. 1889, p. 457) that, in imposing such taxes, no discrimination shall be made between persons engaged in the same business otherwise than by proportioning the tax upon any business to the amount of business done, though one gas company's property is worth, and its earnings are, much less than another's; the charter provision not forbidding the imposition of a uniform license tax upon all engaging in a particular calling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, §§ 8–13.]

2. SAME.

A $100 monthly license tax by a city upon gas companies, regardless of the business done and the earnings, does not infringe Const. art. 13, § 1, requiring all property to be taxed in proportion to its value to be ascertained as provided by law, and defining property as including franchises, etc.; occupation taxes not falling within the constitutional provision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, §§ 8–13.]

3. CONSTITUTIONAL LAW — CLASS LEGISLATION.

A $100 monthly license tax by a city upon gas companies, regardless of the business done or earnings, is not unconstitutional as an unreasonable discrimination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, §§ 8–13.]

4. LICENSES—TAXES.

A $100 monthly license tax by a city upon gas companies is an exercise of the taxing, and not the police, power; and hence the rule that penalties or fees exacted for permits issued under police regulations must bear some reasonable proportion to the expenses of regulating the business is inapplicable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, §§ 8–13.]

5. SAME.

A $100 monthly license tax by a city upon gas companies is not invalid as prohibitive or unduly oppressive as to a company whose property in the city is not worth more than $100,000, and whose income is only $1,500 monthly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, §§ 8–15.]

Department 1. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action to recover license taxes by the city of Los Angeles against the Los Angeles Independent Gas Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. M. Barstow and Clara Shortridge Foltz, for appellant. Leslie R. Hewitt, Lewis R. Works, and W. B. Mathews, for respondent.

SHAW, J. This is a suit to recover license taxes imposed by an ordinance of the city of Los Angeles. The clause relating to defendant is as follows: "For every person, firm or corporation conducting, managing, or carrying on the business of manufacturing, selling, distributing, or furnishing gas for light, heat, or power, $100 per month." The defendant claims that this clause of the ordinance is unconstitutional and void. The particular reason advanced in support of this claim is that the same sum is imposed upon every person, firm or corporation, regardless of the extent, amount, or value of the business done, or the income thereof. It is alleged in the answer that there are but two companies engaged in the business in the city; that the value of defendant's property devoted to the business in the city does not exceed $100,000; that it distributes only 50,000 cubic feet of gas each day, has only 10 miles of street mains, and receives an income of only $1,500 a month, whereas, the other company owns a plant in the city worth $3,500,000, including 300 miles of street mains, distributes 5,000,000 cubic feet of gas daily, and has a monthly income therefrom of $125,000. It is contended that this shows an unjust and unlawful discrimination against the defendant. The court below sustained a demurrer to this part of the answer, and, upon the trial, refused to allow proof of the facts therein stated. The appeal is from the judgment.

The Los Angeles charter authorizes the city to impose a license tax upon occupations, business, and trades to raise revenue for the city, qualifying the power by the following restriction: "Provided, that no discrimination shall be made between persons engaged in the same business, otherwise than by proportioning the tax upon any business to the amount of business done." St. 1889, p. 457. This provision does not require occupation taxes to be graded in all cases, according to the amount of the business done. It forbids discrimination between persons engaged in the same business; that is, the charging of a higher rate to one than to the other in any case except when it is done by grading the tax to the amount of the business. It does not forbid the imposition of a uniform license tax upon all persons who engage in a particular calling. The Constitution (article 13, § 1) declares that all property "shall be taxed in proportion to its value, to be ascertained as provided by law," and that the word "property" includes "money, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed, capable of private ownership." If a license tax upon the privilege or right to carry on a particular trade within the city was a tax upon property, as here defined, it would be necessary, in order to lay a valid tax of that character, to provide some mode of ascertaining the value of the right of each person to carry on his paticular business, and to tax it at the same rate and in the same manner as other property is taxed. In that case it would also be necessary for the assessor to include all of this class of property in in his general assessment, and the city council could not impose such a tax upon one occupation without also imposing it upon all occupations at the same rate, or percentage of value. The Constitution is not to be so construed. The distinction between a license tax of this character and a tax upon property is well understood, and it is settled that "occupation taxes are not property taxes and therefore are not subject to the restrictions imposed upon property taxation by statutes and Constitutions." 21 Am. & Eng. Ency. of Law, 775. This statement in the text is fully supported by a large number of cases cited in the footnote. In People v. Naglee, 1 Cal. 252, 52 Am. Dec. 312, in an elaborate discussion of a clause of the Constitution of 1849, similar to that above quoted, the court said that it referred only to a direct tax upon property, and not to a license fee charged to persons following a particular trade or calling. The proposition that these constitutional provisions do not refer to license taxes was also stated, and approved in People v. McCreery, 34 Cal. 448, High v. Shoemaker, 22 Cal. 369, and Ex parte Hurl, 49 Cal. 559. See, also, People v. Martin, 60 Cal. 155. The tax in question is not contrary to the Constitution in this particular.

We find no decision in this state directly holding that a license tax imposing the same amount upon all engaged in the same business, regardless of business done, or the profits received therefrom, is not an unreasonable discrimination, where it may appear that different persons in the business have much more capital employed and earn much more profit than others. But such uniform rate has always been recognized as a valid exercise of the power. Many cases have been before this court wherein the tax has been declared valid, although it was subject to the same objection here made. Los Angeles v. S. P. Co., 61 Cal. 59, Id., 67 Cal. 433, 7 Pac. 819; Ex parte McNally, 73 Cal. 632, 15 Pac. 368; Merced Co. v. Helm, 102 Cal. 166, 36 Pac. 399; Ventura Co. v. Clay, 112 Cal. 67, 44 Pac. 488; Ex parte Senbe, 115 Cal. 631, 47 Pac. 596; Los Angeles v. Eikenberry, 131 Cal. 464, 63 Pac. 766; Sonora v. Curtin, 137 Cal. 584, 70 Pac. 674; Santa Monica v. Guidinger, 137 Cal. 658, 70 Pac. 732; Ex parte Braun, 141 Cal. 205, 74 Pac. 780. In other states the question has been directly decided. In Nebraska the Constitution and the statute required that local license taxes should be uniform. In Magneau v. Fremont, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786, 27 Am. St. Rep. 436, in deciding this question, the court said: "The ordinance imposes a fixed sum upon each of the various avocations therein named. The fact that it does not classify each business and graduate the amount that shall be paid by the person pursuing an avocation according to the amount of the business he shall do is not a violation of the rule of uniformity prescribed by both the Constitution and statute. It is not an income tax, but a license fee or tax for the privilege of carrying on business in the city. The ordinance makes no exceptions in favor of or against any one carrying on the business taxed, but operates uniformly on the class to which it applies." The following cases are to the same effect: Braun v. Chicago, 110 Ill. 193; St. Louis v. Sternberg, 69 Mo. 301; State v. Powell, 100 N. C. 525, 6 S. E. 424; In re Butin, 28 Tex. App. 304, 13 S. W. 10; Ex parte Williams, 31 Tex. Cr. R. 262, 20 S. W. 582, 21 L. R. A. 783; Banta v. Chicago, 172 Ill. 204, 50 N. E. 238, 40 L. R. A. 611; Stull v. De Mattos, 23 Wash. 71, 62 Pac. 453, 51 L. R. A. 892; Singer M. Co. v. Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; Stewart v. Kehrer, 115 Ga. 184, 41 S. E. 682; Browne v. Selser, 106 La. 691, 31 South. 290.

The tax here levied is not an exercise of the police power, but of the power of taxation, and the rule that penalties or fees exacted for permits issued under police regulations must bear some reasonable proportion to the expenses of regulating the business is not applicable. The facts stated in the answer do not establish the proposition that the tax in question would be prohibitive or unduly oppressive. It would probably be fairer, where there are only a few persons engaged in a business of this character, to so graduate the tax in proportion to the amount of the business that it shall approximate a just apportionment of the burden of taxation, but we cannot say that the fact that there is a difference between the volume of business done by the respective persons engaged therein, is of itself evidence of such a discrimination in favor of the other company, or against the defendant, as to make the ordinance void. Similar differences must exist in every case, but they have never been held sufficient to invalidate the tax. The facts alleged constituted no defense, and the offer to prove them was properly denied.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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152 Cal. 739

OURSLER et al. v. THACHER et al.
(L. A. 1,955.)

(Supreme Court of California. Jan. 24, 1908.)

MINES AND MINERALS—CONTRACT OF SALE—FORFEITURE.

A contract for the sale of certain mining claims by plaintiffs to defendants provided for payment of the price in installments. Defendants also agreed to perform certain development work, the proceeds of the ore secured to be equally divided between the parties, except that, in the event of a consummation of the purchase, the portion paid to plaintiffs was to be credited on the purchase price, and that, in case of a default in the payment of any installment, the bond should be forfeited, and the sums paid treated as rent of the property. On defendant's default in payment of an installment, plaintiffs, after demand for payment, notified defendants that they elected to terminate the contract therefor, and because of defendant's neglect to do the development work required, after which plaintiffs obtained peaceable possession of the property, and then sued defendants to quiet title as against such contract. *Held*, that all plaintiffs' acts after defendants' default were consistent with an election to enforce the forfeiture provided for; and hence defendants were not entitled to reimbursement of the amounts paid to plaintiffs under the contract on the theory that there had been a mutual rescission thereof.

Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by A. R. Oursler and others against P. Thacher and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

D. P. Hatch (I. H. Preston, of counsel), for appellants. Anderson & Anderson, for respondents.

ANGELLOTTI, J. This is an action to quiet title of plaintiffs to certain mining claims; the complaint being in the ordinary form. The defendants in their answer denied the ownership of plaintiffs on information and belief, but did not set up any claim of title or right in the property in themselves. By cross-complaint the defendant Marshpee Mining Company sought to recover from plaintiffs money paid as part of the purchase price of said claims under a contract for the sale thereof by plaintiffs to certain of the defendants, and also money expended by it in developing such claims while in possession thereof under said contract. The cause was submitted to the trial court for decision upon an agreed statement of facts, and judgment was given quieting plaintiffs' title to the claims, and denying defendant mining company any relief on its cross-complaint. This is an appeal by defendants from such judgment.

The facts agreed to, so far as material, are as follows: Plaintiffs were on November 14, 1904, and ever since have been, the owners of the mining claims. On said November 14th they executed a bond for a deed thereof to defendants Thacher and Blewett. This bond was for the execution and delivery by plaintiffs to said defendants or their assigns on or before the 5th day of December, 1905, of a deed for the claims, provided that said defendants or their assigns on or before that date paid to plaintiffs the agreed purchase price of $100,000, and performed the other conditions specified therein. The other conditions so specified were that the purchasers would pay to plaintiffs on or before December 5, 1904, the sum of $500, and the sum of $500 per month thereafter during the continuance of the bond, said payments to be credited on the purchase price in the event of consummation of the purchase in accord with the terms of the bond, and that the purchasers would begin development work on or before December 27, 1904, and prosecute the same continuously until said consummation of the purchase or the cancellation of the bond, the net proceeds of the ore taken out in said work to be divided equally between the parties, but in the event of said consummation of the purchase the portion paid to plaintiffs to be credited on the purchase price. It was expressly provided that, in case of default in the payment of any $500 monthly installment, "this bond shall immediately upon such default be forfeited and become null and void," and the sums paid treated as rental of the property for the period covered thereby, and that a breach of any condition by the purchasers would release the plaintiffs from the obligation of the bond. The defendant mining company succeeded to the rights of the vendees, and went into possession of the claims under the bond. It paid to plaintiffs and plaintiffs accepted eight monthly installments of $500 each; the last installment being that for July, 1905. It also paid on January 24, 1905, $42.50, and on April 6, 1905, $365.27, proceeds of sales of ore. It also expended in developing said claims the sum of $9,846.40. (These are the amounts sought here to be recovered by defendants.) On August 5, 1905, a monthly installment became due and payable. Demand that the same be paid was forthwith made, and on request of defendants the time for such payment was extended several times, the last extension being to August 18, 1905, at 10 o'clock a. m. At that time demand for immediate payment was again made, and defendants failed and have ever since failed to pay the same or any part thereof. On August 21, 1905, plaintiffs served on Thacher, Blewett, and the mining company a written notice in the following terms: "To Messrs P. Thacher, W. G. Blewett, and the Marshpee Mining Company. Gentlemen: You are hereby notified that the terms of the bond from A. R. Oursler and Clemente Salazar, as parties of the first part, to P. Thacher and W. G. Blewett, as parties of the second part, dated November 14, 1904, and bonding all of that certain property hereinafter more particularly described, have been violated, and that the parties thereto have failed to comply with, and keep certain of its terms and conditions, in this: First. The said parties of the second part in said bond have failed and neglected to do the development work upon said mining properties as therein provided. Second. That the said parties of the second part in said bond have failed and neglected to make the monthly payments therein provided and particularly have failed and neglected to make the monthly payments of $500 due thereunder on the 5th day of August, 1905, and the said monthly payment of $500 still remains unpaid. * * * Wherefore we, the undersigned, A. R. Oursler and Clemente Salazar, parties of the first part in said bond, do hereby declare said bond to be forfeited and all of your interest in the property therein and hereinafter described to be terminated, and we hereby demand of you that you forthwith vacate said property and deliver the possession of the same to us; and that you leave upon said property all of the improvements, machinery and fixtures which are now thereon and which, under the terms of said bond and agreement, endorsed upon said bond supplementary thereto, belong to and are the property of the undersigned. * * * Yours very truly, A. R. Oursler. Clemente Salazar." On August 28, 1905, possession of the property not having been delivered, plaintiffs' attorneys communicated by letter with said defendants, referring to the previous notice, and advising them that, unless the property was delivered by 12 m. of August 30th, suit would be commenced for the possession of the property. Thereafter plaintiffs peaceably took possession of the property, and then brought this action to quiet their title. At the time of the service of the notice, defendants had failed to live up to the obligations of the bond in the matter of doing development work, and did no such work after the service of the notice. There was no attempt by defendants in their pleadings to show any excuse for the failure to comply with the conditions of the bond. The theory of defendant mining company's claim for reimbursement of the amounts paid to plaintiffs under the contract and in doing the development work is that the contract for the sale of the property had been rescinded by mutual consent of the parties, and that, because of such mutual rescission, the mining company was entitled under our decisions to recover the money which it had paid in part performance of the contract.

We see nothing in the admitted facts warranting a conclusion that there was a rescission of the contract within the meaning of the decisions relied on. Plaintiffs had the right without abandoning or rescinding the contract to insist that, by the terms thereof, defendants by reason of their default had no further right thereunder This is clearly established by the decision of this court in Glock v. Howard, etc., Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. That was a case where the vendee after default in the payment of amounts due under the contract, and after the time when under its terms he was entitled to pay and thereupon receive a deed, tendered all sums due and demanded a deed, and, on refusal of the vendor to accept and tender and execute the deed, brought an action for the recovery of the sums paid by him under the contract. No excuse was made by the vendee for the default. The court in bank held that this refusal of the vendor did not constitute a rescission. Justice Henshaw, in an opinion concurred in by Justices McFarland and Temple, said: "But, while it is essentially true that in case of a rescission the vendee may demand that he be restored to his original condition, it does not follow that a vendor who refuses to convey after such breach by the vendee thereby rescinds. To the contrary, in refusing to convey after the vendee's default, he is not treating the contract as at an end, but is expressly standing upon it, and basing his rights upon its terms, covenants, and conditions." Also: "But the vendor, in refusing to accept the tender and to repay the money, is neither violating his contract nor rescinding it, nor treating it as at an end. He is standing squarely upon its terms." Justice Harrison, in an opinion concurred in by Justices Garoutte and Van Fleet, after fully recognizing the doctrine that in the event of a rescission or mutual abandonment the vendee might recover money paid in part performance, said: "But it has never been held that while the contract was insisted upon by the vendor, and he had done no act by which it might be contended that he had abandoned the contract, or was in any respect in default, the vendee could recover the money paid by him in part performance of the contract. * * * The plaintiff could not maintain an action against the defendant to recover the money paid by him, unless there had been a breach of the contract by the defendant, and the defendant was not guilty of a breach of its obligation by failing to execute the conveyance, when the plaintiff was himself in default, or by refusing to comply with the demand of the plaintiff made many months after he had lost his right to the enforcement of the contract." The earlier decisions relied on by counsel for defendants were carefully examined by this court in that case because of the apparent misunderstanding as to their effect, and were fully explained in the opinion, and there is nothing in any later case that is inconsistent with the views of the court on this matter as expressed in such opinion. The stipulated facts here warrant no inference but the one that plaintiffs have done no more than to insist that, under the terms of the contract, defendants had no further rights under such contract, but had forfeited all such rights. Their notice of forfeiture and demand for possession of the mining property were strictly in line with this claim, and were in no sense a repudiation or abandonment of the contract or a consent to a rescission thereof, any more than was the refusal of the vendor to convey in Glock v. Howard, supra, an abandonment or a consent to a rescission. The bringing of the action to quiet title was an act of the same character. Practically it amounted to no more than the calling of the defaulting vendees into court to show why it should not be decreed that under the terms of the contract all their rights thereunder were at an end. In the absence of some sufficient equitable showing to excuse their failure to comply with the terms of the contract, plaintiffs, while standing on their contract, were entitled to such a decree, so as to cut off the possibility of any future claim by the vendee to equitable relief, which might embarrass or cloud his title. Glock v. Howard, 123 Cal. 10, 11, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

There being no rescission or abandonment of the contract by the plaintiffs, and the plaintiffs at all times have insisted on the contract and stood on its terms, and being in no respect in default, the vendees in default were not entitled to recover either the moneys paid by them to plaintiffs or the moneys expended in developing the property.

Other points are made by counsel for plaintiffs in support of the judgment, including one to the effect that the matters alleged in the cross-complaint do not come within the scope of matters as to which a cross-complaint is authorized by our statute in an action to quiet title. Code Civ. Proc. § 442. We have preferred to place our decision in the case upon the ground already set forth, but in so doing we do not desire to be understood as holding that this claim of plaintiffs is without merit.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

(152 Cal. 760)

In re VANCE'S ESTATE. (L. A. 2,078.)

(Supreme Court of California. Jan. 24, 1908.)

1. EXECUTORS AND ADMINISTRATORS — PAYMENT OF CLAIM—EXERCISE OF OPTION.

An option to pay a note by delivery of corporate stock is not a mere personal right of the maker, expiring with his death, but survives to his estate.

2. SAME.

Civ. Code, § 1384, passes the property of an intestate to his heirs, subject to the control of the probate court and the possession of the administrator. Code Civ. Proc. § 1452, vests in the personal representative a right to the possession of all the property of decedent; and section 1581 requires the personal representative to take into his possession all the estate of decedent. *Held* that, where testator gave all his estate to his wife and son, and had reserved an option to pay a note by delivery of corporate stock, title to the stock passed to his legatees, subject to the exercise of the option by executrix.

3. SAME—PAYMENT OF CLAIMS.

Under Code Civ. Proc. §§ 1490 et seq., 1516, 1646, committing to the probate court jurisdiction over the presentation, allowance, and payment of claims against a decedent's estate, the probate court had jurisdiction to make an order authorizing and directing that a note presented as a claim against an estate be paid by the exercise by executrix of the option therein reserved to pay by delivery of corporate stock.

Department 1. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Petition by Marie H. Vance, as executrix of the will of S. A. Vance, filed after the expiration of the time for presenting claims, praying for authority to deliver stock in payment of a note presented against the estate as a claim, in accordance with an option therein reserved. The claimant, Hammond Lumber Company, opposed the petition, and from an order authorizing and directing the executrix to so pay the note, the lumber company appeals. Affirmed.

Page, McCutchen & Knight, for appellant. Taylor & Forgy, for respondent.

SLOSS, J. On May 26, 1903, S. A. Vance made and delivered to Hammond Lumber Company, a corporation, his promissory note reading as follows: "$65,000.00 San Francisco, Calif., May 26, 1903. On or before five years after this date, I promise to pay to the order of Hammond Lumber Company sixty-five thousand dollars, United States gold coin, with interest thereon, payable semiannually at the rate of four per cent. per annum from date until paid. This note is secured by pledge of six hundred and fifty shares of the first preferred cumulative stock of the stock of Vance Redwood Lumber Company, and is payable, at my option, by transfer and delivery of as many of said shares as shall at the time of such transfer and delivery be the equivalent at par of the then unpaid part of this note. [Signed] S. A. Vance." Thereafter S. A. Vance died, leaving a will in which he named his wife, Marie H. Vance, as executrix, and gave all of his estate in equal shares to his said wife and a minor son. Letters testamentary having issued, notice to creditors was published, and within the time allowed the Hammond Lumber Company presented a claim, setting forth the instrument above quoted, and alleging the payments of interest and nonpayment of the principal. The claim was allowed by the executrix and approved by the court. The estate is solvent. After the expiration of the time for presenting claims, the executrix filed a petition, alleging that the 650 shares of stock referred to in the claim had been appraised at $38,750, and that it was to the best interests of the estate that the claim be paid by transfer of said 650 shares, which at par were the equivalent of the unpaid portion of the note. The prayer of the petition was for authority to deliver said stock to the claimant in full payment of its claim. In response to a citation the claimant, Hammond Lumber Company, appeared and opposed the petition. Over its objection, the court made an order authorizing and directing the executrix to transfer and deliver to Hammond Lumber Company, in full payment of the note and claim, a certificate for 650 shares of the first preferred cumulative stock of Vance Redwood Lumber Company, being the shares mentioned in the note. The order further provided that upon such transfer the claim and note "shall be fully paid and satisfied." From this order the Hammond Lumber Company has appealed.

The points made in support of the opposition in the lower court, and now urged on this appeal, are, first, that the option to pay the note by transfer and delivery of the stock was a right, personal to S. A. Vance, the maker, and expired with his death; second, that the superior court as a court of probate had no jurisdiction to make the order directing the payment of the claim by a transfer and delivery of the shares of stock.

1. We see no good reason for holding that the option to pay in stock was a mere personal right of the maker. The note is payable on or before five years after date, and is payable, at the option of the maker, in money or in stock. Two options were here reserved to the maker—the option to pay at any time prior to the expiration of the five years, and the option to pay in stock instead of money. The payee had no right to insist on payment at any time before the end of the five-year period, nor to receive payment in money, if the maker should elect to pay in stock, or vice versa. Both of the options so reserved are valuable rights. It is not suggested that the right to pay before the expiration of the five years was lost to Vance's estate by his death. The right to pay in stock rather than in money stands on no different ground. The option to pay in this manner was reserved solely for the benefit of the maker. The appraised value of the stock ($38,750) shows that this option, at the time of filing the petition, was worth $26,250, the difference between such value and $65,000. Why should the death of the maker be held to transfer this $26,250 from Vance's estate to the Hammond Lumber Company? When the claimant took the note, it contracted for and received, not an obligation to pay $65,000, but an obligation to do one of two things, i. e., to pay $65,000 or to transfer 650 shares of stock. The only right it bargained for was the right to receive the one of these two modes of performance which should prove to be to the advantage of the maker. The maker's death did not transform or enlarge this into an absolute right to receive $65,000. The option reserved was in the nature of a valuable property right, and, as such, passed to the estate of the decedent. Since it had reference to the performance of an obligation of the decedent, its exercise necessarily devolved upon the executrix, who was charged with the duty of carrying out, subject to the direction of the probate court, all binding contracts made by the testator.

The appellant lays great stress upon the proposition that upon the death of one owning property the property passes at once to his heirs, devisees, or legatees. Civ. Code, § 1384; Beckett v. Selover, 7 Cal. 238, 68 Am. Dec. 237; Brenham v. Story, 39 Cal. 185; Estate of Newlove, 142 Cal. 377, 75 Pac. 1083. From this the conclusion is drawn that the 650 shares passed at once, on the death of Vance, to his widow and minor son, and that the executrix, with or without the order of court, had no power to transfer to the claimant any title to said shares. But the passing of title to the heirs, devisees, or legatees is subject to the control of the probate court and the possession of the administrator or executor for the purposes of administration. Civ. Code, § 1384; Code Civ. Proc. §§ 1452, 1581. "The heirs' title is subject to the performance by the administrator of all his trusts, and they finally come into the possession and enjoyment of only such portion of the estate as may remain after the execution of them by the administrator." Robertson v. Burrell, 110 Cal. 568, 574, 42 Pac. 1086. One of those trusts is the payment of the debts of the decedent. Here the testator bound himself either to pay a sum of money or to transfer certain shares of stock. Both the money and the stock passed to his legatees charged with the burden of the performance of this obligation. One or the other was to pass from the estate, according to the exercise of the option by the executrix. Whatever title the legatees took was subject to the exercise of this option.

2. The contention that the probate court was without jurisdiction to make the order appealed from is, in a measure, answered by what has already been said. If the option reserved in the note was a right that passed to the estate and was to be exercised by the executrix, it will hardly be questioned that the exercise of that option for the purpose of satisfying an approved claim was a matter to be passed on by the probate court. "The objects of probate proceedings are to administer, settle, and distribute the estate of deceased persons." Maddock v. Russell, 109 Cal. 417, 422, 42 Pac. 139. The presentation, allowance, and payment of claims are subjects especially committed to the care of the probate court. Code Civ. Proc. §§ 1490 et seq., 1516, 1646. The order in question is to be regarded as an order for the payment of an allowed and approved claim. The appellant submitted itself to the jurisdiction of the court by presenting its claim, and it has no ground for complaint in that the court has made an order directing that it be paid in the manner provided by the contract which is the basis of the claim.

The order is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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152 Cal. 769

In re CALLEN'S ESTATE. (L. A. 1,996.)

(Supreme Court of California. Jan. 27, 1908.)

INSANE PERSONS—LIABILITY OF ESTATE FOR SUPPORT—RIGHTS OF CREDITORS.

Pol. Code, § 2176, declaring that an insane person's estate, to the extent it is sufficient for the purpose, shall be liable for his support and maintenance in a state hospital, does not entitle a state hospital to any claim on an insane person's estate, where at his commitment his debts exceeded the value of his estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, § 106.]

In Bank. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Final accounting in the matter of the estate of James S. Callen, an incompetent person. Two classes of claims were presented —claims of private persons accruing prior to the commitment of Callen to the State Hospital, and the claim of the State Hospital for care subsequent to his commitment. From an order directing the estate to be distributed among the creditors other than the hospital, the Southern California State Hospital and the California State Commission in Lunacy appeal. Affirmed.

John W. Stetson (Cassius Carter, of counsel), for appellants. Haines & Haines, James E. Wadham, and L. L. Boone, for respondents.

HENSHAW, J. James S. Callen had been declared an incompetent, and committed to the Southern California State Hospital. A guardian was appointed of his estate. At the time of the settlement of the final account of the guardian it appeared that he had on hand $476 which could be devoted to the payment of the claims of creditors. Two kinds of claims were presented: First, the claims of private persons, aggregating $1,435, which claims had accrued prior to the commitment of the incompetent to the State Hospital; and, second, the claim of the State Hospital for $435, accrued for the support, care, and maintenance of the incompetent subsequent to his commitment. The court ordered that the moneys in the hands of the guardian be ratably distributed amongst the creditors other than the Southern California Hospital, and from this order the hospital appeals.

It contends, first, that it is an agent and mandatory of the state, and thus represents the state, and that the claim of the state as sovereign should be preferred over that of the general creditors by virtue of the common-law rule to this effect. State v. Foster, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47. Appeal is here made to the rule enunciated in our Code and affirmed in our decisions that, where our statutes are silent, the common law of England furnishes the rule of decision. Est. of Apple, 66 Cal. 434, 6 Pac. 7. But it is sufficient on this to say that our Codes are not silent upon the matter. The state has undertaken the care of its insane and incompetents, and the liability of the estate of such an incompetent is defined by section 2176, Pol. Code. "The husband, wife, father, mother, or children of an insane person, if of sufficient ability, or the estate of such insane person to the extent it is sufficient for the purpose, shall be liable for the care, support, and maintenance of any insane person in a state hospital for the insane to which he has been or may hereafter be committed or transferred."

The first proposition to be considered, then, is whether under this section the state or the asylum has any claim at all upon the estate of the incompetent. It appears that at the time the state first took charge of him, his undisputed debts exceeded three times the value of his property. He was insolvent. Such little property as he possessed was due and owing to creditors, and equitably that property was theirs. Under such state of facts it cannot be successfully argued that the condition contemplated by section 2176 is fulfilled. The estate of the insane person was not sufficient to any extent to provide for his maintenance at the time of his commitment to the asylum. Such property as he possessed belonged to the creditors existing at the time of his commitment. The result is, therefore, that the state had no legal claim at all against the property of the incompetent. It becomes unnecessary, therefore, to consider whether, if it had a valid claim and the funds of the incompetent were inadequate to pay all claims, the state should receive preferential consideration, or should share ratably with the others.

The order appealed from is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; McFARLAND, J.; LORIGAN, J.

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152 Cal. 753

In re BARCLAY'S ESTATE. (L. A. 2,138.)

(Supreme Court of California. Jan. 24, 1908.)

1. WILLS — WORDS CREATING GIFTS — INTENTION OF TESTATOR.

No particular words are essential to create a legacy or devise, and, when the intention of the testator making a gift from the property of his estate is shown, the courts will carry it into effect, if the same can be done consistently with the rules of law applicable thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 228–233.]

2. SAME—GIFTS TO CREDITORS.

Testatrix devised specified property to designated beneficiaries, and provided that the residue of her estate, after a son had been paid what he had paid for her at various times, should go to her children. *Held* to constitute a legacy to the son of all the amounts paid by him for testatrix.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1698–1703.]

3. APPEAL — REVERSAL—TECHNICAL ERRORS—FINDINGS—SUFFICIENCY.

A judgment will not be reversed for failure to find on an affirmative defense, where the record does not show that evidence was introduced in support thereof, or where the evidence introduced was not sufficient to support a finding in favor thereof.

4. WILLS—GIFTS TO CREDITORS—ESTOPPEL.

Testatrix gave specified property to designated beneficiaries, and provided that the residue of her real estate, after a son had been paid what he had paid for her, should go to her children equally. The son presented a verified claim for the amounts advanced, but only a part thereof was allowed by the executors, on the ground that his claim therefor was barred, except to the extent allowed. *Held* that, since under the express provisions of Code Civ. Proc. § 1499, the claim of the son, so far as the same was barred, could not be allowed, he was not estopped from claiming that there was a legacy to him to the amount of his advancements for testatrix.

5. SAME — CONSTRUCTION—DEATH OF BENEFICIARY.

Testatrix gave specified property to designated beneficiaries, and provided that the residue remaining, after a son had been paid what he had paid for her, should go to her children, share and share alike, and declared that 'in case any one or more should die their share to be divided between the remaining children, unless they have heirs." *Held*, that under Civ. Code, § 1336, providing that words in a will referring to death relate to the time of testator's death, etc., the quoted provision referred only to such a death as might occur before the death of testatrix, and it did not apply to a child dying leaving a child and husband surviving.

6. SAME—CODICILS—MODIFICATION OF WILLS—EXTENT.

Under Civ. Code, § 1287, providing that the execution of a codicil referring to a previous will has the effect to republish the will, as modified by the codicil, a will controls, except as modified by a codicil, and the two instruments must be read together so as to make one consistent whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 997.]

7. SAME—ESTATES DEVISED—TRUST ESTATES.

Testatrix gave specified property to beneficiaries named, and provided that the residue should go to her sons and daughters, share and share alike. By a codicil she subjected the property given to a daughter to a trust for her benefit so long as she remained the wife of a person named. She died leaving such person her surviving husband. *Held*, that under Civ. Code, §§ 864, 865, providing that the author of a trust may devise property, subject to the execution of the trust, and declaring that the devisee acquires a legal estate in the property as against all persons except the trustee, the interest of the daughter when terminated by her death passed to her surviving husband, freed from the trust.

Department 1. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

In the matter of the estate of S. C. G. Barclay, deceased. Proceedings in the nature of an action to determine heirship by H. A. Barclay, a beneficiary under the will of the deceased. From a decree determining the interests of claimants under the will of the deceased, and from a denial of a new trial, J. C. Blackinton appeals. Modified and affirmed.

M. W. Conkling, for appellant. Munson & Barclay, for respondent.

ANGELLOTTI, J. This is an appeal by one J. C. Blackinton from a decree determining the respective interests of claimants under the will of deceased, given in a proceeding under section 1664, Code Civ. Proc., and from an order denying his motion for a new trial. The deceased died testate January 3, 1895, leaving as her heirs at law five surviving children, H. A. Barclay, F. H. Barclay, D. E. Barclay, S. C. Blackinton (the wife of appellant), and Lenore Gillmore. Said S. C. Blackinton died intestate on January 29, 1896, leaving surviving her husband (appellant) and their minor son, Roswell, aged about two years. Said son Roswell died June 15, 1896, and the whole estate of S. C. Blackinton was subsequently distributed to appellant. As the successor of his deceased wife, appellant claims a portion of the estate of this deceased.

On June 18, 1894, deceased executed an olographic will. By this instrument, after directing payment of her just debts, she specifically devised certain real property, known as the "Alhambra property," and certain household goods, to her two daughters, "the coins" to H. A. Barclay and D. E. Barclay, and an oil painting to each of her five children. The will then provided as follows:

"The residue of my real estate, after my son, H. A. Barclay, has been paid what he has paid for me at various times, I will and bequeath to my children, Henry A. Barclay, Frank Herbert Barclay, Sallie C. Blackinton, David Eric Barclay, and Lenore Gillmore, share and share alike. In case any one, or more, should die, their share to be divided between the remaining children, unless they have heirs."

On August 28, 1894, she executed an olographic codicil to said will, which was as follows:

"I hereby give and bequeath unto my daughter, Mrs. Lenore Gillmore, in trust for the use of my daughter, Mrs. S. C. Blackinton, wife of J. C. Blackinton, all property and goods of all kinds named in my will to my daughter, S. C. Blackinton, said property to be held by said trustee so long as the said S. C. Blackinton remains the wife of said J. C. Blackinton: provided, however, that the rents, issues and profits thereof shall be paid by said trustee to said S. C. Blackinton, from time to time, as they are received, but in case the said property is sold, the proceeds of the interest of the said S. C. Blackinton shall be placed at interest by the said trustee and the interest thereof paid to S. C. Blackinton from time to time as the same is received, but in case the said S. C. Blackinton shall so request in writing, the proceeds of said property may, instead of being put at interest, be invested in real estate to be held by said trustee and the rents, issues and profits thereof be paid as aforesaid.

"Provided, further, that in case of the death of said J. C. Blackinton, or his divorce from said S. C. Blackinton, then and in that case the whole of the property so held in trust shall be conveyed to or delivered to S. C. Blackinton."

The controversy on this appeal is as to the effect of the codicil on the rights conferred by the will on the daughter S. C. Blackinton, and the effect of the provision in the original will regarding the payment to H. A. Barclay of such sums as he had paid out for the deceased. The latter of these questions is the question principally discussed by counsel. H. A. Barclay, who was the plaintiff in this proceeding, claimed by appropriate allegations in his complaint that he had paid out for deceased between July 8, 1889, and the time of her death, amounts aggregating $10,954.10, which he claimed should be paid to him from the property of the estate, together with interest, before any distribution to residuary legatees and devisees was made. All of these expenditures except some $325 were barred by the statute of limitations. The trial court sustained this claim of plaintiff, adjudging him to be entitled to receive from the estate before distribution of the residue to the residuary legatees and devisees the sum of $10,954.10, with interest. There is no contention on this appeal that the findings as to the payments by H. A. Barclay for deceased are not fully sustained by the evidence, or that he was not entitled to the interest awarded, if he was entitled to the principal. It is urged, first, that there was no legacy of the amounts paid by H. A. Barclay for deceased created by the will, and, second, that said Barclay has elected not to treat the same as a legacy, by proceeding as an ordinary creditor of deceased, and is now estopped to claim that there is any legacy in this regard. We have no doubt that the words of the will in this behalf should be held to constitute a legacy to H. A. Barclay of all amounts that he at various times had paid for her, payable out of the estate before any residuary legacy or devise is distributed. No particular words are essential to create a legacy or devise. The essential thing is that the intention of the testator to thereby make the gift from the property of the estate is shown. When such intention clearly appears, the courts will carry it into effect, if this can be done consistently with the rules of law applicable. While more formal and apt terms would probably have been used in this will if the same had been drawn by a lawyer, the intention of the testatrix to make this gift to H. A. Barclay, and to require its payment before any distribution is had to residuary devisees or legatees, could not have been made more clearly apparent.

The claim of appellant that H. A. Barclay elected to proceed as an ordinary creditor of deceased, and is now estopped to claim as a legatee, was made by allegations in the answer, and evidence was introduced on the trial for the purpose of supporting such allegations. The allegations were substantially that said H. A. Barclay presented a verified claim for all the amounts claimed herein; that the same was allowed by the executrix for $325 only, and rejected as to the balance; that said Barclay thereupon had the same approved by the judge for such amount, and then filed the claim as an allowed claim for $325; and that thereafter he petitioned the superior court for an order of sale of the real property of the estate for the purpose of paying all approved claims, including his own. The trial court failed to make any finding on these allegations, and its failure to do so is claimed to be error necessitating a reversal. The evidence was, however, insufficient to support a conclusion that said Barclay was so estopped, except, perhaps, as to such items as were not barred by the statute of limitations at the time of the presentation of the so-called creditor's claim, which amounts, as we have seen, aggregated not exceeding $325. Both executrix and judge were expressly prohibited by statute from allowing an item in the claim that was so barred (Code Civ. Proc. § 1499), and the rejection of the claim as to such items cannot be held to have been an adjudication as to the merits thereof. There was nothing in the language of the will which put said Barclay to the necessity of abandoning his rights as an ordinary creditor for such amounts as were not barred, if he desired to take as a legatee. The case is not at all like that of Smith v. Furnish, 70 Cal. 424, 12 Pac. 392, where a specific sum ($3,000) was bequeathed in compensation for services rendered the deceased. There the intention of the testator was clear that the party should receive that specific sum in lieu of such amount as might be lawfully due for the services, and proceedings against the estate for the enforcement of a creditor's claim might properly be held inconsistent therewith. But the provision in favor of said Barclay in the will before us was clearly intended not to take away from his rights as a creditor for such amounts as he might lawfully claim and enforce, but to give to him those amounts which the record shows he could not otherwise obtain. It is well settled that a judgment will not be reversed for failure to find upon an affirmative defense, if the record does not show that evidence was introduced in support thereof, and the same rule must obtain where the evidence introduced was not sufficient to support a finding in favor thereof if such finding had been made. The inclusion of the $325 and interest thereon in the amount ordered distributed to Barclay was practically simply an order for the payment of his allowed claim with interest.

The trial court held that by reason of the provisions of the codicil the interest of S. C. Blackinton in the estate was absolutely ended by her death, while still the wife of J. C. Blackinton, and that the property given to her went to the remaining four children, share and share alike. It, therefore, excluded J. C. Blackinton from all participation in the residue of said estate. In this the court erred. The Alhambra property, which was given by the will to S. C. Blackinton and Lenore Gillmore, share and share alike, has been lost to the estate by reason of foreclosure proceedings, and the provision in regard to its disposition in the event of the death of one of the beneficiaries is not material here. As we have seen, the will gave absolutely to said S. C. Blackinton and Lenore Gillmore certain household goods, to be divided among them as they might agree. It appears that such division has been made by the beneficiaries. It also gave them the books of deceased, and gave to said S. C. Blackinton one oil painting, and, after payment of the amounts given to H. A. Barclay, one-fifth of the residue of the real estate. The only provision in the will under which S. C. Blackinton could possibly be deprived of this property was one to the effect that, in case one or more of the children should die, their share was to be divided among the remaining children, "unless they have heirs." This provision apparently referred only to such a death as might occur before the death of the testatrix (Civ. Code, § 1336); but in any event it could not apply to S. C. Blackinton's interest, for she left a child surviving her, as well as her husband. This disposition by the will in favor of S. C. Blackinton was affected by the codicil only to the extent that a different arrangement was provided by the codicil. The will still controls except as modified by the codicil. Civ. Code, § 1287. The dispositions made by will are not to be disturbed by a codicil further than is necessary to give it effect. 1 Jarman on Wills, p. 176. The two are to be read together so as to make one consistent whole. In re Ladd, 94 Cal. 674, 30 Pac. 99; Matter of Scott, 141 Cal. 485, 75 Pac. 44. The only effect of the codicil was to subject the property so given to S. C. Blackinton to a trust (of which she was the beneficiary) so long as she remained the wife of J. C. Blackinton. The will as modified by the codicil absolutely devised this property to S. C. Blackinton, subject only to the execution of the trust. The author of a trust may devise property, subject to the execution of the trust (Civ. Code, § 864), and such a devisee acquires a legal estate in the property as against all persons except the trustee. Civ. Code, § 865. When the trust was terminated by the death of S. C. Blackinton, her interest in the property passed, freed from the trust, to her heirs, and appellant, J. C. Blackinton, is entitled to receive the same on distribution.

It follows that the decree should be modified so as to provide that the household goods and books assigned to S. C. Blackinton in the division between her and Lenore Gillmore shall be distributed to J. C. Blackinton, and that after the specific legacies are satisfied, and the amounts found due H. A. Barclay are paid, one-fifth of any residue shall be distributed to J. C. Blackinton as the successor of S. C. Blackinton, and the remaining four-fifths to the other children of deceased, or their successors, H. A. Barclay taking one-fifth as an heir of deceased and one-fifth as the successor of Lenore Gillmore, deceased, and D. E. Barclay taking one-fifth as an heir and one-fifth as the successor of F. H. Barclay.

The order denying a new trial is affirmed, and the cause is remanded, with directions to the lower court to modify the judgment in accord with the views we have expressed; said judgment, when so modified, to stand affirmed.

We concur: SHAW, J.; SLOSS, J.

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152 Cal. 778

In re JOHNSON'S ESTATE. (L. A. 2,052.)

(Supreme Court of California. Jan. 31, 1908.)

1. APPEAL — CONFLICTING EVIDENCE — FINDINGS.

The appellate court cannot decide contrary to the findings of the trial court, where the evidence is conflicting; the trial court, in the absence of a jury, being the exclusive judge of the credibility of the witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983–3989.]

2. WILLS—PUBLICATION—REQUESTS FOR SUBSCRIBING WITNESSES.

An express declaration to the subscribing witnesses that the document executed was testatrix's will, or an express request that they attest it as witnesses, is not required; it being sufficient if testatrix, at the time, by words or conduct, conveyed to the witnesses the information that the instrument was her will, and that she desired their attestation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 305–317.]

3. SAME—EXECUTION—EVIDENCE.

A will was drawn at testatrix's request by her attorney, and was executed in his office, under the direction of his law partner. Testatrix said to him that she wanted him to call witnesses to "this will of hers," the persons who signed as witnesses being then in the room. The attorney thereupon asked them to witness the document, whereupon testatrix and the witnesses immediately signed the instrument in the presence of each other, there being written after her signature and above theirs the usual attestation clause reciting that they signed at her request and in her presence, and that she declared the instrument to be her last will in their presence. *Held*, to warrant a finding that the will was duly executed, though some of the witnesses could not recall what occurred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 700–723.]

4. SAME — DESTRUCTION — REVOCATION — EVIDENCE.

On an application for probate of a will, evidence *held* to warrant a finding that the will, properly executed, was in existence after testatrix's death, and that the will was not revoked prior to such event.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 732, 733.]

5. WITNESSES—CONTRADICTION—PARTY'S OWN WITNESS.

Under Code Civ. Proc. § 1339, requiring proponents in a proceeding to establish a lost will to prove that it was in existence at testatrix's death, where B. and contestant, so far as proponent knew, were the only persons who had seen the will after testatrix's death, so that proponent was practically compelled to produce B. as a witness, and she testified that she did not remember seeing any handwriting on the paper at all, the paper being typewritten, proponent was entitled to show that B. had previously told proponent's attorney that the will was signed by testatrix and two witnesses, for the purpose of explaining the action of proponent's attorneys in calling B., and to show that they were surprised by her testimony.

6. APPEAL—ESTOPPEL TO ALLEGE ERROR—CONSENT.

Proponent in a will contest, having been compelled to produce a witness whose testimony was adverse, sought to introduce testimony of contradictory statements made by the witness, for the sole purpose of explaining his action in calling the witness, and to show that he was surprised by her testimony, to which contestant's counsel replied that he understood that proponent's counsel wanted the testimony explained as far as that was concerned, and that it was all right. *Held*, that contestant consented to the admission of the evidence, and could not object, on appeal, that it was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3591–3616.]

7. Wills—Testamentary Capacity—Preliminary Proof—Presumptions.

When proponent of a will, on a petition for probate, opens the proceedings by preliminary proof, as required by statute, he may rely on a presumption that the testator was of sound mind when the will was executed, as evidence in his favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 101–110.]

8. Same—Evidence—Attending Circumstances.

Circumstances attending the execution of a will and the conduct of the testator at the time are admissible on the issue of testamentary capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 111–136.]

9. Same—Prima Facie Case.

The presumption of sanity on the part of a testatrix, and evidence that she acted in a rational manner at the time the will was executed, was sufficient to establish a prima facie case of testamentary capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 103–137, 138.]

Department 1. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Application for probate of the will of Sarah Johnson, deceased, to which Della Sherbourne filed objections. From orders admitting the will to probate and denying contestant's motion for a new trial, she appeals. Affirmed.

C. W. Davison, J. R. Wilder, and L. L. Miller, for appellant. T. M. Stewart and Haas, Garrett & Dunnigan, for respondent.

SHAW, J. The contestant appeals from an order of the superior court admitting a will to probate, and from an order refusing her motion for a new trial. Sarah Johnson died on May 19, 1905. The petition for probate of her will alleged that the will was in writing, was signed by her in her lifetime, and was duly attested by two subscribing witnesses, and that after her death it was willfully destroyed by Della Sherbourne, the contestant. The written grounds of opposition filed by the contestant denied that the alleged will had been signed by the deceased, or had been by her declared to be her will in the presence of the witnesses, or at all, or that it had been signed by any witnesses, or that the deceased, at the time of the alleged execution thereof, was of sound and disposing mind and memory. The contest was tried before the court, without a jury, and the findings of the court were in favor of the proponent upon all the grounds of opposition.

It is earnestly contended that the evidence is insufficient to support the findings in regard to the execution of the will, the testamentary capacity of the deceased at the time, and the contents of the document found to have been executed as the will. It is sufficient to say with regard to these facts in dispute that the case comes within the rule that this court cannot decide contrary to the findings of the court below, where there is conflicting evidence, and there is substantial evidence tending to prove the facts found, and the additional rule that the trial court is the exclusive judge of the credibility of the witnesses testifying before it. There was no very satisfactory evidence that at the time of its execution the deceased made an express declaration to the subscribing witnesses that the document executed was her will, or expressly requested them to attest it. But an express declaration and request are not absolutely necessary. It is sufficient if, at the time, she did, by words or conduct, convey to them the information that the instrument was her will, and that she desired them to attest it as witnesses. There was evidence to the effect that the will was drawn at her request by her attorney; that it was executed in his office, and under the direction of his partner, who was also an attorney accustomed to such matters and familiar with the requirements of the law regarding such execution; that she said to him that she wanted him to call witnesses to this will of hers; that the two persons who signed as witnesses were then in the room; that he thereupon asked them to witness the execution of the document; and that immediately she and they signed the document in the presence of each other, she as testator and they as attesting witnesses, there being written after her signature and above theirs the usual attestation clause reciting the facts that they signed at her request and in her presence, and that she declared that it was her last will in their presence. This was sufficient to justify the court in finding a due execution of the will. The fact that some of the witnesses to the transaction could not recollect what occurred is not sufficient to require us to overthrow the findings, where there are enough circumstances and testimony, aside from theirs, to justify the inference that the will was properly executed, as is the case here. In re Tyler's Estate, 121 Cal. 409, 53 Pac. 928; Rugg v. Rugg, 83 N. Y. 592; Patton v. Hope, 37 N. J. Eq. 527; Cilley v. Cilley, 34 Me. 164; Barnes v. Barnes, 66 Me. 286; Allison v. Allison, 46 Ill. 61, 92 Am. Dec. 237.

It is claimed that there is no evidence that the will was in existence after the death of the deceased. It may be conceded that the evidence that there were signatures to the document found in her trunk after her death, and claimed to be the will, is not very strong. But we cannot say that it was insufficient. It was shown that the contents of the will were first dictated to a stenographer, who took down the dictation in shorthand, and that but one longhand draft was made thereof by the stenographer, and that this draft was typewritten. From this the inference follows that this draft was the identical paper which was signed by the testator and the witnesses. It was also shown by the contestant's testimony, and also by another witness, that after the death of the testator a typewritten document was found in her trunk, which was in all respects identical with the typewritten draft of the will made by the stenographer before its execution; but the contestant testified that it had no signatures appended, and the other witness claimed that she could not remember that it did. Their testimony on this point was somewhat hesitating, and, indeed, the contestant, in one of her answers, when testifying, said: "I just looked at the signatures." There was other testimony that the will was in the possession of the testator two days before her death, and was then produced by her and examined by one of her attorneys, who saw the signatures appended; that the testator declared that it was just as she wanted it; that it was then put back in her trunk and locked up; that between that time and her death she was unable to leave her room; and that a nurse was constantly in attendance upon her, who would have known, if any such transaction as the destruction of the will had taken place, and that she had no knowledge of any such occurrence. From these facts the court might properly have concluded that the will was not revoked or destroyed prior to her death, and that the testimony that the typewritten document bore no signatures was false.

Mrs. Beard was called by the proponents, and interrogated concerning the destruction of the will by the contestant after the death of the testator. It was she who, in connection with the contestant, testified to the finding of an unsigned copy of the will in the testator's trunk after her death. Her testimony as to the absence of signatures was very evasive, and generally negative, as, for example, that she did not remember seeing any signatures. She testified that she had a glance at the inside of the will. In further examination the following occurred: "Q. You didn't see any handwriting or pen writing on the paper at all? A. No, sir; I don't remember of any." This testimony by a friend of the only heir as to what she saw on the occasion of the finding of a paper in the form of a will in the testator's effects was some evidence tending to show that the paper was not signed. Her testimony indicated that she could have seen the signatures if there had been any, and, so far as it went, it was unfavorable to the proponents on the point. Over the objection of the contestant, and solely for the purpose of explaining to the court the reason for calling her as their witness, the proponent, after laying the proper foundation therefor, was permitted to prove that prior to the trial she had told proponent's attorney that on the occasion in question she had read the will; that it gave Della Sherbourne only one dollar, and gave the balance to the testator's brother and sisters, and made Mr. Hester her executor; and that it was signed by Mrs. Johnson and two witnesses. It is conceded that, where a witness is called to testify for a party as to a fact, and gives only negative testimony, as that he has no knowledge on the subject, or no recollection as to the existence or nonexistence of the fact, and his testimony cannot be said to be injurious to the party calling him, such party cannot be allowed to introduce evidence by way of impeachment to show that he made statements out of court to the party or his attorney, inconsistent with his testimony, and showing knowledge and recollection of the fact. People v. Creeks, 141 Cal. 529, 75 Pac. 101; In re Kennedy's Estate, 104 Cal. 429, 38 Pac. 93.

In case of a lost will proof of its existence at the death of the testator must be made by the proponent. Code Civ. Proc. § 1339. This witness and the contestant, so far as the proponent knew, were the only persons who had seen the will after the testator's death. The proponent was practically compelled to produce the witness. The impeaching evidence was offered, and was received by the court for the sole purpose of explaining the action of proponent's attorneys in calling the witness, and that they were surprised by her testimony. This was clearly stated at the close of the impeaching testimony, and was apparently understood and consented to by the contestant, for her attorney then responded: "Yes, sir; I understand that Mr. Stewart wants the testimony explained as far as that is concerned. That is all right." Under these circumstances the rule that, when a witness called by a party has no knowledge or recollection of the fact inquired of, and gives substantially no adverse testimony on the subject, explanatory testimony is inadmissible, is not strictly applicable. The testimony was evidently considered by the court and counsel as adverse and injurious to the proponent. We also think the contestant consented to the explanation, and cannot now complain, even if it were conceded to be inadmissible. The trial was had without a jury, and doubtless counsel were satisfied that the court could disregard the testimony so far as it tended to prove that there were no signatures.

When a proponent of a will, upon the trial, opens the proceedings by preliminary proof, as required by the statute, he may rely on the presumption that the testator was of sound mind at the time of the execution of the will. Such presumption is evidence in his favor. The circumstances attending such execution, and the conduct of the testator at the time, may also be considered on that point. In the present case the sanity of the testator was sufficiently established by this presumption and by the circumstances indicating that she was at the time acting in a rational manner. This evidence may have been slight; but it was sufficient to make out a prima facie case, and it fully warranted the denial of the motion for a nonsuit, or dismissal of the cause, made by the contestant at the close of the proponent's preliminary proof.

The absence of one of the subscribing witnesses was sufficiently explained. The persons who were believed to be the subscribing witnesses were called to testify. One of them had no recollection whatever of the matter. The other testified to the execution of the will, and the attestation by himself and the other person as witnesses. The attestation of a will is not a matter of great importance to the witness, and a failure by such persons to remember the occurrence is not so unusual as to justify the refusal of probate on that account, if there is other satisfactory evidence of the due execution.

With respect to the insufficiency of the proof of the destruction of the will, we may add that, if the court believed from the facts we have mentioned that the will was in existence after the death of the testator, and that it was locked in her trunk a day or two before her death and while she was in her last sickness, it may have believed the testimony of the two witnesses, Della Sherbourne and Mrs. Beard, to the fact of the destruction of the paper found in the said trunk, and have refused to believe their statements that it was unsigned. This was a matter addressed to the conscience of the trial judge, and we cannot interfere with his decision on the subject.

The judgment admitting the will to probate and the order refusing a new trial are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

152 Cal. 772

CRANDALL v. PARKS. (L. A. 1,923.)

(Supreme Court of California. Jan. 31, 1908.)

1. Appeal — Review — Scope and Extent — Time of Appeal — Sufficiency of Evidence.

Under the express provisions of Code Civ. Proc. § 939, subd. 1, an exception to a judgment, because not supported by the evidence, cannot be reviewed, where appeal from the judgment is not taken within 60 days after its rendition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1888.]

2. Pleading—Answer—Admissions by Failure to Deny.

In an action to rescind an exchange, a denial that a representation was made at all did not make an issue on the allegation of the complaint that defendant knew, when making the representation, that it was untrue, and hence under the express provisions of Code Civ. Proc. § 462, it was admitted that the representation, if made, was made with knowledge that it was untrue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1228.]

3. Exchange of Property—Action to Rescind — Trial—Findings of Fact—Sufficiency—Admissions in Pleadings.

In an action to rescind an exchange, a finding that defendant knew that a representation was untrue, or that, if he believed it true, the representation was not warranted by the information he had, Civ. Code, § 1572, was unnecessary, where it was admitted that he knew the representation was untrue, under the express provisions of Code Civ. Proc. § 462, by a failure to deny that allegation of the complaint.

4. Fraud — Fraudulent Representations — Matters of Fact or of Opinion.

A representation that one had owned land for about 15 years, had lived thereon, and was well acquainted with its quality and value, and that the actual value thereof was a specified amount an acre, was a representation of fact, within the rule that, where a party states a matter which might otherwise be only an opinion as a fact, so that the other party may reasonably so treat it, then the statement is not of opinion, but a representation of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 12, 13.]

5. Same—Reliance on Representations.

On an exchange of property, one party may rely on the representation of the other as to the value of land remotely situated in another state, which he has never seen, and cannot personally examine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 20.]

6. Same.

On an exchange of property, one party may rely on the representation of the other as to the ownership of personal property.

Department 1. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by H. J. Crandall against R. N. Parks. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

W. H. Francis and Dadmun & Belieu, for appellant. F. P. Willard, for respondent.

ANGELLOTTI, J. Defendant appealed from a judgment rescinding a contract for the exchange of property, and from an order denying his motion for a new trial. The appeal from the order denying a new trial has been dismissed. The appeal from the judgment was not taken within 60 days after its rendition and entry, and therefore the exceptions to the decision on the ground that it is not supported by the evidence cannot be reviewed. Code Civ. Proc. § 939, subd. 1.

It is claimed that the findings are not sufficient to support the judgment. They show substantially the following facts: Plaintiff was the owner and in possession of certain land in San Diego county, in this state, of the value of $2,500, and certain personal property thereon of the value of $214. Defendant, for the purpose of inducing plaintiff to exchange the same for 80 acres of land in the state of Oregon owned by him, and a restaurant outfit in the city of San Diego in this state, claimed to be worth $400, and found not to exceed $225 in value, represented to plaintiff that he had owned the Oregon land for about 15 years, had lived thereon, and was well acquainted with its quality, character, and value, and that the reasonable and actual value thereof was $40 per acre, and also that he was the owner of the restaurant outfit, including a hot water tank and an ice chest or refrigerator of the value of $40. The value of the Oregon land did not in fact, exceed the sum of $500, or $6.25 per acre. Neither the hot water tank nor refrigerator belonged to defendant. Plaintiff never saw the Oregon land, and had no knowledge as to its value, nature, or quality, except the statements of defendant in regard thereto, and he had no information as to the ownership of the restaurant outfit, except that given him by defendant. Defendant knew this. An exchange of the properties was effected, plaintiff being induced to make the same solely by reason of such representations as to value and ownership, upon which he wholly relied. Defendant well knew the plaintiff in making the exchange relied and acted solely upon these representations.

There was no finding that defendant knew or believed at the time he made the representation as to the value of the Oregon land that the same was untrue, or that, if he believed it true, the representation was not warranted by the information he then had, and defendant urges that, in the absence of such element, there was no fraud on his part. Civ. Code, § 1572. There was, however, no necessity for such a finding in view of the state of the pleadings. The complaint alleged, in terms, that defendant knew at the time he made said representation to plaintiff that it was false and untrue. This allegation was not denied by the answer, the defendant resting upon a denial that he made the representation at all. This denial did not make an issue upon the question of defendant's knowledge as to the falsity of the representation, if made. The only issue was as to whether the representation was made. If made, it was admitted by the failure to deny in the answer that it was made with knowledge that it was not true. The allegation of the complaint in this behalf, not being controverted by the answer, must, for the purposes of the action, be taken as true. Code Civ. Proc. § 462. A finding is not necessary as to a fact admitted by the pleadings, as where a fact is alleged in the complaint and not denied in the answer. First Nat. Bank v. Maxwell, 123 Cal. 366, 55 Pac. 980, 69 Am. St. Rep. 64. It is therefore unnecessary to consider further defendant's contention on this point. What we have said in regard to the representations as to the Oregon land is equally applicable to the representation as to the ownership of the articles of personal property of which defendant was not the owner.

It is claimed that the representation as to the value of the Oregon land was nothing more than a mere expression of his own opinion as to the value on the part of the defendant, and therefore that an action will not lie on account thereof. This, however, is not the effect of a fair construction of the findings. A statement as to the value of property is not always made as a mere expression of opinion upon which the other party has no right to rely. It may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made. When it is such, it is like any other representation of fact, and may be a fraudulent misrepresentation warranting rescission. The rule in regard to this matter is stated by Mr. Pomeroy as follows: "Wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation." 2 Pom. Eq. Jur. § 878. He further says that the statements which most frequently come within this branch of the rule are those concerning value. There is nothing in the opinion in Norris v. Crandall, 133 Cal. xix, 65 Pac. 568, in conflict with this view. The court was there discussing the question of the sufficiency of the evidence to sustain the conclusion of the trial court that there was no fraudulent misrepresentation of fact, and, in affirming that conclusion, said, in effect, that the evidence was sufficient to sustain a conclusion that the expression as to value was made and understood as a mere expression of opinion only. The court there said, in accord with the rule we have stated, that there would be force in the appellant's contention, "if the evidence compelled the conclusion that the exchange of properties was brought about by a false statement of value by defendants, made as a substantive fact on which plaintiffs relied as a fact, and not as defendant's opinion as to the fact." The findings sufficiently bring the case within the operation of this rule.

That plaintiff never made or commenced any investigation for himself as to the value of the Oregon land or the ownership of the personal property, that he believed and relied solely on the statements and representations of defendant in regard thereto, and that he was induced to make the exchange solely by reason thereof, are all fully established by the findings, which are conclusive upon this appeal. We know of no reason why defendant should be allowed to maintain that plaintiff was not entitled to rely, without investigation on his part, upon a representation as to the value of land so remotely situated, which he had never seen and could not personally examine—a representation, "to the truth of which the party has deliberately pledged his faith." See Dow v. Swain, 125 Cal. 681 to 684, 58 Pac. 272 to 274. He was clearly entitled also to rely upon the representation as to the ownership of the personal property. Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 899, is not in point. There the party had not relied on the representation made at all, but had investigated for himself as to the truth thereof, and was charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness.

Complaint is made that the trial court erred in admitting the evidence of three witnesses as to the value of the Oregon land, the objection being that they were not sufficiently shown to be qualified to testify as experts concerning such value. No such specific objection appears to have been made in the lower court, the only objection there made being the general objection that the proposed testimony was immaterial, irrelevant, and incompetent. This was hardly sufficient to bring to the attention of the trial court the objection now made. However this may be, the evidence in the record was sufficient to warrant a ruling that the witnesses were qualified to testify on the subject.

There is no other point made by defendant that is available to him on this appeal.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

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152 Cal. 785

STEELE v. SAN LUIS OBISPO COUNTY.

(L. A. 1,998.)

(Supreme Court of California. Jan. 31, 1908.)

TAXATION—RECOVERY OF TAXES PAID—IRREGULARITIES.

Pol. Code, § 3682, requires the clerk of the board of supervisors, when delivering the assessment book after equalization by the board to the county auditor, to make his affidavit that as clerk he has kept correct minutes of all the acts of the board, and that all alterations in assessments directed have been made and entered, and that no alterations have been made therein, except those authorized. Section 3732 requires the auditor, after computing the taxes, to deliver the corrected assessment book to the tax collector, with his affidavit attached thereto that he received the assessment book from the clerk of the board of supervisors, with his affidavit affixed thereto, and that he has corrected it to conform to the requirements of the state board of equalization, etc. Section 3819 provides for the recovery of taxes paid on void assessments. The affidavit required by section 3682 did not accompany the assessment book for a certain year, and was not made until two days before the day noticed for the sale for delinquent taxes. The affidavit of the auditor was never made. No change or alteration of any kind had been made by the board of supervisors, and the county auditor had complied with the law as to the computing of the taxes, and delivered the book at the appointed time. *Held*, that an owner of property who paid taxes on his property on the day of the sale for delinquent taxes, under protest to prevent such sale, cannot recover the amount so paid, because of the failure of the clerk and auditor to attach their affidavits to the assessment book.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 996.]

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by T. J. Steele against county of San Luis Obispo. Judgment for defendant, and plaintiff appeals. Affirmed.

McD. R. Venable, Albert Nelson, and Wm. Shipsey, for appellant. Charles A. Palmer and W. H. Spencer, for respondent.

ANGELLOTTI, J. This is an action to recover certain state and county taxes for the fiscal year 1904-05, with penalties and costs, paid by plaintiff and his assignors under protest. Defendant had judgment, and plaintiff appeals from such judgment and from an order denying his motion for a new trial.

The payments were made by the taxpayers on the day noticed by the tax collector for the sale of the property for delinquent taxes, and were made for the purpose of preventing such sale and the issuance of certificates of sale thereon. The basis of plaintiff's claim was the failure of the clerk of the board of supervisors, when delivering the assessment book after equalization by the board to the county auditor, to accompany the same with his affidavit, as required by section 3682 of the Political Code, and the failure of the auditor to make or attach to the assessment book the affidavit required by section 3732 of the Political Code. Section 3682 requires the clerk to accompany the book with his affidavit to the effect that as clerk of the board he has kept correct minutes of all the acts of the board touching alterations in the assessment book, and that all alterations agreed to or directed to be made have been made and entered in the book, and that no changes or alterations have been made therein except those authorized. No such affidavit was made by the clerk when he delivered the book, or until after publication of the delinquent list and notice of sale. Two days before the day noticed for sale he did make, subscribe, and attach to the book an affidavit in the form prescribed by the section of the Code. Section 3732 requires the auditor, after computing the taxes on the various assessments, to deliver the corrected assessment book on or before the second Monday in October to the tax collector, with an affidavit attached thereto, and by him subscribed, stating that he received the assessment book of the taxable property from the clerk of the board of supervisors, with his affidavit thereto affixed, and that he has corrected it and made it to conform to the requirements of the state board of equalization, and that he has reckoned the respective sums due on taxes, and has added up the columns of valuation, taxes, and acreage, as required by law. This affidavit was never made. As a matter of fact, no change or alteration of any kind had been made by the board of supervisors or clerk in said assessment book, and the county auditor had complied with all requirements of the law as to the computing of the taxes fully and completely, and delivered the book with the taxes so computed thereon to the tax collector at the appointed time. The various assessments were in all respects valid save for the omission of such affidavits, and the amounts designated as taxes opposite the respective assessments were the amounts of taxes due from the various taxpayers for state and county taxes for the fiscal year 1904-05.

We are satisfied that under such circumstances the plaintiff should not be allowed to recover the taxes paid by him and his assignors. It may be conceded, in accord with the decision of this court in Miller v. County of Kern, 137 Cal. 521, 70 Pac. 549, that without such affidavits annexed to the assessment book the assessments were defective and not legally enforceable by the tax collector. They were defective and nonenforceable, however, solely because they were not properly authenticated by affidavits of the clerk and auditor showing certain requisites to have been complied with. When it was made to appear in this action that all such requisites had in fact been complied with by these officers, there was presented simply a case of taxpayers who have paid only their fair and just proportion of the taxes levied for the year, seeking to recover the same upon what has been made to appear is, under the facts, a most technical defect in no degree affecting any substantial right. Such a case is clearly subject to the doctrine enunciated in Couts v. Cornell, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168. That action, it is true, was one in equity, the plaintiff seeking a decree declaring certain assessments and the sales and certificates thereunder invalid because of a technical defect in the description of property in the assessment, and enjoining the issuance of any deed in pursuance of such certificates. But the rules based upon the maxim that he who seeks equity must do equity are applicable in suits to recover taxes paid. The idea upon which such a suit is predicated is that the county or municipality has received that which in justice it ought not to retain, and therefore, when the proceedings have been simply irregular, the action will not lie. There must be something further. The tax must be void, a mere nullity. Cooley on Taxation (3d Ed.) p. 419. Section 3819, Pol. Code, providing for the recovery of taxes paid on void assessments, was not intended to lay down any different rule. In accord with the views expressed in Couts v. Cornell, supra, plaintiff and his assignors, under the facts here appearing, justly owed the several amounts of taxes charged against them on the assessment book. There was a valid existing obligation upon them to pay such taxes. Assuming that payment thereof could not have been enforced in the absence of the affidavits required by statute, and that a sale by the tax collector under those conditions would not have passed the title, that case establishes that they could not, without paying or offering to pay the taxes due, have obtained a decree relieving their property from the cloud created by the assessment or preventing the execution of a deed purporting to convey that property for delinquent taxes. Instead of asking this well-recognized equitable relief, they have discharged their obligations by paying the amount thereof, and now claim to be entitled to recover the amounts they owed and paid, not on the ground that they did not justly owe the same, but solely because of what has been shown to be a technical omission in the assessment book by the clerk and auditor. The answer to their claim must be the same as was the answer to the claim of plaintiff in Couts v. Cornell, supra.

No special claim has been made in regard to such portion of the amount as was paid for penalties and costs, and we have therefore not felt called upon to consider whether a recovery should be had therefor, even though the taxes themselves are not recoverable. Plaintiff and his assignors are entitled to no particular consideration in this regard, as it must have been apparent to them that they were relying upon a pure technicality to save them from paying the taxes they justly owed.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.

STEELE v. KELSHAW, Treasurer, et al. (L. A. 1,997.)

(Supreme Court of California. Jan. 31, 1908.)

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by T. J. Steele against John Kelshaw, Treasurer, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

McD. R. Venable, Albert Nelson, and Wm. Shipsey, for appellant. Paul M. Gregg and Spencer & Burnett, for respondents.

ANGELLOTTI, J. This action, to recover certain special high school taxes paid under protest, presents the same questions as to invalidity of assessment and tax as those presented and determined in the case of Steele v. County of San Luis Obispo (L. A. 1,998) 93 Pac. 1020, this day decided. No recovery was sought herein of any sums paid as penalties for delinquency or for costs. The decision in that case requires an affirmance of the judgment and order in this case.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

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152 Cal. 655

VERDUGO CANON WATER CO. et al. v. VERDUGO et al. (L. A. 1,797.)

(Supreme Court of California. Jan. 23, 1908.)

1. WATERS—RIPARIAN RIGHTS.

Where land in one common ownership is riparian to a stream, the waters thereof, including not only the surface stream, but also the underground flow constituting a part of the stream, are not merely appurtenant to the land as a right acquired by prescription or appropriation, but are a part of the land itself as parcel thereof.

2. Partition—Decree—Construction.

A decree which partitioned land riparian to streams, and which apportioned the waters thereof to separate tracts, did not change the character of the rights of the respective parties to the waters of the streams; but the right assigned to each tract was a riparian right.

3. Waters—Subterranean Waters—Diversion.

A party will not be permitted to decrease underground waters essential to the existence and preservation of surface water, to the depletion of the surface water, to the injury of those to whom the surface water has been assigned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 113.]

4. Partition—Decree—Construction.

Where a decree which partitions lands riparian to streams apportions the waters thereof, without specifically disposing of the underground waters, the underground waters essential for the preservation of the surface streams undiminished cannot be diverted; but the surplus belongs to the riparian lands to be used by the owners in accordance with the law of riparian rights, except that the partition cuts off from this right all lands except those tracts which extend to some portion of the underground flow.

5. Waters—Subterranean Waters—Well-Defined Channel.

Lands riparian to a stream, divided in part of its course into distinct channels, was partitioned, and the waters of the stream were apportioned among the various tracts, without specifically disposing of the underground flow. Practically all the lands were alike riparian to the whole of the stream constituted by the underground flow. *Held* that, in determining the right to use the underground flow, it must be treated as one stream, and each parcel of land is entitled to its share thereof, whether it comes from the underflow supporting the particular surface stream set apart for it by the partition, or from some other part of the underflow, except that no owner may diminish the surface stream to the injury of any party entitled to it; the riparian rights below including the right to prevent undue interference with the underflow above.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 109.]

6. Same.

Necessity is not the sole measure of right to unappropriated underground water, and in a suit to restrain one from appropriating for irrigation purposes underground water a finding that he has never taken or used more water than reasonably necessary for the proper irrigation of his land is insufficient, since his right is limited to a proper proportion of the underground water as compared with the rights of others.

7. Same.

In a suit to restrain defendant from taking underground waters to the depletion of a surface stream, evidence *held* to require the court to ascertain whether the taking has depleted the surface stream, and to determine the amount of the decrease of the surface water resulting from the taking, and to enjoin defendant from decreasing the surface flow, unless plaintiff was estopped from asserting his rights.

8. Same.

To establish the right to an injunction to restrain the taking of water, it is not necessary that plaintiff should be able to prove the extent of his injury with absolute precision, and where the taking of water by defendant is a wrongful taking of that which belongs to plaintiff, and is of substantial quantity, and causes him substantial injury, the court is not excused from making any finding on the subject by the fact that the evidence is indefinite as to the exact quantity taken or the exact amount of the injury.

9. Same.

One whose water supply has ceased is not on that account entitled to use the supply of another, and the fact of the failure of his own water supply has no bearing on the question, except to show that he was acting from necessity, and not from a wanton desire to appropriate to himself the property of others.

10. Same.

Where one sunk a well on his land, and pumped underground water for his private use, and thereby interfered with the rights of another, the latter is not limited to an action for damages; but in a proper case he may obtain an injunction to restrain the continuance of the wrongful act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 117.]

11. Same.

Defendant sunk a well on his land, and pumped underground water for his own use, and thereby interfered with the water rights of plaintiff. It did not appear that defendant was induced to sink his well by any act or word of plaintiff, or that he relied on the silence of plaintiff as evidence of his own right or of plaintiff's consent; nor did it appear that plaintiff intended that defendant should act in reliance on his silence, or expected that he would do so. It was not shown that plaintiff was under any duty toward defendant to disclose any claim he might have to the water, nor that defendant did not know, as well as plaintiff, that the pumping of the well would decrease plaintiff's water. *Held*, that plaintiff was not estopped from maintaining a suit to restrain defendant from continuing to take water.

12. Estoppel — Nature — Permitting Improvements.

A party, to be estopped, must intend, or must be so situated that he should be held to have expected, that the other party shall act, and the other party must, by words, conduct, or silence of the first party, be induced to do what he would not otherwise do; but the mere fact that the latter expended money in improvements on his own land with the knowledge of another and without objection from him creates no estoppel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 264–267.]

13. Same.

A mere passive acquiescence, where one is under no duty to speak, does not raise an estoppel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 285–287.]

14. Equity—"Laches."

The defense of laches does not rest entirely on lapse of time; but to constitute laches there must be something more than mere delay by plaintiff, accompanied by an expenditure of money or effort on the part of defendant, and it must also appear that it will be inequitable to enforce plaintiff's claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 212, 213.

For other definitions, see Words and Phrases, vol. 5, pp. 3970, 3971; vol. 8, p. 7700.]

15. Waters—Irrigation—Determination of Rights—Laches.

Plaintiffs and defendant being tenants in common of the rights in an underground water flow, defendant sank a well on his own land, and erected a pump and a distributing system to irrigate his own land. *Held*, in proceedings to determine the several rights in the water, that defendant could not urge that plaintiffs were guilty of laches in permitting his expenditure without complaint, since there was nothing in the mere erection of the water plant which would invade plaintiffs' rights and call for protest from plaintiffs; such invasion being committed only by the pumping of an excessive amount of water, and since after the commencement of the pumping plaintiffs had done nothing to induce defendant to believe plaintiffs assented to defendant's act.

16. ESTOPPEL — NATURE—ACTS CONSTITUTING ESTOPPEL.

One embarking with others in a common enterprise to use common property for the common benefit at a common expense owes to the others the duty, where he proposes to reserve a part of the benefit to himself exclusively, to inform the others fully in regard to it; and where he does not he is estopped from asserting his claim after the others have incurred the expense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 285–287.]

17. SAME—EVIDENCE—SUFFICIENCY.

Circumstances *held* not to show that one was estopped from taking by means of pumps his reasonable share of underground waters for use on his land for irrigation.

18. SAME—NATURE OF ESTOPPEL.

No estoppel can exist, unless the party invoking it was led to place himself in the prejudicial position in part, at least, by his own ignorance of the rights of the other party, or his own lack of knowledge of the true state of the title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 138.]

19. SAME—EVIDENCE—SUFFICIENCY.

Evidence *held* to show that defendant is estopped to take by means of pumps underground water above a dam erected by him and plaintiff for their common benefit and at their common expense, and use the same on lands below the dam, so far as the same will decrease the amount that will flow to and be intercepted by the dam.

20. WATERS—APPORTIONMENT.

Land riparian to a stream was partitioned, and the waters of the stream were apportioned among various tracts, without specifically disposing of the underground flow. Some of the owners of the land entitled to a certain proportion of the stream erected a dam at their joint expense for the purpose of intercepting underground waters. *Held*, that no person above or below the dam should be allowed to take by means of pumps more than his reasonable part of the available surplus waters of the underground waters, where such taking affected the surface stream or prevented another person from obtaining his reasonable share, and no person of those entitled to use the water collected by the dam could pump water above the dam for use on his lands below, where such pumping decreased the flow at the dam; and the rights in the surplus of the underground waters must be adjusted by ascertaining the total average amount available and the amount required by each party when used economically, and on that basis apportioning to each his share.

Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by the Verdugo Cañon Water Company and others against Teodoro Verdugo and others to quiet title to water rights. From a judgment quieting title, plaintiffs and defendant E. M. Ross appeal. Reversed.

Works, Lee & Works, for appellants, Verdugo Cañon Water Co. et al. J. S. Chapman, Graves, O'Melveny & Shankland, Hunsaker & Britt, and Robert E. Ross, for appellant Ross. H. H. Appel, for respondent Verdugo. John S. Chapman, Hunsaker & Britt, Graves, O'Melveny & Shankland, Robert E. Ross, and Catesby E. Thom, for respondent Thom.

SHAW, J. The plaintiffs herein appeal from the judgment and from an order denying their motion for a new trial. The defendant E. M. Ross appeals from certain parts of the judgment. All the appeals are presented upon the same record.

The action is by the Verdugo Cañon Water Company and some 300 other persons, who are its stockholders, to determine and quiet title to certain water rights claimed by them in a stream of water flowing in the Verdugo Cañon, and to enjoin the defendants from taking the water alleged to belong to the plaintiffs. It is alleged that the plaintiffs other than the corporation are the owners of lands bordering on the stream; that as such landowners they have the right to take three-fourths of its waters, flowing above and below the surface of the ground, for use on their lands, in proportion to the area of the respective holdings; that the corporation was organized for the purpose of diverting said waters from said stream and distributing them to the plaintiffs and other persons entitled thereto; that it has constructed works, pipes, and ditches for that purpose, and is now engaged in said diversion and distribution; and that the defendants claim adversely the waters to which the plaintiffs are entitled, and without right are taking and using said waters, to the plaintiffs' injury.

The lands comprising the La Canada Ranch and the San Rafael Ranch in Los Angeles county were, prior to 1871, held in common ownership by a number of persons. The two ranches adjoined; La Canada lying north of San Rafael. In that year, in an action between them for that purpose, a partition of the two ranches was made by judicial decree. Verdugo Cañon begins near the base of Sister Elsie Mountain in La Canada Ranch, and extends from thence southerly across the line between the two ranches and for several miles into the San Rafael Ranch, where, after passing through a rather narrow gorge, it opens or expands into a wide plain, forming part of what is usually known as the "San Fernando Valley." The floor of the cañon is comparatively level, and varies in width from about 700 feet to something over 1,800 feet, with high hills or mountains on each side. In these mountains are a number of side cañons in which small rills flow; the water sinking in the ground either before or immediately after reaching the floor of the cañon. During times of heavy rain, and for a few days afterward, a stream of water flows down the cañon, through all the lands in controversy, and into the Los Angeles river, some distance below. This is of infrequent occurrence, and, as it has no particular bearing upon the questions presented, no further consideration need be given to it.

At the time the partition decree was made, three streams arose in the cañon, within the San Rafael Ranch, and flowed for some distance separately, and then united and flowed for some distance on the surface down the cañon, finally sinking in the sand and gravel. These streams oozed out of the loose material composing the bed of the cañon at three places nearly of the same level or altitude, almost on the same line extending laterally across the cañon, and near the northerly line of the "cañon tract" hereinafter mentioned. One arose near the east side and somewhat further up the cañon than the other two. It is called the "east side stream." The other two arose nearer the western side, and united in a single stream before joining with the east side stream. The stream composed of these two is called the "west side stream." In partitioning the ranches the waters of these streams were apportioned among and set apart to certain of the lands assigned in severalty. A tract of 2,629.01 acres, much of it unfit for irrigation, was set off to the defendant Teodoro Verdugo. It embraces the entire cañon from the narrows for several miles toward the north and includes the places whereon the aforesaid streams arose to the surface. It will here be designated as the "cañon tract." The east side stream, so far as required, was set apart to the cañon tract for irrigation and other uses thereon. The combined west side stream, and any surplus of the east side stream remaining after the cañon tract was supplied therefrom, were set off to a large body of land situated on the plain below the narrows, for irrigation and other uses thereon. These lower lands covered an area of about 3,333 acres, and were generally fit for irrigation. They were divided and set off in severalty in tracts of various areas to 21 different owners. For convenience of designation the west side stream was divided into 10,000 parts. It was apportioned to the land at the ratio of three ten-thousandths of the water to each acre of the land. A large part of this 3,333 acres was afterward subdivided and sold in smaller tracts, each having its proportionate share of the waters, originally assigned. The plaintiffs are the owners of about three-fourths of the land to which this water was assigned, and the defendants C. E. Thom and E. M. Ross, respectively, each own about one-eighth thereof. The land of the plaintiffs, collectively, is entitled to three-fourths of this water, and that of Thom and Ross, respectively, to one-eighth thereof. The Verdugo Cañon Water Company diverts this water for all the interested parties, including Thom and Ross, by means of dams and diverting works to the expense of which Thom and Ross contributed one-eighth each. Their shares of the water are delivered to their respective pipes near the diverting works. The defendant E. M. Ross has also become the owner of several hundred acres of land of the cañon tract, and has an orchard of about 100 acres thereon, upon which he uses water from the east side stream for irrigation.

In 1871, and for years thereafter, there appears to have been sufficient water in the streams for all the uses to which it was then applied by the persons entitled thereto. As years passed, the area of land set out to orchards, vineyards, and other fruits by the plaintiffs and defendants was very much increased, and the orchards of citrous fruits also required more and more water as they grew older, so that about the year 1891 the water began to be insufficient. In the year 1893 a series of dry years began, and they continued until 1902, when the present action was begun. From the increased demand and the decreased supply the result has been that during and after 1893 the water naturally flowing on the surface was not enough to keep alive and properly nourish the trees and plants on the land entitled to share in it. From time to time the parties, or some of them, increased their individual supply of water by sinking wells deep in the strata of sand and gravel underlying the bed of the cañon and the plain below, and pumping water therefrom. For a like purpose in 1894 the Verdugo Cañon Water Company and the defendants C. E. Thom and E. M. Ross jointly purchased about 8 acres of land, part of the cañon tract, situated at the head of the narrows, and extending across the cañon from the west wall towards, but not quite reaching, the east wall thereof. Upon this tract, at joint expense, in the proportion of three-fourths to the company and one-eighth each to Thom and Ross, they have constructed what is called a submerged dam, part of its length consisting of a cement wall and part of wooden cribs, by which the water flowing underground in the sand and gravel of the cañon is collected and diverted, and this water has ever since then been distributed to the respective parties along with the surface flow of the west side stream, and in the same proportion. This dam, so far as it has been constructed, is about 500 feet long, including the cribs. Further construction thereof ceased in 1896. For many years past all the waters of the east side stream have been used on the cañon tract, and there has been no surplus therefrom to add to the waters of the west side stream.

In 1898 E. M. Ross sunk a well in the cañon at a point about 1,000 feet above the submerged dam, and near the east side of the cañon, in lands constituting a part of the cañon tract. The well was completed in March, 1899, and in May, 1899, he began pumping, and has ever since then, during the irrigating seasons, pumped therefrom a stream of water averaging a flow of 18 miners' inches flowing under 4-inch pressure. He has used this water on land in the cañon tract, and also on other lands, and he claims the absolute right to use it on any other land, as he pleases, without regard to the effect on the amount of water collected by the dam, or flowing in the west side stream. In 1897 Teodoro Verdugo sunk a well in the cañon and placed a pump therein some 2 miles above the dam and near the point where the streams formerly rose to the surface, which he began to pump in the spring of 1898, and from which he has ever since, during the irrigating seasons, pumped a stream of about 35 miners' inches of water, which he has used to irrigate lands in the cañon tract, claiming the right to do so. The defendant C. E. Thom also has three wells near, but above, the Verdugo well, from the easterly one of which he claims the right to pump water for irrigation of his land below the dam, or upon any other land; but no water has been pumped therefrom. Thom and Ross have each put down wells in the cañon, at a point about 1,500 feet below the dam, from which they each pump water to irrigate land of the San Rafael Ranch below the dam and entitled to water from the west side stream under the decree, and each claims the right to continue to do so. These several diversions of underground water by the defendants for their exclusive use, and these claims of right to do so, occasioned this suit.

1. The partition decree did not change the character of the rights of the respective parties to the waters of the cañon. It created no new rights or estate therein, but merely divided and apportioned the pre-existing rights and estates. Prior thereto the lands were in one common ownership, and the part of the San Rafael Ranch here involved was all riparian to that stream. Its waters were therefore not merely appurtenant thereto, as a right acquired by prescription or appropriation would be, but were a part of the land itself, as parcel thereof. This was the case with respect to each of the three surface streams then flowing, and also with respect to all the underground flow which constituted a part of said streams. In making the partition of these waters the right to the use of the surface streams, which previously attached to the entire ranch, was completely severed from the other parts thereof and transferred to the lands to which water was assigned. The right thus assigned to each tract by the partition was a riparian right, and it continues to possess that character, with all its attributes, since the partition as fully as before. With respect to the two surface streams, known as the "east side stream" and the "west side stream," respectively, the partition effected a complete separation of the waters; the east side stream being given so far as necessary, and for many years past this has meant all of it, to the cañon tract exclusively, and the west side stream exclusively to the lands below the mouth of the cañon. The water of this west side stream was not actually separated among the owners of the several tracts. It was merely apportioned between them, giving to each in common a certain number of undivided shares of the whole. It is obvious that the continued presence in the soil, sand, and gravel composing the bed of the cañon of a sufficient quantity of water to supply and support these surface streams in their natural state is essential to their existence and preservation, and that the parties have as clear a right to have this quantity remain underground for that purpose as they have to the stream upon the surface. Neither party should be permitted to decrease this necessary quantity of underground water, to the depletion of the surface stream and the injury of those to whom it has been assigned. This much is clear from the previous decisions of this court. Los Angeles v. Pomeroy, 124 Cal. 621, 57 Pac. 585; McClintock v. Hudson, 141 Cal. 280, 74 Pac. 849; Cohen v. La Canada Co., 142 Cal. 439, 76 Pac. 47. And it is conceded by all the parties, except the defendant Verdugo.

The partition did not specifically deal with or dispose of the underground waters. The only right concerning them which is affected by it at all was the right to have them remain undisturbed for the preservation of the surface streams undiminished, and this is a mere incident arising from the necessity of keeping the disposition of the surface flow effectual. There may possibly be a quantity of this underground water which could be taken without affecting the surface streams, even if taken above the point where the surface water is diverted into flumes or ditches. The defendants claim that there is a large amount thus available for use. All of the underflow, whether necessary to preserve the surface flow above or not, becomes available for such taking as soon as it passes below such points of diversion. The right to make use of all such surplus still belongs to the lands riparian thereto in the same manner as before the partition. The partition cut off from this right all lands of the ranch set off to the different parties in severalty, except those tracts which extended to some portion of the underground flow; but otherwise the right to the surplus was not affected by the decree. The underground water thus undisposed of is not to be distinguished, so far as legal rights thereto are concerned, from a similar surplus remaining in a surface stream after a partition had been made allotting certain parts thereof, less than the whole, to the use of the riparian owners. For illustration, suppose that, in a partition of lands riparian to a surface stream of 1,000 miners' inches, the amount of 500 inches is allotted to the several tracts in fixed proportions. The right to the use of the 500 inches not so apportioned would in such a case, as between those parties, still remain attached to the riparian lands as a riparian right, unaffected by the provisions of the decree fixing the proportions in which the parties are entitled to use the water expressly set apart to them. So in the present case the underground water was not set apart, and the available surplus thereof belongs as before to the riparian lands, to be used by the owners in accordance with the law of riparian rights. The relative rights of the parties in this surplus are to be determined by that law, without aid from the partition decree. The fact that the stream above, at some point in its course, is divided into distinct channels, does not affect the right of the lands below to share in the use of both or all of them. All of the lands concerned in this action, or practically all of them, are, it appears, alike riparian to the whole of the stream constituted by this underflow. For the determination of present rights to its use, it must be treated as constituting but one stream. Each parcel of land, therefore, is entitled to its proper share of the entire underflow, without regard to the question whether it comes from the underflow supporting the particular surface stream set apart for it by the partition, or from some other part of the underflow, always, of course, saving the proposition that no owner may, by extracting the underflow, diminish either surface stream to the injury of any party entitled to it.

It is to be noted that the plaintiffs are not entitled by the decree to three-fourths of all of the surface flow of the cañon, but only to three-fourths of the west side stream and of the surplus of the east side stream, when there is any. The court below appears to have adopted the view that the separation of the right to the surface streams by the partition accomplished a like separation of the right to all of the underground waters, both of the parts thereof necessary to sustain the surface flow and of the surplus. It made a finding attempting to designate on the surface of the ground a boundary line separating these two supposed underground streams, and declaring that the waters thereof, respectively, and the right to pump and use the same, belonged to the parties entitled under the partition to the respective surface streams. This declaration of right was not expressly stated in the decree; but some of the provisions thereof, as will presently appear, are obviously based upon it. In this theory the court was in error, and for this and other errors, to be presently discussed, the judgment and order must be reversed. Other points are presented in the record which may again be involved upon a new trial. We now proceed to the consideration of these propositions.

2. The finding is that the underground flow in the cañon is in two separate and distinct streams; one giving rise to the east side surface stream, and the other to the two streams composing the west side surface stream. The boundary line between them was declared to be the easterly line of a certain "inclosed field" mentioned in the partition decree. The evidence shows that the general course of this line is north and south, that it is located about midway of the bed of the cañon, and that it has many sharp angles, so acute, indeed, that it would be extremely remarkable, if not impossible, that there could be any natural impervious barrier having such a course. There is no evidence to indicate that there is any difference in the material of the bed of the cañon corresponding to this line, or anything therein that could thus divide or separate the underflow. The finding as to this line of separation was purely arbitrary and entirely without support. The fact that the streams arose in different places, and the circumstance that, as the dry years continued and the places where they arose receded further and further down the cañon, the line of these places followed the previous course of the respective streams, constitute some evidence that the density or permeability of the material of the parts of the cañon bed, corresponding to the previous courses of the streams, is different from the adjacent parts thereof, and that the space between them is less porous than the lines of these streams. There is no finding, however, and no evidence, that the separation is so complete that the pumping of water from one of them will not affect the flow, above or below the surface, in the other; and this is the vital point in the case. It is unlikely that it is so, since, wherever there have been explorations in the cañon beneath the surface, the material has been found to be practically homogeneous and equally permeable throughout. But as the right to the use of the surplus underflow remains undivided, and the riparian rights of the lands below include the right to prevent undue interference with either branch of the underflow above, supposing that there are two or more branches, and as the cañon tract extends to all of them, the question of the separation of the underground flow is of no consequence in the present stage of the case.

3. Driven by the necessity arising from the increased acreage irrigated and the scant supply of water after the year 1892, many of the plaintiffs have been compelled to obtain water for their lands from wells sunk thereon. This water lies in the sands and gravels at a considerable depth beneath the surface, and for the most part appears to come from the underground flow of the cañon, which goes under the dam and spreads under the surface of the plain below. Some of it, of course, comes from rainfall below the dam, and some, it is claimed, comes from the Los Angeles river; but the water from these last-named sources is not material to the case, except, possibly, as it may affect the necessities of the particular party and thus assist in determining the amount he may be allowed to take of the waters of the cañon proper. The court did not specifically find whether or not the amount of water pumped by each party was the proportion of the underground flow to which the particular party was entitled; nor did it determine whether or not any of that pumped above the dam constituted a part of the water which, as above stated, remains unpartitioned. It finds that none of the parties has ever tak-

en or used more water than was reasonably necessary for the proper irrigation of his land, and that none has had enough for that purpose; but necessity is not the sole measure of right in such cases.

The decree does not attempt to declare the comparative rights of each party, nor to go into that question at all. It does not mention the rights of the several plaintiffs to pump below the dam, nor in any manner fix the amounts they may take by that method. It is directed entirely to the rights of the defendants. It declares that the defendants Thom and Ross may each continue to pump and use the water from his wells below the dam as heretofore; that E. M. Ross may use, upon his 100-acre orchard in the cañon tract, enough water from his upper well to make up, when added to his part of the surface flow of the east side stream, a total flow of 22¼ miners' inches, but may not use a greater amount thereof on the cañon tract under present conditions, and that he may use all the waters of said upper well, "and of said east side stream, both surface and subterranean," upon any of his lands within the cañon tract; that Verdugo may, as heretofore, pump 35 inches from his well; that C. E. Thom may pump from his east well, near the Verdugo well, and use the water upon his land in the cañon tract, but not on other land; and that the waters, surface and subterranean, intercepted and diverted by the dam, are to be used upon the lands below the cañon tract, three-fourths by the plaintiffs and one-eighth each by defendants Thom and Ross. These provisions of the decree are manifestly based on the theory that the entire flow of what the court calls the "east side stream," both above and below the surface, east of the arbitrary division line established in the findings between the underflow of that and the west side stream, belongs absolutely to the cañon tract by virtue of the partition, if necessary for its irrigation. In view of what has been said, the decree is erroneous as to the surplus of the underflow, if any, in that it does not limit the right of each to his proper proportion as compared to the rights of the other owners.

4. The well of the defendant Verdugo is not situated over what the court finds to be the east side stream, but is well within the territory which it finds contains the underground waters of the west side stream. With respect to the effect of the pumping of 35 miners' inches from this well, upon the west side stream and upon the underflow intercepted by the dam, the finding is that "the court is unable to discover from the evidence in this case that the flow of the waters at the said point of diversion and at the submerged dam is affected by the pumping of said well." If this was intended as a finding that the flow of the water is not affected by the pumping from the well, the evidence does not support it. If intended as a declaration that a finding is excused by the want of evidence on the subject, it is unwarranted. From other findings it appears that this west side stream has its source in the mountains above, is fed by water from that watershed, and flows underground in the upper part of the cañon down to the places where it appears on the surface; that it first appeared on the surface in the said "inclosed field," at a point less than 1,000 feet below the Verdugo well, and that during the last 10 or 12 years preceding the trial, which was in December, 1903, its place of appearance on the surface had gradually dropped farther and farther down the cañon a total distance of over a mile and a half, and that its flow had constantly decreased in quantity, so that it became insufficient for the needs of those to whom it was allotted. The evidence indicates that the total natural flow of the cañon, above and below the surface, is less than 200 miners' inches. This well is about 116 feet deep, the bottom being in coarse gravel containing an abundance of water, and after reaching a depth of 27 feet it passes through similar water-bearing material all the way to the bottom. It would scarcely require the evidence of experts to prove that a well sunk in the sand and gravel of an underground stream of this character, 1,000 feet or less above the point where the stream originally issued upon the surface, and pumping a constant flow of 35 miners' inches, would to some extent reduce the flow of the surface stream. Especially would this effect follow where the surface stream and the underground flow is as small as in the present case. Hydraulic engineers of admitted qualifications did testify, however, in effect, that the pumping of that quantity from the well would materially reduce the surface stream, and that, taking the underground and surface flow as a whole, its amount would ultimately be reduced by an amount equal to the quantity pumped from the well, if none of it were returned to such stream. This, in the absence of extraordinary circumstances not proven, and not to be presumed, is self-evident. There were other circumstances also tending to prove that the pumping of Verdugo's well affected the flow of water below. There is no evidence at all indicating that it would not or did not materially reduce the flow. It is true that when the pumping began it did not at once have a perceptible effect on the surface stream; but this delay was to be expected. It also appears that from 1892 to 1903 there was a scant rainfall, and that the flow of the stream was greatly diminished by the drought. But neither this natural decrease, nor the fact that the effect of the pumping upon the flow must necessarily have been gradual, makes it any the less inevitable that the taking of the water from the stream by the well above will eventually reduce the amount that would otherwise flow in the stream below to the extent that the water so taken therefrom is not returned thereto. This is the necessary effect of any diversion

from a stream, whether flowing on the surface or beneath, whether in an unobstructed channel or in the gravel and sand which partly fills the rocky gorge of its original course. From the evidence the court should have found whether it did reduce the surface stream, and, if there was a reduction, it should have ascertained, as nearly as it could from the evidence before it, the amount of such decrease. The defendant Verdugo should have been enjoined from decreasing the surface flow of the west side stream and from taking more than his share of the surplus underflow, unless, as Verdugo claimed, there was an estoppel against the plaintiffs which prevents them from asserting their rights in that respect. The court found that there was such estoppel. This proposition, and also the claim that plaintiffs are estopped as to the upper well of E. M. Ross, and that they are barred by laches as to both of these defendants, will be presently considered.

5. The court finds that the amount of water diverted by the submerged dam is greatly diminished, and that this decrease "is largely, if not wholly, due to the many years of continuous drought." It further finds "that the fluctuations in the quantity of water flowing at the submerged dam into the common works has been considerable for several years past; but the court cannot determine from the evidence in this case that such fluctuations have been due to any extent, or, if any, to what extent, by reason of the pumping of the water from the upper well of Judge Ross." Another finding states that "it is impossible to determine" to what extent, if at all, the decrease aforesaid has been caused by the pumping of the upper well of E. M. Ross. These findings, and those to the same effect concerning the Verdugo well, are the only findings in response to the issue made upon the allegation of the complaint that the defendants have put down wells and have taken out water from the stream that belongs to the plaintiffs. It may be conceded that it would be impossible to determine accurately the exact amount of the water pumped from this well that, if not so pumped, would have reached the pipes at the submerged dam. But it is not necessary, in order to establish the right to an injunction, that the plaintiff should be able to prove the extent of his injury with absolute precision. If the taking of the water by the defendants is a wrongful taking of that which belongs to the plaintiffs, and is of a substantial quantity and causes them substantial injury, the court is not excused from making any finding on the subject by the fact that the evidence is indefinite as to the exact quantity taken, or the exact amount of the injury. The evidence was that there had been continuous pumping from this well of a stream of water varying from 16 to 26 miners' inches. The well penetrated, to the depth of 100 feet, into the strata of water-bearing sand and gravel of which the bed of the cañon is composed. It was situated about 1,000 feet above the dam. That the strata of sand and gravel pierced by the well, and from which the water was pumped, extended from the well, down the cañon, to the dam, was fairly established, and there is nothing in contradiction. The evidence referred to, and stated in the discussion of the effect of the pumping of the Verdugo well upon the underground and surface flow, is equally applicable here. It was shown that all the underground water of the cañon, which did not rise to the surface, flowed slowly down the cañon underground, and had no outlet other than the narrow gorge across whch the dam was constructed. The fact that there were fluctuations in the quantity flowing, before as well as after the pumping began, and the fact that dry seasons diminished the flow at the dam, do not disprove the fact that the taking out of water above also diminished it. From the evidence it is practically certain that the pumping of this well, as stated, would materially reduce the underflow at the dam. The court should have made a definite finding upon this issue.

6. Upon the subject of these estoppels, the findings as to Verdugo state that his well was sunk in 1897, less than five years before this action was begun, and from thence hitherto has been pumped during the irrigating seasons and the water used by Verdugo upon the cañon tract to the extent of 35 miners' inches, he claiming the right so to take and use the water; "that the said well was sunk, a pump constructed, and pipes and other conduits constructed for the use of the water therefrom" at the expense of "more than $1,000, and that the same was done with the full knowledge and acquiescence of the plaintiffs; and that no objection was made thereto by any person until a short time prior to the commencement of this action, except the general claim that he was not entitled to any of the waters of the west side stream," and the claim that the pumping of the well affected the flow of the waters at the submerged dam, and also at the points of diversion of the west side stream, and the objection shown by the action of Glassell et al. v. Verdugo, the particulars of which appear only in the evidence. It is further found that the court was unable to discover that the flow was affected as claimed; that owing to light rainfall the flow of the stream had so diminished that it was "impossible to obtain sufficient of the waters of the east side stream, by diversions from the surface, for the irrigation of the said cañon tract," or of Verdugo's part thereof; and that on account of this diminution and lack of surface flow, and "in view of the fact that the said well was sunk, and the pumps and other appliances erected and constructed, for the purposes aforesaid, by the said Verdugo, at great expense, and with the knowledge of the plaintiffs in this action, and without objection, except as above found, the court finds that the said defendant Teodoro Verdugo is entitled to use the waters of

the said well in manner as aforesaid, and is entitled to continue the use of the said water of the said well, and to pump the same for said use upon his said premises." There is another finding in which the above facts, claimed to create an estoppel in favor of Verdugo, are in substance repeated, with the additional statement that "the amount of water taken by him by means of the said pump is no more than the amount to which he would have been entitled." This we must presume to mean that the amount was no more than he would have been entitled to take from the east side stream, as against the other persons to whom he had sold parts of the cañon tract; otherwise, upon the theory adopted by the court below that all the underflow had been partitioned, it would be inconsistent with the findings that the decree in partition had excluded him from a share of the west side stream, and the underflow thereof. The evidence shows that in April, 1893, in the action of Glassell v. Verdugo, the plaintiffs obtained judgment against Verdugo in the superior court enjoining him from diverting or using any of the waters rising within the "inclosed field" mentioned in the partition suit, or from maintaining any dam or other artificial obstruction to the free flow of the waters thereof in the natural channels, and declaring plaintiffs to be the owners of all said waters, under the former decree of partition. From this judgment he appealed to the Supreme Court, and the judgment was affirmed by the Supreme Court and became final on August 9, 1895. Glassell v. Verdugo, 108 Cal. 503, 41 Pac. 403. The findings in the case show that what is here known as the "west side stream" were the waters referred to, and that the suit was to enjoin him from diverting the same by means of ditches or cuts made in the soil or sand at the places where they rose to the surface.

The upper well of E. M. Ross was completed in March, 1899, and it has been pumped, during irrigating seasons, ever since May, 1899. This action was begun on February 20, 1902, less than three years thereafter. There is no finding that the plaintiffs acquiesced in the pumping of this well. It was put down and the pump erected therein by Judge Ross with full knowledge that the plaintiffs claimed three-fourths of all the underflow that might be intercepted by the submerged dam. Otherwise, the facts are substantially the same with respect to this well as in the case of the Verdugo well. So far as the finding of an estoppel in favor of Verdugo was based upon the fact that the supply of Verdugo from the surface flow of the east side stream had failed, if based upon that fact at all, it was, upon the theory which the court had adopted, that there were separate rights to the underground flow, clearly erroneous. One whose water supply has ceased is not, on that account, entitled to seize the supply of another person. The fact of such failure has no bearing upon the question, further than to show that Verdugo was acting from dire necessity, and not from a wanton desire to appropriate to himself the property of others. The use of the defendants was not a public use, and therefore the rule established in Fresno, etc., Co. v. S. P. Co., 135 Cal. 202, 67 Pac. 773, and Southern C. R. R. Co. v. Slauson, 138 Cal. 342, 71 Pac. 352, 94 Am. St. Rep. 58, limiting the owner's right, after the public use is begun, to an action for damages, has no application.

The facts stated are not sufficient to create estoppels against the plaintiffs. It does not appear that either Verdugo or Ross was induced to put down his well by any act, word, or tacit encouragement of the plaintiffs, or either of them, or relied upon their silence as evidence of his own right or of their consent. Nor does it appear that plaintiffs intended that either should act in reliance upon their silence, or expected that either would do so. It is not shown that plaintiffs were under any duty toward either to disclose any claim they might have to the water, nor that said defendants did not know, at least as well as the plaintiffs knew, that the pumping of the respective wells would decrease the west side stream and the underflow at the dam. The party estopped must always intend, or at least must be so situated that he should be held to have expected, that the other party shall act, and the other party must, by the words, conduct, or silence of the first party, be induced or led to do what he would not otherwise do. Carpy v. Dowdell, 115 Cal. 677, 47 Pac. 695; Swain v. Seamans, 9 Wall. (U. S.) 274, 19 L. Ed. 554; Dickerson v. Colegrove, 100 U. S. 580, 25 L. Ed. 618. The mere fact that the defendants expended money in sinking the wells and putting in the pumps each upon his own land, with the knowledge of the plaintiffs and without objection by them, creates no estoppel. Kelly v. Taylor, 23 Cal. 15; Maye v. Yappen, 23 Cal. 308; Stockman v. Riverside L. & I. Co., 64 Cal. 59, 28 Pac. 116; Leonard v. Flynn, 89 Cal. 542, 26 Pac. 1099. If the finding that the Verdugo well was sunk and the money expended with their "acquiescence" means more than a passive acquiescence or failure to object, it would be contrary to the evidence. A mere passive acquiescence where one is under no duty to speak does not raise an estoppel. Lux v. Haggin, 69 Cal. 270, 4 Pac. 919, 10 Pac. 674; Rochdale Co. v. King, 2 Sim. N. S. 89.

It is suggested that, although the facts found may come short of creating an estoppel, they are sufficient to show that the plaintiffs are barred by their laches. It is well-established doctrine that the defense of laches does not rest entirely upon lapse of time, nor require any specific period of delay, as does the statute of limitations. But, in order to constitute laches, there must be something more than mere delay by the plaintiff, accompanied by an expenditure of money or effort on the part of the defendant. It must also appear that it will be inequitable to enforce the claim. "The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect." Penn. M. L. I. Co. v. Austin, 168 U. S. 698, 18 Sup. Ct. 228, 42 L. Ed. 626. It is said that the cases on the subject "proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in conditions during this period of delay, it would be an injustice to the latter to permit the" claimant now to assert his rights. Galliher v. Cadwell, 145 U. S. 372, 12 Sup. Ct. 874, 36 L. Ed. 738. "The acquiescence which will bar a complainant from the exercise in his favor of the discretionary jurisdiction by injunction must be such as proves his assent to the acts of the defendant, and to the injuries to himself which have flowed, or can reasonably be anticipated to flow, from those acts." Lux v. Haggin, 69 Cal. 271, 4 Pac. 919, 10 Pac. 674. The same case quotes approvingly this passage from Rochdale, etc., Co. v. King, 2 Simon (N. S.) 89: "Where one invades the right of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the statute of limitations." The evidence shows that the acquiescence of the plaintiffs in the sinking of these wells and the pumping thereof was nothing more than a mere failure to actively interfere. The consent of plaintiffs was not asked; nor were they informed by either defendant of the intention to sink the wells, expend the money, or pump the water. There was nothing in the circumstances to put upon the plaintiffs any duty or obligation to inform either defendant that the pumping of the water would be, or was, a violation of plaintiffs' rights. Verdugo well knew, from the former action against him, that plaintiffs did object to any diminution of, or interference with, the west side stream. The court finds that the plaintiffs, during the time the Verdugo well was being pumped, claimed that it was depleting their own supply; but it does not find that they for a moment assented to the injury thus caused. The evidence shows that there was no such assent. While these defendants were sinking the wells, erecting the pumps, and laying the pipes, the plaintiffs had no information from them, or, so far as appears, from any other source, as to the amount of water they proposed to pump. During that period they were certainly not required, by any rule of law or equity, to inform him that he incurred the expense at his peril if the subsequent pumping should invade their rights. Each defendant was conducting his operations upon his own land. The expense was complete when the pump was erected and the pipes laid. That expense was not incurred in reliance upon any word or act, nor upon the silence, delay, or tacit encouragement, of plaintiffs. Up to the point of the completion of the works there could be no laches. After that completion there was no change of conditions, or at all events none that would make it unjust for plaintiffs to assert their rights. The subsequent events consisted wholly of the continuous pumping of the wells, to the depletion of plaintiffs' source of supply, and to the profit and advantage of the defendants, respectively. They were not induced to pump the water by the delay of plaintiffs to prevent them, nor was either of them thereby induced to believe that plaintiffs had no right in the water he was pumping, or that, if they had such right, they had abandoned it. As presented by the evidence, the case is simply this: That each of said defendants was urged solely by his own extreme necessity, not relying on the act, omission, or word of any one, and that, while he doubtless hoped that plaintiffs would not interfere, he proposed to continue, regardless of the effect upon their supply, until they did prevent him. Each may have believed that plaintiffs had no such right; but such belief sprang from no act, word, silence, or delay on their part. The necessary elements are wholly wanting, and therefore the defense of laches is not established.

7. It is claimed on behalf of the defendant E. M. Ross that the pumping of his upper well takes water only from the underflow of the east side stream, and does not affect the water of the west side stream, nor the underflow thereof, and hence that it is within his legal rights. Under the partition decree he is entitled to the use of the east side stream upon his land in the cañon tract; but as to the underflow thereof his right under that decree, as we have heretofore stated, does not extend to its use, but only to have it remain to preserve the surface flow. As to the use of the unpartitioned surplus underflow for irrigation he is entitled only to his proportionate share with the other parties, including the plaintiffs. It is declared by the judgment in the case at bar that the plaintiffs and the defendants C. E. Thom and E. M. Ross are entitled, as tenants in common, in the proportions heretofore stated, to all the waters of the west side stream and all the waters intercepted by the submerged dam, which, of course, includes, in part at least, the underflow of both the east side and west side streams. Nevertheless E. M. Ross is given the right to pump his upper well and to thereby decrease the underflow from the east side stream at the dam. It is contended by the plaintiffs that he is estopped and cannot be allowed to pump water to the extent that

it will affect such underflow, even if he uses no more than his reasonable share. This estoppel, it is claimed, arises out of certain transactions between him and the plaintiffs, which it becomes necessary to state.

About the year 1893, when the water began to run short, the plaintiffs and the defendants Thom and Ross, being jointly interested in the west side stream, began to look about for means by which the common supply could be increased. Up to about May, 1894, the talk had been confined to proposals to make a more perfect dam to catch the surface stream. It was believed by all of them that there was a considerable amount of water flowing underground down the cañon through the narrow gorge, below the places where the surface streams were then diverted, and that by constructing a dam across this gorge to the solid ground on each side, and extending it below the surface to bed rock, all of this underflow could be intercepted and added to their common supply for their lands below. On May 14, 1894, which was about the time of the first mention of the project to construct a submerged dam, E. M. Ross wrote to the secretary of the plaintiff company, referring to the previous suggestions of a dam for surface water, and saying: "I was told yesterday and the day before that your company is now talking of putting down a submerged dam somewhere in the cañon. That, of course, is an altogether different thing, and involves the development of water not rising in the old field of the partition decree, and not of the surplus of the Teodoro Verdugo water. If it is desired to develop water on my land, perhaps terms may be agreed upon; but otherwise not." The water of the "old field" means the west side stream, and the "surplus of the Teodoro Verdugo water" the surplus of the east side stream. On May 25, 1894, the plaintiffs wrote a letter to E. M. Ross, saying that it was their desire "to obtain the co-operation of yourself and Capt. Thom in the construction of such works as are deemed advisable on the land owned in common by the owners of the waters flowing from Verdugo Cañon, for collecting all such waters, flowing below as well as on the surface, and conducting the same to our common use." This evidently referred to lands to be thereafter purchased in common, for at that time there was no land "owned in common." It is clear, from this and other evidence, that the plan in contemplation during the subsequent negotiations was the plan above stated, or some similar plan to accomplish a similar result. Soon after this negotiations began with Teodoro Verdugo, the owner of the land considered best for a site for the proposed dam, looking to the purchase of a tract of 9.39 acres, for $4,000; but the price proved to be too high for the means of the company, and that purchase was abandoned. In all the negotiations and transactions concerning this submerged dam, it was understood that it was to be a common enterprise; that the property necessary therefor should be held, the expense thereof contributed, and the benefits thereof shared in the same proportions—that is, in the proportion of three-fourths to the plaintiffs and one-eighth each to Thom and Ross. Shortly after the 9.39-acre purchase was dropped, E. M. Ross obtained a contract from Verdugo to buy on his own account a tract of 58.87 acres, including part of the 9.39 acres, and, in connection therewith, an option from Verdugo for the purchase of a tract of 7.81 acres, being the westerly and remaining part of the 9.39 acres, at the price of $2,500. He asked the plaintiffs and Thom to join with him in buying this 7.81 acres at that price as a site for the dam previously proposed. This tract did not extend entirely across the cañon to the east side, or to solid ground, but only to the easterly bank of the wash. The plaintiffs objected on this account, and wanted to have the tract extended easterly to the railroad track, to which the defendant refused to accede. Thereupon a meeting was arranged at which all the interested parties were present or represented. At this meeting it was agreed that the 7.81-acre tract should be purchased, and that E. M. Ross should give a right of way from the easterly line of the tract through his 58.87-acre tract to solid ground on the east side of the cañon, as a part of the site for the dam. Opposite the lower part of the 7.81-acre tract a small side cañon from the east joined the main cañon, and at the junction there were evidences of water. This the defendant Ross wanted to hold for his own use, and for that reason he stipulated that the dam should be placed not more than 100 feet south of the north line of the 58.87-acre tract. The agreement was carried out, and the grant of the right of way executed on September 5, 1894.

The court finds that at this meeting "it was feared that there might be some difficulty in the development of water on this 7.81-acre tract alone, by reason of the fact that the construction of a dam, submerged, might have the effect of turning the waters around the east side of the dam, and thereby escape without being brought to the surface." The dam was a considerable distance below the junction of all the surface streams, and no separation of the underflow into parts corresponding to the respective surface streams was then suggested. All present must have understood that a dam across the cañon to solid ground on each side would bring to the surface all the underflow in both tracts of land—that through which the right of way extended, as well as the 7.81 acres. Nothing was said about any division of these waters, so as to give to the common owners the water from their tract and to E. M. Ross that from the right of way. He did not at that time, nor until long after, say or suggest that, when the dam was extended upon the right of way, he would own, or would claim, the water coming directly from the right of way for his exclusive use. It was not suggested by any one that any part of the water to be obtained by the common works, when completed, should be devoted to any other than common use, or be other than common property. It is quite clear, however, from all the evidence, that the plaintiffs understood that all the water obtained was to be owned and used in common, and that Judge Ross, on the other hand, understood or believed that the water coming to the dam through his 58.87-acre tract would belong exclusively to him, and that all other water obtained would be common water. It is also manifest that none of the parties was aware of the understanding of the other on this point, that each supposed that all understood it as he understood it, and that each was acting in perfect good faith, without intent to deceive, defraud, or mislead the other party to the arrangement.

The work on the dam was begun in 1895 and was vigorously prosecuted during that season. On September 30, 1895, the excavation had reached the land of Ross, and had disclosed considerable underflow coming from his land. He then stated to the plaintiffs that it would be necessary to "guard against taking any water that might be developed" on his land. Several thousand dollars had then been expended in the work. About the 1st of August, 1896, he made a definite claim that the water "developed on his land," as he expressed it, belonged to him exclusively, and not to the common owners, regardless of its amount. The plaintiff company, according to the arrangement between the parties, was in charge of the work. Immediately upon this claim being made, the work was stopped in order to come to a settlement of the matter. At that time the dam was completed for a distance of 210 feet at the west end, and the excavation had been made from the east end of the completed part, easterly across the 7.81-acre tract, and some 60 feet into the land of E. M. Ross, and of a depth varying from 30 to 45 feet. After considerable negotiation, on August 3, 1896, he made a written waiver of any claim he might lawfully have to the exclusive use of this water, and agreed to claim only a one-eighth of the whole thereof, in common with the others. The work was then resumed, and a substantial amount of expenditure was made upon it after this waiver. It was never completed, but it has the effect of intercepting from 30 to 40 miners' inches of water in addition to the surface flow. From the inception of the work upon it until the beginning of this action the defendant Ross has regularly received one-eighth of the water obtained thereby and has paid one-eighth of the expense of maintaining the dam and operating the common works.

Shortly before the trial of the case in the court below, in December, 1903, he discovered that, at the time he made the written waiver of August 3, 1896, giving up any right he might have to the exclusive use of the water, he had forgotten the fact that on August 14, 1894, a day or two before he began to negotiate with Verdugo for the purchase of the 7.81-acre tract for common use, the plaintiffs had written to him a letter stating that they could not raise the money to pay their share of the price of the 9.39-acre tract previously proposed, the negotiations for which had been left in his hands, and that they had abandoned the intention of joining in the purchase. The waiver was made upon the receipt of a written statement of the plaintiffs, purporting to be a history of the negotiations from May, 1894, up to the execution of the right of way, in September; but this letter was omitted, and, although it had been all the time in his own possession, he had completely forgotten it, until, in looking over his correspondence preparatory to the trial, he found it. His testimony was that, having forgotten that the plaintiffs had abandoned the proposed joint acquisition of a dam site, the history made it to appear to him that, while he was intrusted with the negotiations for the 9.39-acre tract, he had taken a smaller tract instead, and thereby obtained an advantage for himself, and that, not wishing to appear to occupy such a position, he waived his rights, but that if he had then remembered the letter of the plaintiffs abandoning the enterprise, or the fact that they had abandoned it before he took up the negotiation on his own account, he would not have made the waiver. The court found that he was not estopped by the giving of the right of way in 1894, nor by the waiver of 1896, from pumping water from his upper well and thereby depleting the supply at the dam. The conclusion that he was not estopped by the waiver of August 3, 1896, alone, was clearly correct. It had been given under a mistake of fact, and but for that mistake it would have been withheld. His failure to recall the fact of plaintiffs' withdrawal from the scheme was not that degree of neglect that would bind him to stand by the waiver, notwithstanding the mistake by which it was induced.

The question whether or not he is estopped by the execution of the right of way, the circumstances upon which it was given, and the subsequent action of the plaintiffs on the faith of it, presents greater difficulty. He had the right to take out water by wells or otherwise of the surplus underflow of the cañon, to the extent of his reasonable proportion thereof, for use upon his lands in the cañon tract, provided he did not thereby injuriously affect the surface flow of the west side stream. The plaintiffs were fully aware of this right. His offer of an interest in the 7.81 acres with the right of way was practically an offer from him to them. It was substantially an opportunity to carry out the original plan at less cost, and it was so understood. The plaintiffs were thereby induced to accept and pay for a three-fourths interest in the site and to pay three-fourths of the cost of the works constructed thereon. The whole object, so far as the plaintiffs knew, and he stated nothing to the contrary, was to add the water of the underflow to be collected by the dam, including the underflow of the east side stream, to the waters of the west side stream set apart for use on the lands below. He was a tenant in common with them in the west side stream. If, under all these circumstances, it was a part of his design to induce them to aid, to the extent of three-fourths of the cost, in the erection of a dam to intercept all the underflow, in which, as it was then flowing at that place, all were entitled to share, in order that, by means of that dam, he could obtain for his own exclusive use all that part of the water that might flow out of the land through which he was to grant the right of way; if he proposed to secure this advantage from their efforts and expenditure in the common work —the principles of equity and justice, and the relations existing between them, demanded of him a full and frank disclosure of his purposes and claims. He had no right to remain silent in the belief that they understood the matter as he did. One who is embarking with others in a common enterprise, to use common property for the common benefit at common expense, owes to the others the duty, if he proposes or intends to reserve a part of the benefit to himself exclusively, to inform the others fully in regard to it. If he does not, he will be estopped to assert his claim after the others have incurred the expense. This seems to have been the view of the court below with regard to all the underflow that actually reached the dam; for it declared all those waters to be subject to the common ownership, in the proportions stated, for use on the lands below. We are of the opinion that the estoppel does not apply to the claim that he has the right to take, by means of pumps in the cañon above, his reasonable share of the underflow, for use on his lands in the cañon tract.

In Boggs v. Merced M. Co., 14 Cal. 279, 368, the essentials of an estoppel were said to be these: The party estopped must have known the true state of his own title; he must have intended to deceive, or have acted with such culpable negligence as to amount to constructive fraud; the other party must have been without knowledge, or the means of acquiring knowledge, of the true state of the title; he must have relied directly upon the conduct upon which the estoppel rests; and it must appear that he will be injured if the estoppel is not enforced. Other authorities, more favorable to plaintiffs' contention, hold that all these elements, and especially that of deceit or fraud, are not always necessary. In 2 Pomeroy's Equity Jurisprudence, § 818, other well-established instances of estoppel are thus described: "Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. A fraudulent intention to deceive or mislead is not essential. All instances of this class in equity rest upon the principle: If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent. Mich., etc., Co. v. Parcell, 38 Mich. 480, per Cooley, J. A most important application includes all cases where an owner of property, A., stands by and permits another person, B., to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objections, as by expending money upon it, making improvements, erecting buildings, and the like. Of course, it is essential that B. should be acting in ignorance of the real condition of the title, and in the supposition that he was rightful in his own dealing." In Thompson v. Simpson, 128 N. Y. 289, 28 N. E. 632, the court says: "An estoppel may arise, although there was no designed fraud on the part of the person sought to be estopped. The cases of Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166, 10 Am. Dec. 316, and Continental Bk. v. Nat. Bk. of Com., 50 N. Y. 576, were cases where there was no intent to mislead, but where what was said was intended to influence the action of the other party, and did influence it, and a duty rested upon the party giving the information, or making the statement, if he spoke at all, to have ascertained the actual facts, so as not to have misled the other party to his prejudice. An estoppel may arise also from silence as well as words. But this is only where there is a duty to speak, and the party upon whom the duty rests has an opportunity to speak, and, knowing the circumstances require him to speak, keeps silent." And upon the subject of duty it is further said: "It is not necessary that the duty to speak should arise out of any agreement, or rest upon any legal obligation in the ordinary sense. Courts of equity apply to the case the principles of natural justice, and whenever these require disclosure they raise the duty and bind the conscience, and base upon the omission an equitable forfeiture to the extent necessary to the protection of the innocent party." 128 N. Y. 291, 28 N. E. 633.

All these authorities agree that no estoppel can exist unless the party invoking it was led to place himself in the prejudicial position, in part, at least, by his own ignorance of the rights of the other party or his own lack of knowledge of the true state of the title. This element is entirely wanting in the present instance. The plaintiffs knew that E. M. Ross owned land in the cañon tract, that he had a large orchard thereon above the proposed dam which required water, and that he had the right to use thereon a due proportion of the underflow of the cañon. They may have supposed and believed that he did not intend to exercise that right, but they were not led to that belief by any act or word of his. His conduct in entering into the work with them to obtain the underflow at the dam for use on his lower lands, which were entitled to a share thereof, was not inconsistent with his right to take, from the same flow above, the share of the water to which his upper land was reasonably entitled. He could not obtain the water from the dam for use on the upper land, and he said nothing to indicate that he would not obtain it by other means, if the upper land required it in the future. As the plaintiffs acted with full knowledge of his right and without any promise or representation by him that he would not exercise it if occasion arose, he is not estopped to pump water from his upper well, for use on his part of the cañon tract, to the full extent of the share due to that land.

8. The appeal of the defendant E. M. Ross is from that part of the judgment fixing his right to pump water from his "upper well" which limits the amount he can pump to 22¼ miners' inches and forbids him from using it elsewhere than on the cañon tract. What has been said sufficiently disposes of the questions presented by this appeal. Under the partition he is given only the right to the surface flow of the east side stream. With regard to the available unpartitioned underflow, he is entitled, as a riparian owner, to his reasonable share thereof, and may use it upon any of his riparian land in the cañon tract. In regard to his right to take the underflow, by means of a pump, from his land above the dam, for use upon his lands below, his riparian rights are modified by the estoppel existing against him by reason of the facts referred to in the preceding subdivision of this opinion. As we have said, the dam was built to intercept all this underflow and devote it to use on the lower lands; and he, no more than the other parties interested, should be permitted to take out water from the underflow above the dam for use on the lower lands to a sufficient extent to decrease the amount thereof that will flow to and be intercepted by the dam. If any can be taken out without producing that effect, he and the other owners of riparian lands below are each entitled to a reasonable share thereof.

9. In conclusion, it is necessary to give some directions relating to a new trial. If pumping is allowed without check above the points of diversion of the surface streams, it is practically certain that those streams will cease to flow. It is by no means certain that the pumping now going on below those points does not exceed the average normal flow of the underground stream; that it is not in fact a process of exhaustion, so that in a few years of use at the same rate, even that supply will fail. No party above or below the dam should be allowed to take by such process more than his reasonable part of the available surplus, if such taking affects the surface streams, or prevents another party from obtaining his reasonable share; and no party, of those entitled to use the water collected by the submerged dam, has the right to pump water above the dam for use on his lands below, if such pumping decreases the flow at the dam. The only just method of adjusting the rights in this surplus of the underflow is to ascertain, as near as may be, the total average amount thereof available for this use, and the amount required by each party when used as economically and sparingly as may be reasonably possible, and upon this basis apportion to each his due share. In this calculation the amount of underflow collected by the dam should be included as a part of the whole available surplus underflow, and the portions of that water delivered to those interested in the dam, not including the surface flow there distributed, are to be charged to said parties, respectively, against their share of such underflow; also, those who are now pumping water of the underground stream above or below the dam must be charged therewith as part of their shares and the amount pumped computed as part of the whole supply to be apportioned. It is certain that there will be no surplus, and it may turn out that some are pumping or receiving more than their share. It appears that in some instances several persons use a common pump. There can be no objection to this, if all of them are entitled to receive some amount and reserve only their due. In the case of the division of a surface stream, the portions allotted to the respective parties and the whole flow of the stream can be readily measured, and a fair division of such waters may easily be made self-executing by the mere device of giving to each a fixed proportion of the whole, instead of a certain quantity of water, so that, although the total quantity in the stream may vary, the rule of division will remain constant. But this cannot well be done where different persons, each upon his own land and by means of his own pump, is taking a proportion of an underground stream. In such a case the parties would not be able to agree upon the total amount available of the underground supply, and there would be no means of accurate measurement to settle their differences, as in the case of common shares of a surface stream. A decree merely fixing the proportion of the underground supply to which each was entitled would be of no benefit, for it would not enable either party to know the amount which he could pump. The total supply can only be determined by the court after a consideration of such evidence as it can obtain on the question. It will be necessary for the court to determine from the evidence the total amount of the underflow available for a division and to determine the share of

each, by fixing a positive quantity which each may take as his proper proportion of the whole.

The judgment and order are reversed, with costs of appeal in favor of plaintiffs.

We concur: LORIGAN, J.; ANGELLOTTI, J.; McFARLAND, J.; SLOSS, J.

BEATTY, C. J. I concur in the judgment and generally in the opinion of Justice SHAW. I share his conviction that there is but one subsurface stream within the cañon, but in my opinion it is not very material whether there is one or two. In either case I think that all the owners of the cañon tract and of the lower tract have a right in common to pump from the subsurface stream each his just proportion of the subsurface flow, irrespective of its effect upon the surface flow. That just proportion was originally equivalent to the proportion of the irrigable area of each subdivision to the irrigable area of the whole—modified, perhaps, by the greater or less need of particular tracts in respect to artificial irrigation. By convention, by prescription, and possibly by other means, the rights of particular subdivisions may of course have been enlarged or diminished. There is nothing in any of our previous decisions which conflicts with the right of the owner of land overlying an underground stream to pump a reasonable share of the underground flow to the surface and apply it to the surface for irrigation, even though it may diminish the surface flow of a stream breaking out below. In doing so he is merely exercising his riparian right in the matter of irrigation. In this view Verdugo, Ross, and Thom have a right to pump above the submerged dam each his reasonable share of the subsurface flow for the irrigation of so much of his cultivated land as lies within the cañon tract. If upon fuller and more specific findings as to the total subsurface flow and the area of the particular tracts it shall be found that either is pumping or threatening to pump more than his share, he should be enjoined as to the excess; otherwise, not.

On the questions of estoppel I concur in the main opinion.

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7 Cal. App. 150

SNIPSIC CO. v. SMITH. (Civ. 285.)

(Court of Appeal, First District, California. Dec. 19, 1907.)

PLEADING — SEPARATE DEFENSES — GENERAL DEMURRER.

Since, under Code Civ. Proc. § 441, providing that defendant may set forth by answer as many defenses as he has, a defendant may plead as many defenses as he has, though they are inconsistent with each other, an answer pleading separately two defenses, one specifically denying every allegation of the complaint, and one setting up affirmative matter, is not subject to a general demurrer; the denials of the first defense presenting a perfect answer to the cause of action, not destroyed by admissions in the second defense.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Snipsic Company against Joseph Smith. From a judgment against defendant for failure to further plead after sustaining a demurrer to his answer, he appeals. Reversed.

J. E. McElroy and James G. Quinn, for appellant. Howard K. James, for respondent.

HALL, J. This is an appeal from judgment rendered against defendant for failure to further plead after demurrer sustained to his answer.

The complaint states a cause of action for goods sold and delivered by plaintiff's assignor to defendant, and is unverified. The answer set up two defenses. The first specifically denies every allegation of the complaint, including the allegation of nonpayment and of the assignment to plaintiff. As a separate defense defendant set up as affirmative matter that he was fraudulently induced to sign the writing referred to in the complaint. The demurrer to the answer was a general demurrer to the entire answer, and not a demurrer to each separate defense.

As the first defense was separately pleaded, ending with a demand for judgment, it is difficult to see upon what theory the demurrer was sustained. The denials of the first defense present a perfect answer to the cause of action, and any admissions, if we assume that there are any, in the second and separate defense, cannot be regarded as destroying the effect of such denials. Banta v. Siller, 121 Cal. 414, 53 Pac. 935; Nudd & Lord v. Thompson et al., 34 Cal. 39; Amador County v. Butterfield, 51 Cal. 526; Botto v. Vandament, 67 Cal. 332, 7 Pac. 753; McDonald v. Southern Ry. Co., 101 Cal. 206, 35 Pac. 643, 646. In several of the above-cited cases the question arose upon a motion by plaintiff for judgment upon the pleadings; but such a motion presents for determination the same questions of law as are presented by a general demurrer to the answer. The defendant had the right to plead as many defenses as he had (Code Civ. Proc. § 441), even though they were inconsistent with each other. Banta v. Siller, supra.

The court erred in sustaining plaintiff's demurrer to defendant's answer, and the judgment is therefore reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 136

Ex parte VON VETSERA. (Cr. 117.)

(Court of Appeal, First District, California. Dec. 19, 1907.)

1. Habeas Corpus—Judgment—Form—Sufficiency.

A judgment sentencing one to imprisonment, and reciting that accused had been convicted of a felony, without designating the offense, is sufficient in form to withstand an attack on habeas corpus for the discharge of accused.

2. Criminal Law — Evidence — Best and Secondary Evidence—Judgment.

A judgment must be reduced to writing, and can only be proved by the record of its entry or by parol after proof of the destruction or loss of the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 879, 882.]

3. Same—Modifying Judgment—Authority of Court.

A judgment in no way reduced to writing or entered in the minutes of the clerk may be revised by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2531.]

4. Habeas Corpus — Judgment — Discharging One Confined in State's Prison—Sufficiency.

The court on habeas corpus announced in open court that the petitioner was illegally imprisoned in the state's prison, and ordered his discharge. No written order for the discharge was made or signed by the judge, and no entry of the order was made in the minutes of the court, or in any manner, except that the clerk made a memorandum thereof in a book kept by him as a personal memorandum to aid his memory in subsequently making entries in the minutes of the court. Subsequently the court made and signed in open court a written order vacating and setting aside the previous order. *Held*, that the first order was not a final adjudication by the court that petitioner should be discharged; the order, not having been entered in the minutes of the court, being subject to be vacated by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 101.]

Petition on habeas corpus by Simon L. Monckros Von Vetsera for his discharge from imprisonment in the state's prison. Petitioner remanded.

Jas. W. Keys, for petitioner. Thos. B. Boyd, and Walter Burpee, for respondent.

HALL, J. Petitioner is in the custody of the warden of the state prison at San Quentin. From the return to the writ it appears that he was delivered into the custody of the warden of said state prison in execution of two judgments rendered by the superior court of the county of Alameda, May 31, 1900, the term of imprisonment prescribed in each judgment being 14 years, and the term in the second one to commence upon the expiration of the term of the first, it being recited that defendant had been convicted upon both charges before judgment was rendered upon either. The only possible criticism of the form of the judgments is that it is recited in each that defendant was convicted of a "felony," the particular felony not being designated. That this form of judgment is sufficient to withstand an attack upon habeas corpus does not admit of discussion. Ex parte Gibson, 31 Cal. 620, 91 Am. Dec. 546; Ex parte Murray, 43 Cal. 455; People v. Kelly, 120 Cal. 271, 52 Pac. 587. It results that the prisoner must be remanded, unless he is now entitled to be discharged by virtue of certain proceedings had in and before the superior court of Marin county.

It appears that the petitioner made application, by petition addressed to and filed in said superior court, for a writ of habeas corpus. The court ordered the writ to issue, and in obedience to such writ the warden produced the prisoner before the court on the 4th day of October, 1907, with his return to the writ, setting up that he held him by virtue of the two judgments hereinbefore referred to. The hearing was continued by said court to October 15, 1907, and the presence of the prisoner waived. On the 15th day of October, 1907, the court heard the matter, and the judge of the court, in open court, announced that the petitioner was illegally detained by said warden, and ordered that he be discharged from the custody of said warden. No written order for his discharge was made or signed by the judge, and no entry of such order was made in the minutes of the court, or in any manner, save that the clerk made a memorandum thereof in pencil in a book, manifestly kept by him as a personal memorandum book in aid of his memory in subsequently making entries in the minutes of the court. The book bore no title, label, or other indicia of official character. The entry concerning the order announced by the judge of the court is in pencil, several words are represented by abbreviations, and the whole is manifestly a personal memorandum of the clerk to be used to aid his memory when he should enter the order in the minutes of the court. Subsequently, on October 17, 1907, the court, in the absence of the prisoner, made and signed in open court a written order, reciting that the previous order had never been entered in the minutes of the court, and vacating and setting aside the same, and, in effect, reserving the matter of the prisoner's application for further action.

Petitioner now insists that the order made on October 15th was a final adjudication by a court of competent jurisdiction that petitioner should be discharged, and that said court thereby lost jurisdiction to subsequently enter any different order. We cannot agree with this contention. Until the judgment had been entered in the minutes of the court, or had been in some authentic manner reduced to writing, as by the judge signing a written order, it must be held that the judgment lay in the breast of the judge, and that the court had plenary power thereover. We have been cited to no case precisely in point, but in jurisdictions where terms of court exist it has always been held that the court had such power during the term. "A court has plenary control of its judgments, orders, and decrees during the term at which they are rendered, and may amend, correct, modify, or supplement them for cause shown, or may, to promote justice, revise, supersede, revoke, or vacate them as may in its discretion seem necessary." 23 Cyc. 860. See, also, De Castro v. Richardson, 25 Cal. 49. "This power is inherent in all courts of general jurisdiction, and is not dependent upon, nor derived from, the statute." 23 Cyc. 902; 1 Black on Judgments, § 305. The right to revise the judgment during the term is based upon the fiction that the judgment was not entered or the roll made up until the close of the term. The actual want of the entry of the judgment, surely, is a stronger basis for the existence of the right to change the judgment than the fiction that it has not been entered or the roll made up. "A judgment must be reduced to writing, and cannot exist in the memory of the officers of the court." 11 Ency. of Pl. & Prac. 925; Davidson v. Murphy, 13 Conn. 213; Jones v. Walker, 5 Yerg. (Tenn.) 427; Balm v. Nunn, 63 Iowa, 641, 19 N. W. 810; Young v. People, 171 Ill. 299, 49 N. E. 503. A judgment can only be proved by the record of its entry, or by parol after proof of the destruction or loss of the record. Young v. People, supra; Case v. Plato, 54 Iowa, 64, 6 N. W. 128. It has been held that the oral announcement of the court's decision is not sufficient basis for the entry of a judgment nunc pro tunc. Boyd v. Schott, 152 Ind. 161, 52 N. E. 752; Young v. Young, 165 Mo. 624, 65 S. W. 1016, 88 Am. St. Rep. 440.

We have been cited to no case that holds that an order or judgment in no way reduced to writing, or entered in the minutes of the clerk, may not be revised by the court making the order or judgment. On the contrary, it has been held that at any time before "final judgment signed" it was proper for the court to amend its judgment. People v. Thompson, 4 Cal. 239. So, too, the court may change its conclusions of law at any time before judgment is entered. Condee v. Barton, 62 Cal. 1; Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; Brady v. Burke, 90 Cal. 1, 27 Pac. 52. In Niles v. Edwards, 95 Cal. 47,[1] relied on by petitioner to support the proposition that an order or judgment, to be effectual, need not be entered in the minutes, the court had under consideration an order modifying a department judgment of the Supreme Court that was not entered by the clerk in the minutes of the court until after the expiration of the time for granting a rehearing, but the order had been reduced to writing and signed by four justices. So, too, Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109, cited by petitioner, is really authority against him. It is there said: "It is essential, however, that the action of the court be made a matter of record in order that there may be no uncertainty as to what its action had been, and for this purpose it is customary, as well as expedient, to have its acts entered in the minutes kept by the clerk; but if the order is formally prepared and signed by the judge, and made a matter of record by filing with the clerk, the same end is attained as if it were spread at length upon the minutes of its daily transactions."

In the case at bar the order relied on by petitioner for his discharge, never having been entered in the minutes of the court, was subject to be vacated and revised by the court, and, having been thus vacated, affords no warrant for his release from the imprisonment under which he is held by virtue of the judgments of the superior court of Alameda county.

Petitioner is therefore remanded.

We concur: COOPER, P. J.; KERRIGAN, J.

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7 Cal. App. 163

PEOPLE v. CAIN. (Cr. 68.)

(Court of Appeal, Second District, California. Dec. 20, 1907. Rehearing Denied by Supreme Court Feb. 17, 1908.)

1. Larceny—Ownership of Property—Larceny by General Owner—"Personal Property of Another."

Pen. Code, § 484, defines larceny as the felonious stealing, etc., of personal property of another. *Held*, that the phrase "personal property of another," as so used, means property in the possession of another who is entitled, as bailee or otherwise to retain possession for some benefit or profit to himself to the exclusion of all others, and not absolute ownership as defined by Civ. Code, § 679, so that a taking of a heifer by the general owner thereof from the possession of an agister entitled to hold the same under a lien for pasturage, with the intent to deprive the latter thereof, constituted larceny.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 11–21.

For other definitions, see Words and Phrases, vol. 5, pp. 3991–4003; vol. 8, p. 7701.]

2. Criminal Law—Instructions—Construction as a Whole.

An instruction in a criminal case must be read in connection with other portions of the charge; it being unnecessary in dealing with each particular phase of the case for the court to repeat all the conditions and limitations which are to be gathered from the entire charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1990–1995.]

3. Same—Circumstantial Evidence.

Where the court charged that the law presumes every man innocent until his guilt is established to a moral certainty, and beyond all reasonable doubt, and that such presumption attaches to every fact essential to a conviction, an instruction that, while every fact essential to prove defendant's guilt to a moral certainty must be fully proven, the law permits this to be done by circumstantial evidence, and where the evidence is circumstantial, but proves every fact essential, to sustain the hypothesis of guilt, and to exclude the hypothesis of innocence, and is inconsistent with any other rational conclusion than that of guilt, it is the jury's duty to convict, was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1990–1995.]

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[1] 30 Pac. 134.

4. Same—Appeal—Prejudice.

On appeal from a conviction, the burden is on accused not only to disclose wherein an instruction objected to constituted error, but also to affirmatively show that it tended to mislead the jury to the possible prejudice of his rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3090-3099.]

5. Larceny—Instructions.

B. agreed to pasture a heifer for defendant at a certain price per month, and during the season sold possession of the pasture to C., who continued the pasturage until the animal became lost, and, being later discovered in a pasture where it was claimed defendant had placed her, he was charged with stealing her from C. *Held*, that an instruction that a person who takes in cattle to pasture for compensation, and who has the possession thereof, has a lien for pasturing them, and may be deemed the owner thereof within the law of larceny, was not objectionable as justifying a construction that, if defendant took the animal, he was guilty of stealing her as against B.

6. Criminal Law — Appeal — Conviction — Conflicting Evidence.

Where the evidence is conflicting, the conviction will not be set aside on appeal as contrary to the evidence, the credibility of the witnesses and the weight of their testimony in the first instance being for the jury, and then for the trial judge on a motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

7. Larceny—Evidence—Intent.

B., having taken defendant's heifer to pasture, sold the possession of the pasture to C., who continued the pasturage until the heifer was lost, whereupon defendant stated that he would hold both B. and C. responsible. The heifer having been subsequently found in an adjoining pasture, where it was claimed she was taken by defendant, B. and C. returned her to the latter's pasture, whereupon they were arrested for stealing her, and, after this prosecution was dismissed, defendant was arrested for stealing her from C. *Held*, that evidence that B. and C. were arrested for stealing the heifer and the proceedings in such prosecution were admissible as bearing on defendant's intent in taking the heifer from C.'s pasture.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Samuel Cain was convicted of grand larceny, and he appeals. Affirmed.

Alfred Daggett, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Dep. Atty. Gen., for the People.

SHAW, J. The defendant was convicted of the crime of grand larceny upon an information wherein it was charged that he did willfully, unlawfully, and feloniously take, steal, lead, and drive away a certain young cow, to wit, a heifer, then and there of the age of about 2½ years and then and there the personal property of one T. D. Cheney. Defendant appeals from the judgment and an order of the court denying his motion for a new trial, and in support thereof presents his bill of exceptions.

The subject of the larceny charged was a cow which belonged to defendant. When it was about one year old defendant placed it in a pasture owned by one Blades, agreeing to pay Blades a certain sum per month for its pasturage. A year later, April, 1906, Blades sold and transferred possession of the pasture to T. D. Cheney, who, through Blades, informed defendant that, if the animal remained there, he (Cheney) would charge defendant $1 per month for its pasturage. In September following the defendant called upon Cheney to pay the pasturage bill, and get the cow, but, owing to a dispute as to the amount due for pasturage and defendant's refusal to pay the sum claimed by Cheney as due himself and Blades, he did not get her. In November, 1906, the cow disappeared from the pasture, and, upon defendant being informed of her disappearance, he stated that he would hold Blades and Cheney responsible for her value. Several months later a cow claimed and shown by the prosecution to be the one in dispute was found in a neighboring pasture, where, it was charged, she had been placed by defendant, and from which she was taken by Blades and Cheney to the latter's pasture. Defendant caused the arrest of both Blades and Cheney for taking this cow, claiming that she was not the one in dispute, but another which defendant owned. The charge against Blades and Cheney was dismissed upon the hearing; whereupon defendant was charged with the larceny of the animal as above stated.

1. It is insisted that the court erred in instructing the jury, in substance, that the law recognized a general and special ownership in personal property, and that it might be stolen from one whose ownership was either general or special; that one who had actual possession of cattle received by him for pasture for compensation has a lien thereon for such compensation, and is a special owner thereof and may be deemed the owner thereof within the law of larceny, and an information may properly allege him to be the owner thereof; and, in connection therewith, giving the following instruction: "From these principles it follows that a person having the general ownership of personal property may be guilty of stealing his own property from another who has a special ownership therein; and, if a man willfully and feloniously takes his own personal property away from the possession of a special owner thereof, with intent to charge such special owner therewith when such special owner has the right as against him to retain it for some benefit to himself, he is guilty of larceny of such property." Section 484 of the Penal Code defines larceny as the felonious stealing, taking, carrying, leading, or driving away the personal property of another. It being admitted that the animal was the personal property of the defendant, appellant strenuously contends that one of the essential elements necessary to constitute the crime, namely, that the subject of the larceny shall be the "personal property of another," is lacking. This position is not tenable. The law is well settled that the taking of personal property by the general owner with felonious

intent from one in possession by virtue of some special right or interest therein constitutes larceny. "It is larceny to steal cattle from an agister who takes them from the owner to pasture, and the property may be alleged in the information to be the property of the agister." People v. Buelna, 81 Cal. 135, 22 Pac. 396; People v. Thompson, 34 Cal. 671; People v. Long, 50 Mich. 249, 15 N. W. 105; 12 Ency. of Plead. & Prac. p. 965; Palmer v. People, 10 Wend. (N. Y.) 166, 25 Am. Dec. 551; State v. McCoy, 89 N. C. 466; State v. Stephens, 32 Tex. 156. By virtue of the law (Civ. Code, § 3051) Cheney not only had an interest in the heifer to the extent of his lien thereon, but sustained to defendant as the general owner a relation which might render him legally chargeable for the value of the cow; and this lien, the enforcement of which depended upon possession, as well as the liability for her value, if imposed, constituted property in the animal which might be feloniously taken from him by the general owner. There is nothing in the Code provisions to which appellant directs attention contrary to the general rule. The phrase, "personal property of another," as used in section 484 of the Penal Code, correctly interpreted, means property in the possession of another who is entitled as bailee, or otherwise, to retain possession thereof for some benefit or profit to himself to the exclusion of all others, rather than the absolute ownership defined by section 679 of the Civil Code. Our conclusion is that the taking of property by the general owner thereof from the possession of one who rightfully holds it as bailee or otherwise for benefit to himself, with the intent to charge such bailee with the value thereof, or deprive him of such benefit, constitutes larceny.

2. There was no error in the instruction given to the jury in relation to the scope, effect, and consideration to be given to circumstantial evidence, as follows: "While every fact essential to prove the guilt of the defendant to a moral certainty must be fully proven, the law permits this to be done by circumstantial evidence, and where the evidence is circumstantial, but proves every fact essential to sustain the hypothesis of guilt, and to exclude the hypothesis of innocence, and is inconsistent with any other rational conclusion than that of the guilt of the defendant, the law makes it the duty of the jury to convict the defendant." The instruction upon this subject must be read in connection with other portions of the charge. (People v. Flynn, 73 Cal. 511, 15 Pac. 102; People v. Neber, 125 Cal. 560, 58 Pac. 133); and, when so read and considered, the instruction is substantially identical with that upon the same subject sanctioned in the case of People v. Dick, 32 Cal. 215, cited by appellant. The court had theretofore charged the jury that "the law presumes every man innocent until his guilt is established to a moral certainty and beyond all reasonable doubt, and this presumption attaches * * * to every fact essential to a conviction." In charging the jury it is not necessary in dealing with each particular phase of the case to repeat all the conditions and limitations which are to be gathered from the entire text. People v. Doyell, 48 Cal. 85; People v. Nelson, 56 Cal. 77; People v. Clark, 84 Cal. 573, 24 Pac. 313.

3. The court at the request of the prosecution instructed the jury in the language of section 485 of the Penal Code relating to the finding of lost property. Appellant insists that the action of the court in giving this instruction was erroneous, for the reason that such instruction was not applicable to any theory in support of which evidence was offered. Conceding appellant's position to be correct, it does not follow that it constitutes reversible error. "The giving of an instruction not supported by the evidence is sufficient ground for reversal where it appears that such instruction misled, or might have misled, the jury to the prejudice of the party complaining." Blashfield on Instructions to Juries, § 91; People v. Devine, 95 Cal. 227, 30 Pac. 378; People v. Roberts, 1 Cal. App. 447, 82 Pac. 624. In the case last cited the court says: "While we recognize that it is not every case of giving an instruction not pertinent to the evidence that will result in the reversal of a judgment, we are of the opinion that the giving of the instruction under discussion, under the circumstances of this case, was prejudicial." A careful examination of the record fails to disclose any manner in which the alleged error could have prejudiced the substantial rights of the defendant (Pen. Code, § 1404), and counsel does not attempt to point out wherein such rights might have been affected. At the hearing on an appeal prosecuted by one convicted of a crime, the burden rests upon him, not only to disclose wherein the giving of an instruction constituted error, but also to show affirmatively that it tends in some degree to mislead or confuse the minds of the jury to the possible prejudice of his rights; and, unless this is made to appear, the alleged error must be regarded as harmless.

4. The court instructed the jury as follows: "A person who takes in cattle to pasture for compensation, and who has the care and possession of such cattle, has a lien thereon for his compensation for pasturing the same, and is a special owner thereof, and may be deemed to be the owner thereof within the law of larceny, and an information charging the larceny of such cattle may properly allege that he is the owner thereof." Appellant contends that the giving of this instruction constituted error, for the reason that it conveyed to the jury the idea that if defendant took the animal away he was guilty of stealing her as against Blades. The defendant was not charged with stealing the property of

Blades, but was charged with stealing the personal property of one T. D. Cheney. The instruction clearly shows that, in order to justify a verdict of guilty, the jury must be satisfied that the heifer was at the time of the taking in the possession of Cheney.

5. It is next contended that the verdict is contrary to the evidence. In reply to this it may be said that an examination of the voluminous record shows abundant testimony to justify the conclusion reached by the jury. No good purpose could be subserved by reviewing it. The evidence is conflicting, and, while some of the witnesses may have sworn falsely, as claimed by appellant, still the credibility of the witnesses and the weight to be given their testimony are matters, in the first instance, for the consideration of the jury, and, in the second, for the trial judge upon hearing the motion for new trial.

6. The witness Blades was asked the following question by the prosecution: "Were you and Mr. Cheney placed under arrest for stealing this calf, you have been referring to, that you took into town at that time?" The court overruled defendant's objection to the same, and this ruling is assigned as error. The question was proper as tending to elicit evidence of the intent of defendant in taking the heifer from the pasture of Cheney. It was necessary, under the theory of the prosecution, to prove that he took her with the intent to charge Cheney with her value. He had stated that he would hold Blades and Cheney responsible for her loss. This question, and the admission of the evidence in the proceedings had before the justice of the peace wherein Blades and Cheney had been arrested for taking the heifer from the pasture wherein it was claimed defendant had placed her, were proper and legitimate for the purpose of showing the wrongful intent with which defendant deprived Cheney of the possession of her. The evidence was admissible upon the same ground that evidence of a civil suit instituted by defendant against them for her value would be admissible.

We are unable to find any prejudicial error in the record.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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7 Cal. App. 160

WEBSTER v. GIBSON et al. (Civ. 431.)

(Court of Appeal, Second District, California. Dec. 20, 1907.)

1. SPECIFIC PERFORMANCE — CONTRACT — RESCISSION.

Where after the execution of a contract for the sale of land it was modified by an escrow agreement providing that, unless a certificate showing an unincumbered title should be signed by an abstract company within a specified time, the transaction was at an end, and the vendee refused to accept the title as shown by the certificate, whereupon the abstract company surrendered to each of the parties the papers and money to which they were entitled, there was a rescission of the contract, precluding a decree for specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 183–187.]

2. SAME—FRAUD—ABILITY TO CONVEY.

Where a contract for the sale of land was tainted with fraud practiced by the vendee, and the price agreed to be paid was not the full value of the premises, and defendant was not able to convey a marketable title, specific performance was properly denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 160–171½, 257–277.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Suit by E. C. Webster against Anna N. Gibson and another. From a judgment for defendants, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

Kemp & Collier, for appellant. Munson & Barclay, for respondents.

ALLEN, P. J. Action for specific performance. Judgment for defendants. Appeal from judgment and an order denying a new trial.

The material facts involved, as found by the court, were: That on March 21, 1905, defendant Anna Gibson was the owner of certain real property. That on said date she signed a receipt for $100, acknowledging the same as part payment on account of a sale by her to plaintiff of said property. That the total consideration price was $4,900. Of this sum $2,900 was to be paid on production of a certificate of title and delivery of a deed, and the balance to be secured by mortgage, drawing 6 per cent. interest, on a part of the premises sold. No time was specified in this agreement within which the same should be performed.

The court found the signature of Mrs. Gibson to have been procured by misrepresentation in relation to certain material facts involved in the transaction. Subsequent to the execution of the instrument Mrs. Gibson acknowledged the deed conveying said premises to plaintiff, and left the same with a notary, without instructions, intending, however, that the same should be by some person delivered to the purchaser in performance of her agreement. Subsequently, on April 14, 1905, the husband, without instructions from the wife, obtained possession of the deed, and on said date he and the plaintiff executed to an abstract company certain written escrow instructions relative to its delivery, among which instructions it is stated that, if the abstract company could, within 15 days, write an unlimited certificate showing the title to be free of incumbrance, except taxes for the current year, it should deliver the deed to plaintiff and pay to defendant Anna Gibson the $2,900 purchase money, and deliver to her the mortgage. It was further stipulated that, unless such abstract company could write such certificate within 15 days, it should return the money and mortgage to plaintiff. It appears that the title was in such condition, by reason of certain building restrictions theretofore imposed upon the premises, that the abstract company could not write such certificate, and the title was not free and unincumbered in defendant; that on May 3d notice of the condition of the title was communicated to all parties, and plaintiff was notified that unless he was willing, within 24 hours, to accept the title in its then condition the deed would be returned to the defendant; that plaintiff did not agree to accept such title within the time specified, and thereupon, on May 5th the deed was returned to the defendants, and the money and mortgage restored to plaintiff; that on the day following the defendant tendered to plaintiff the $100 received under the original receipt, which he refused to accept; that no subsequent tender of the money or mortgage was ever made by plaintiff to said Anna Gibson, and she is not able to transfer a good and sufficient title to plaintiff; that the terms of said original agreement were not just and equitable; that the sum of $4,900 was not the full value of the premises at the date of the execution of the said agreement.

There is testimony in the record tending to support each and every finding above mentioned, and such findings support the judgment. Viewing the case presented by the record from any point, the judgment should be affirmed. Assuming the correctness of plaintiff's position—that certain findings have no support from the evidence, and therefore it is but just to say that the husband was the authorized agent of the wife, and that all of his acts were by her authority—it still appears that the written agreement of the wife, as subsequently modified by the escrow agreement, signed by the husband alone, all of which instruments, if considered at all, should be read together, is an agreement that, unless a certificate showing an unincumbered title should be signed by the abstract company within 15 days from April 15th, the transaction was at an end. There is evidence in the record that plaintiff refused to accept the title as shown by the certificate, and thereupon the abstract company holding the papers and money in escrow, acting under the instructions given by the parties, surrendered to each the papers and money to which they were respectively entitled. We believe, however, that the court was warranted from the evidence in finding that the original transaction was tainted with fraud, practiced by plaintiff, and that the husband was in no respect the agent of his wife, and that the price agreed to be paid was not the full value of the said premises, and that defendant was not able to convey a good and sufficient title—all of which being true, no judgment other than that rendered would be warranted.

We have examined the specifications of error alleged to have occurred at the trial, and find nothing prejudicial therein.

The judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

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7 Cal. App. 176

JOYCE v. NEWMARK & EDWARDS et al.

(Civ. 439.)

(Court of Appeal, Second District, California. Dec. 20, 1907.)

COURTS—STARE DECISIS—RULE OF PROPERTY.

The rule that, where a contract for public improvement and the resolution of intention and the intermediate proceedings to the final award of the contract are based upon specifications providing that all loss or damages arising from the nature of the work to be done shall be sustained by the contractor, the bonds issued pursuant to such contract and the property assessments are void, is a rule of property, which the court must follow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 336.]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Suit by T. F. Joyce against Newmark & Edwards and others. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

Jones & Drake, for appellants. Bernard & Potter, for respondent.

ALLEN, P. J. Action to obtain a decree annulling certain assessments and bonds issued pursuant thereto, and to quiet title to certain premises involved. Judgment for plaintiff, from which judgment and a subsequent order denying a new trial defendants appeal.

The ownership of plaintiff in the premises is not questioned. The only claim of defendants thereto grows out of the issuance of certain bonds issued on account of the improvement of Workman street in the city of Los Angeles. The record shows that the contract for the work of such improvement was awarded to one Groat; that such contract, and the resolution of intention to improve the street, and all proceedings intermediate the adoption of the resolution to improve and the final award of the contract, were based upon provisions contained in the specifications; "that all loss or damages arising from the nature of the work to be done * * * shall be sustained by the contractor." The effect of such provision in the specifications has been determined by the Supreme Court of this state in many cases, and finally in Woollacott v. Meekin (Cal. App.) 91 Pac. 612, wherein such specifications are said to be unauthorized and impose conditions tending to increase the cost of the work, and therefore render void the bonds issued pursuant to such contract. In that case it is further determined by a majority of the court that the like decisions in previous cases involving a similar question were permissible and comstitute a rule of property, and the duty of the courts was to adhere thereto. Under this mandate, we are permitted only to say that this claim of defendants, being a claim of lien based upon a void assessment and void bonds, was properly annulled, and, under such last-named decision, the decree quieting title properly entered.

This conclusion renders it unnecessary to discuss any other questions involved in the appeal.

The judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

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7 Cal. App. 127

PEOPLE v. JOHNSON. (Cr. 111.)

(Court of Appeal, First District, California. Dec. 16, 1907.)

1. Forgery — Information — Manner of Fraud.

Where an instrument alleged to have been forged appears to be one the forgery of which is prohibited by statute, and to be one that may work a fraud on the person intended to be defrauded, it is not necessary that the information allege the manner in which the person could be defrauded by such instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 78.]

2. Same.

An information for forgery charged that J. did willfully, etc., and with intent to defraud the United Railroads of San Francisco, make, alter, forge, and counterfeit a certain writing set out, which purported to be a receipt by one Francis A. for services rendered to such railroads, and further charged that defendant uttered the same to the assistant treasurer of the United Railroads with intent to defraud them, etc. *Held*, that the instrument being a proper subject of forgery under Pen. Code, § 470, prohibiting the forging of receipts, the information sufficiently showed that it was susceptible of being used to defraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 78.]

3. Same — Information — Evidence — Variance.

Where an information charged defendant with forging a receipt but the proof showed that the receipt was signed by defendant in his own name as his receipt, and, at most, tended to show forgery of an instrument in the aspect of an order for the payment of money, there was a fatal variance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 93.]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Thomas Johnson was convicted of forgery, and he appeals. Reversed.

Brennan & Lane, for appellant. Attorney General Webb, for the People.

HALL, J. Defendant was convicted of the crime of forgery, and appealed to this court from the judgment, the order denying his motion in arrest of judgment, and the order denying his motion for a new trial. No demurrer was filed to the information, but defendant, on his motion for an arrest of judgment, attacked, and now attacks, the information upon the ground that the facts stated do not constitute a public offense. Pen. Code, § 1012.

The information charges that the defendant, Thomas Johnson, did willfully, unlawfully, feloniously, falsely, fraudulently, and with intent to prejudice, damage and defraud the United Railroads of San Francisco, a corporation, make, alter, forge and counterfeit a certain instrument in writing in the words and figures following, to wit:

"Date ......190......Page 0330, No. 4517.
"Name: Francis A.
"Received of the United Railroads of San Francisco $11.25, in full for services to Jan. 12, 1907.
"Francis A. [Signature]."

—and further charges in the usual form that he then and there uttered the same to one Ivor Jones, then and there the assistant treasurer of said United Railroads of San Francisco, with intent to defraud said United Railroads, knowing the same to be altered, forged and counterfeit.

The point urged against the information is that it does not appear that the United Railroads could have been injured by the instrument set forth; it being upon its face a receipt, evidencing payment of money by the United Railroads to the signer of the receipt. Where it does not appear from the face of the instrument that the instrument forged could work an injury to the person alleged to have been intended to be defrauded, extrinsic facts must be alleged sufficient to show that such party could have been defrauded thereby. On the contrary, if the instrument appears on its face to be one prohibited to be forged by the statute, and appears on its face to be one that may work a fraud on the person intended to be defrauded, it is not necessary to allege how such person could be defrauded. "The instrument being set out, and purporting on its face to be the thing prohibited to be forged, * * * there is no need of further allegations to show how it was the thing, or how it could be used as an instrument of fraud, or that it was so used in fact." Commonwealth v. White, 145 Mass. 392, 14 N. E. 611. It is sufficient that the forged instrument might be used to perpetrate a fraud, and it is not necessary to set out in detail how the fraud could be effected. Commonwealth v. Costello, 120 Mass. 358; Travis v. State, 83 Ga. 372, 9 S. E. 1063; People v. Van Alstine, 57 Mich. 74, 23 N. W. 594; People v. Ah Woo, 28 Cal. 212; Ex parte Finley, 66 Cal. 262, 5 Pac. 222; People v. Bibby, 91 Cal. 470, 27 Pac. 781; People v. McGlade, 139 Cal. 66, 72 Pac. 600; West v. State, 22 N. J. Law, 212; Snell v. State, 2 Humph. (Tenn.) 347. In People v. Munroe, 100 Cal. 664, 35 Pac. 326, 24 L. R. A. 33, 38 Am. St. Rep. 323, it is said that the essential ingredients of forgery are "(1) A false making of some instrument; (2) a fraudulent intent; (3) if genuine, the writing might injure another." The court further said that "the third element stated is expressly recognized by this court to be the true test as to the nature of the writing"—citing People v. Frank, 28 Cal. 514; People v. Tomlinson, 35 Cal. 506; Ex parte Finley, 66 Cal. 263, 5 Pac. 222.

Turning, now, to the instrument set forth in the indictment, and alleged to have been forged by defendant Johnson with intent to defraud the United Railroads, it purports on its face to be a receipt of one Francis A., who, for the purpose of determining the sufficiency of the information, must be assumed to be a different person from the defendant. Receipts are in terms mentioned in the statute in the list of instruments that may be the subject of forgery. Pen. Code, § 470. If the defendant forged this receipt, and then presented it to the United Railroads as the genuine receipt of Francis A., and thereby procured any money from said United Railroads that it may have owed Francis A., it is perfectly clear that the corporation would have been defrauded thereby. Or, again, if Johnson were a disbursing officer of such corporation, and forged said receipt, and gave it to the corporation as a voucher for money falsely claimed to have been paid out by him for said corporation to Francis A., the corporation could and would have been prejudiced and defrauded thereby. We thus see that the instrument might, if accepted as true and genuine, work a fraud on the United Railroads, and the information meets the requirements of the law in this regard. It appears on its face that it might be used to work a fraud on the person or corporation intended to be defrauded. The only case cited by appellant which we think sustains his contention is Clarke v. State, 8 Ohio St. 630, where it was held that a receipt could not be forged with intent to defraud the payor therein. But this case was not argued by the Attorney General, but he confessed error, and the court, without citing any authorities, held that the receipt could not work a fraud on the payor. We believe the court came to a wrong conclusion in that case, even under the rule announced in general terms by itself in that case. The information in the case at bar is sufficient. We have thus far been considering the information only; but when we come to an examination of the evidence the case bears a different aspect.

It appears that Thomas Johnson and Francis A. are one and the same person, and, when the defendant signed the name Francis A. to the receipt, he signed it as his own name. It was the name under which he was known, and under which he was working for the United Railroads. It seems to have been the practice with the United Railroads to issue to laborers, such as was the defendant, brass tags numbered to correspond with numbers written against the names of the laborers in the weekly pay roll. In order to facilitate paying the men, blank receipts would be filled out by clerks in the office of the company for the amount due the men. Upon each blank receipt thus filled out would be written the name of the man and his number. These receipts were thereupon, by an employé of the company, delivered to the men holding the corresponding brass tags, and the tags taken up. The men were required to sign these receipts upon being paid their wages. In accordance with this custom, defendant was given the receipt set forth in the information, save that the amount written thereon was $4.25, and the same had not then been signed by anybody. Defendant subsequently presented the same to the assistant treasurer of the company for the purpose of getting his wages, signed by himself, but with the amount thereof changed to $11.25. Treated as a receipt, the instrument was clearly the instrument of the defendant. He had a perfect right to sign his name thereto, and it is difficult to see why he had not the right to change the amount thereof before executing it; that is, before delivering it to the company. It was an instrument intended to be signed and executed by himself alone. While as a matter of convenience the instrument had been prepared by the clerk of the United Railroads, it did not on its face purport to be an instrument executed or to be executed by the company.

It is claimed by the respondent that the instrument, when delivered to defendant, was in effect, under the methods adopted by the company for the payment of its laborers, a request or order for the payment of money. But on its face it certainly did not so appear, and no facts are charged in the information to give it such effect. The instrument charged to have been forged appears in the information to be a receipt, shown in the evidence to have been signed by defendant in his own name as his receipt. If it be conceded for purposes of argument that, notwithstanding that the instrument set forth is, on its face, unambiguous and plainly a receipt, facts might have been alleged to give it the force and effect of a request or order for the payment of money, an information so framed would charge a different offense than the one charged in the information. Defendant is charged with forging a receipt. True, it is not called a receipt in the information, but it is set out in full, and clearly appears to be a receipt. The evidence, however, at the best, only tends to show a forgery of the instrument in the aspect of an order for the payment of money. No such case is made by the information, but an entirely different offense is charged. Defendant raised the question of variance several times during the trial. For the reasons above set forth, the evidence does not support the verdict, and the court should have granted a new trial. In the case of People v. Peacock, 6 Cow. (N. Y.) 72, cited by the respondent, although defendant signed his own name, he signed it as the name of another person who bore the same name, and for whom the goods were intended, as the defendant well knew. The case simply enunciates the same rule as laid down in People v. Rushing, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141, but in its facts bears no resemblance to the case at bar.

The judgment and order denying the motion for a new trial are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

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7 Cal. App. 132

LYNCH v. McGHAN. (Civ. 327.)

(Court of Appeal, Third District, California. Dec. 17, 1907.)

1. Trover and Conversion—Damages—Use of Property.

Civ. Code, § 3333, provides that, for breach of a noncontract obligation, the measure of damages, except where otherwise expressly provided, is the amount that will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. Section 3336 provides that the detriment caused by the wrongful conversion of personal property is presumed to be the value of the property at the time of the conversion, with interest, or, where action has been prosecuted with reasonable diligence, the highest market value at any time between the conversion and the verdict, without interest at the option of the injured party, and a fair compensation for time and money properly expended in pursuit of the property. *Held*, that plaintiff in an action for conversion of certain horses could not recover for the use of the horses under section 3333, but was limited to the damges specified in section 3336.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 253–255.]

2. New Trial—Newly Discovered Evidence—Discretion.

The granting a motion for a new trial for newly discovered evidence is largely in the discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 201.]

3. Same—Nature of Order.

Where an order granting a new trial did not specify the ground on which it was granted, it would be upheld on appeal if justified on any ground contained in the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3772–3776.]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by L. A. Lynch against Charles McGhan. From an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

A. H. Carpenter, for appellant. Jacobs & Flack, for respondent. Miller & Clark, for intervener.

BURNETT, J. The appeal is from an order granting defendant's motion for a new trial. The action was brought to recover damages for the conversion of six horses and some other personal property. The court found that "plaintiff has been damaged by such unlawful conversion in the following specific amounts, namely: The sum of $252.60 cash taken from plaintiff; the sum of $160, the value of the aforesaid six horses; the sum of $17, the amount of time and money spent by plaintiff in the pursuit of the aforesaid property; the sum of $140 on account of the loss of use of the aforesaid six horses from the time of their conversion, and the sum of $22.60, which is the interest on the value of the aforesaid money and horses from the time of their conversion by defendant at the rate of seven per cent per annum, which makes the total amount of plaintiff's damages sustained in the premises the sum of $592.20." It is obvious that this finding is erroneous, at least as to the $140 for the use of the horses.

The rule as to damages for the conversion of personal property is prescribed in section 3336 of the Civil Code as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of the conversion, with the interest from that time, or where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict without interest at the option of the injured party; and (2) a fair compensation for the time and money properly expended in pursuit of the property." The interest on the value of the property is the allowance provided by the statute in lieu of the value of the use of the property and not in addition thereto. The question has been more or less considered in the following cases: Douglass v. Kraft, 9 Cal. 562; Hamer v. Hathaway, 33 Cal. 117; Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462; Barrante v. Garratt, 50 Cal. 112; McCray v. Burr, 125 Cal. 636, 58 Pac. 203; Yukon River, etc., Co. v. Gratto, 136 Cal. 541, 69 Pac. 252.

Appellant claims that interest was allowed under said section 3336 and damages for the use of the stock under section 3333 of the Civil Code, and that these are concurrent sections. In support of the contention the following cases are cited: Stevenson v. Smith, 28 Cal. 103, 87 Am. Dec. 107; Fairbanks v. Williams, 58 Cal. 242; Livestock, etc., Co. v. Union Co., 114 Cal. 447, 46 Pac. 286. The language employed by the Legislature precludes such construction, and the cases cited are not in point. Said section 3333 lays down a general rule of damages, and especially excepts the instances "where otherwise expressly provided by this Code." As we have seen, for the case at bar there is an express provision in said section 3336. The Stevenson Case, supra, was not in conversion, but was for the recovery of the possession of a mare and damages for her detention. It was properly held by the court that special damages must be pleaded. The question involved in the Fairbanks Case, supra, was as to the expense incurred in the pursuit of the property. In the Livestock, etc., Case the action was for the recovery of the possession of the property with damages for its detention or its value in case delivery could not be had

What is said by the court as to damages for the detention of the property must be considered in view of the nature of the action.

Again, one of the grounds upon which the motion for a new trial was based is "newly discovered evidence material for the defendant which he could not, with reasonable diligence, have discovered and produced at the trial." Certain affidavits were introduced containing important statements bearing upon the issue as to the ownership of the property. Much must be conceded to the discretion of the trial court in the determination of the sufficiency of the newly discovered evidence to justify a new trial. This is true whether said evidence be cumulative or otherwise. Admitting that it is cumulative, if the court had denied the motion on that ground, it would be a sufficient reason for affirmance; but the contrary is not true that the order granting the motion should be reversed because the additional evidence is merely cumulative, because, as said in Oberlander v. Fixen & Co., 129 Cal. 692, 62 Pac. 254: "For, in either case, it is for the trial judge to determine whether the evidence is of character probably to affect the result on a new trial; and, unless the evidence be of such a character as to make it manifest and certain to this court that in the one case it would, or in the other that it would not, result differently on a retrial, the order will not be disturbed." So here the newly discovered evidence is such that, if the motion for a new trial had been either granted or denied on that ground, it could not be said that the trial court was not justified in its action. It does not appear upon what specific ground the motion was granted, as the order is in the following form: "And the court, being fully advised thereupon, grants said motion for a new trial to the defendant, Charles McGhan."

There can be no question, therefore, that, if justified on any ground contained in the motion, the order must be upheld.

The order granting the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 170

SALTER et al. v. CALIFORNIA CYCLEWAY CO. et al. (Civ. 436.)

(Court of Appeal, Second District, California. Dec. 20, 1907.)

DEEDS—RESERVATIONS.

The owner of land granted an easement for a bicycle road on condition that, unless it should be used within a specified time, the right of way should revert to him. After his death his executors sold a portion of the premises over which the easement extended. The sale was confirmed by the superior court, and, in the order of confirmation and in the appraisement filed by the executors, the property was described as "being part of Tp. 1 S., Rg. 12 W., $1^{82}/_{100}$ acres, * * * (except $^{24}/_{100}$ of an acre in a cycleway) of lot 4, Sec. 6." The deed executed by the executors described the property so as to include all of lot 4, which general description was followed by a statement that the property was described in the inventory in the manner following, and then followed a description as in the order of confirmation. *Held*, that the deed, order, and inventory could only be read as to include all of the ground included in the easement, subject to whatever rights existed under the grant thereof, and there was nothing to show a reservation of the fee in the ground over which the easement extended.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Fred R. Salter and another against the California Cycleway Company and another. Defendants appeal from a judgment in favor of plaintiffs, and from an order denying a new trial. Affirmed.

Porter, Sutton & Cruickshank, for appellant. Charles L. Batcheller, McNutt & Hannon, and Walter L. Krug, for respondents.

ALLEN, P. J. Action to quiet title and to have certain easements declared forfeited. Judgment for plaintiffs. Defendants appeal from the judgment, and from an order denying a new trial.

The first point made on appeal is that plaintiffs did not show title to the property across which the easements were originally granted. We think there is nothing in this point. All parties claim under Andrew Glassell, deceased. Glassell granted the easements upon the express stipulation that, unless the contemplated bicycle road and the viaduct referred to should be completed and used within five years from and after the date of the deed, said right of way should revert to the grantor, and, if at any time the grantees or their assigns should cease to use the same for the purposes specified for a continuous period of three years, a reverter should result. After the death of Glassell his executors sold to one Rogers a portion of the premises over which the easements extended. Plaintiffs deraign title through Rogers. The sale to Rogers was confirmed by the superior court, and in such order of confirmation and in the appraisement filed by the executors the property under consideration was described as "$7^{30}/_{100}$ acres, being (exc. of $^{25}/_{100}$ acres in Cycleway & R. R. R. W.) S. $7^{55}/_{100}$ acres of lot 3," etc. The second tract is described as: "Being part of Tp. 1 S., Rg. 12 W., $1^{82}/_{100}$ acres, being all S. of R. R. R. W. (except $^{24}/_{100}$ of an acre in a cycleway) of lot 4, Sec. 6." The deed executed by the executors to Rogers described the property so as to include all of lots 1 and 4 hereinbefore mentioned. This general description was followed by a statement that the said real property was described in the inventory in the manner following. Then follows, so far as affects the property in litigation, a description as in the order of confirmation.

We are of opinion that a fair construction of the deed, order, and inventory can only be to read the same as including all of said ground included in the easements, but subject to whatever rights existed under the deeds granting the same; and this intention is evident from the manner of description, and nothing therein can be said to amount to a reservation of the fee in the ground over which the easements extended. There is satisfactory evidence in the record supporting the finding that no part of this cycleway over the premises in question had been completed; nor had the same ever been used in the manner stipulated in the deed.

The judgment of forfeiture and decree quieting title to the premises were warranted.

We find no error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

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7 Cal. App. 172

UNITED STATES NAT. BANK OF PORTLAND v. WADDINGHAM. (Civ. 438.)

(Court of Appeal, Second District, California. Dec. 20, 1907.)

1. BILLS AND NOTES—CONSTRUCTION—INTEREST.

Civ. Code, § 1651, provides that the written parts of an instrument shall control the printed ones, and section 1654 declares that an uncertainty in the language of a contract is to be interpreted most strongly against the party who caused the uncertainty to exist. A blank form of note contained a provision that the maker would pay, "with interest, payable monthly, at the rate of ——— per cent. per ——— until paid," and a further provision that, should the note not be paid at maturity, it should thereafter bear interest at a specified per cent. per month. The maker struck out the first provision as to payment of interest, except the words "until paid," and wrote in place of such provision "without interest." *Held*, that the maker was required to pay interest at the rate of 2 per cent. from the maturity of the note.

2. INTEREST—INTEREST ON FINDINGS.

Code Civ. Proc. § 1035, provides that the clerk must include in the judgment entered up by him any interest on the verdict or decision of the court from the time it was rendered or made. *Held* that, where, in an action on a note calling for 2 per cent. interest after maturity, the decision was in favor of the holder, the judgment entered by the clerk should have been the aggregate amount of principal and interest due at the rate called for by the note at the time the decision was rendered, and a judgment apparently entitling the holder to the rate called for by the note until execution on the judgment was erroneous.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by the United States National Bank of Portland against J. H. Waddingham. From a judgment in favor of plaintiff, defendant appeals. Modified and affirmed.

Theo. Martin and Grant Jackson, for appellant. Lawler, Allen & Van Dyke, for respondent.

TAGGART, J. Action on promissory note. Judgment for plaintiff, and defendant appeals.

Defendant, on August 1, 1905, executed to plaintiff's assignor a promissory note for $2,000, using for that purpose a blank form as follows:

"$...... Los Angeles, Cal., ..., 190..

"On......190.., at three o'clock p. m. of that day (no grace) for value received, I promise to pay to the order of.........., ... dollars, at the Los Angeles National Bank, *with interest payable monthly, at the rate of* ....*per cent. per*.......until paid. [If said interest be not paid when due, it shall be added to the principal, and bear interest at the same rate as the principal, and the whole amount of principal and interest shall thereafter be due and payable at the option of the payee.] Principal and interest payable in gold coin of the United States; and should this note not be paid at maturity it shall thereafter bear interest at the rate of two per cent. per month." (The italics and brackets are inserted for purpose of reference.)

The amount ($2,000), date (August 1, 1905), day when due (November 1, 1905), and the name of the payee (Caples Bros., Portland, Or.), were inserted in the proper blanks in the form. The words italicised were erased by running a pen through them, and there was written immediately above them the words, "without interest." It is conceded that the portion of the note included in the brackets has no bearing upon the question to be considered upon this appeal, which is: Was it the intention of the parties to said note that the principal should bear interest as provided in the last clause of the note?

The agreement that the principal shall bear interest at the rate of 2 per cent. per month after maturity is irreconcilable with the promise, "without interest until paid." The words "until paid," are a part of the original form, and the words "without interest" are the only written part of the instrument to be considered in applying the rule of section 1651, Civ. Code, that the written parts control the printed parts. In seeking to ascertain the intention of the parties from the writing, it will be observed, first, that the maker of the note selected from the various current blank forms of promissory notes one containing a penal clause. If instead of erasing the reference to per cent. and interest the maker had inserted some rate of interest, say 6 per cent., the note would then have read: "With interest payable monthly, at the rate of 6 per cent. per annum until paid." It would not, we think, or at least could not legally be said, that the maker intended by the use of the word "paid" to render ineffective the penal clause in the note increasing the interest to 2 per cent. after maturity. If the expression "with interest until paid" should be construed so as to render the penal clause effective, the same rule would render such a construction proper where the expression used was "without interest until paid." Giving effect thus to every part of the contract, so far as possible, the last interest clause was evidently intended to modify the first, if payment were not made prior to the maturity of the note, that is, on or before November 1, 1905. This construction is also supported by the rule of section 1654 of the Civil Code that an uncertainty in the language of a contract is to be interpreted most strongly against the party who caused the uncertainty to exist, the promisor being presumed to be such party.

The conclusion of the court that plaintiff was entitled to recover judgment for $2,000, with interest thereon at the rate of 2 per cent. per month from November 1, 1905, was correct, but would have been better expressed had the computation of interest been made and the whole amount of the principal and interest due at the date of the finding stated therein. The judgment as framed apparently entitles the plaintiff to continue to enjoy the benefit of the 2 per cent. per month interest clause until execution on the judgment. This is improper.

The statute provides (Code Civ. Proc. § 1035), "the clerk must include in the judgment entered up by him any interest on the verdict or decision of the court from the time it was rendered or made." The interest after verdict or decision must be computed at the legal rate upon the aggregate amount of principal and interest due at the contract rate at the time the decision or verdict was rendered. Murdock v. Clarke, 88 Cal. 394, 26 Pac. 601. The theory of the law is not that the party recover the particular note or chose in action, but that he recover a fixed and definite sum as damages for the nonperformance of the contract, and in cases of failure to pay money due the true measure of damage is the amount of money owing and the interest that was agreed upon. The amount of the judgment being ascertained, the statute steps in and regulates the rate at which it shall bear interest. Guy v. Franklin, 5 Cal. 417. The rule is not affected by the judgment being formulated by the court instead of the clerk. Barnhart v. Edwards, 128 Cal. 575, 61 Pac. 176.

That there may be no uncertainty in this respect, the judgment should be modified so as to state the total sum of principal and interest due at the date of the rendition of the decision (findings) in accordance with the foregoing opinion, which appears from the record to have been on July 20, 1906. Eight months and 19 days interest at 2 per cent. per month on $2,000 would be $345.33. The amount of the judgment, then, should be $2,345.33, entered as of July 20, 1906. The statute provides the rate of interest thereon.

It is therefore ordered that the superior court modify said judgment by striking out the words and figures "two thousand (2,000) dollars, together with interest thereon from November 1, 1905, at the rate of two (2) per cent. a month," and inserting in lieu thereof the words and figures "two thousand three hundred and forty-five and 33/100 ($2,345.33) dollars"; and, when said judgment is so modified, it is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 199

In re McCARTHY'S ESTATE. (Civ. 423.)

(Court of Appeal, First District, California. December 24, 1907. Rehearing denied by Supreme Court Feb. 20, 1908.)

HOMESTEAD — SURVIVING WIFE — VALUE — RIGHTS OF CREDITORS.

Community property of a husband and wife, of the value of $2,000 at the time it is set apart as a homestead, which at the time of the death of the husband has increased in value to an amount in excess of the homestead exemption, cannot be reached by creditors of the estate, since by the direct provisions of Code Civ. Proc. § 1474, title to the homestead vests absolutely in the survivor, and the fact that Civ. Code, § 1265, provides that the title shall vest subject to no other liability than such as exists or has been created under the provisions of the title "Homestead," and the latter part of Civ. Code, § 1474, provides that in either case it is not subject to the payment of any debt or liability except as provided in the Civil Code, does not affect the rule, where the creditors' claims do not come within the liabilities to which the sections refer, as fixed by Civ. Code, tit. "Homesteads," § 1241.

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Petition by the administratrix of the estate of Charles Patrick McCarthy, deceased, to set apart a homestead to her as his widow. From an order setting apart the homestead, a creditor appeals. Affirmed.

See 82 Pac. 635.

Wyckoff & Gardner, for appellant. James A. Hall, for respondent.

COOPER J. Appeal from order setting apart a homestead. The facts necessary to a decision of the question in this case are as follows: In November, 1883, Charles Patrick McCarthy duly executed and recorded a declaration of homestead upon the premises described in the petition. At the time of such recording the premises were community property of the said McCarthy and his wife, Ellen, and they resided thereon with their children. The value at that time was $2,000. The premises continued to be the home of McCarthy and his family until his death in January, 1903. In February, 1903, Ellen McCarthy, the widow, was duly appointed administratrix, took the oath, qualified, and ever since has been such administratrix. The estate is insolvent, and certain creditors have proven their claims, which have been duly allowed by the superior court, and are on file. An inventory and appraisement has been duly made and filed, in which the said premises are appraised at the sum of $5,000. In June, 1903, the administratrix duly filed her petition, praying for an order setting apart the premises to her as the surviving widow of deceased. This petition was opposed by Mary Burke, a creditor of the estate, whose claim has been duly allowed and filed. Upon the trial the court found that the homestead was, at the time of the death of McCarthy and at the time of the hearing, of the value of $8,000.

This finding may be regarded as immaterial, if the homestead is, under the law, the property of the widow and exempt from execution or other process by the creditors of the estate. If the homestead was exempt from execution, it was the duty of the court to set it apart to the widow. Code Civ. Proc. § 1465. The question for decision, as stated by appellant's counsel, is: "As against a protesting creditor of the estate, may the court set apart to the surviving wife the whole of a homestead selected by the husband during his lifetime from the community property; the said homestead having been of the value of $2,000 at the time of selection, and of the value of $8,000 at the time of the death and ever since, and the estate being otherwise insolvent?"

Section 1474 of the Code of Civil Procedure provides: "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor." This case comes within the language of the above-quoted section. It has been held in such case that the title vests by operation of law in the survivor immediately upon the death of the other spouse, without any order setting apart the homestead (Baker v. Brickell, 87 Cal. 339, 25 Pac. 489, 1067; Fisher v. Bartholomew [Cal. App.] 88 Pac. 608, and cases cited), and the title to such homestead could not be affected by a subsequent order of the court (Fisher v. Bartholomew, supra; Estate of Fath, 132 Cal. 612, 64 Pac. 995).

It is contended by appellant that, notwithstanding the language of the section quoted, the survivor gets title to the homestead subject to the provisions of the Civil Code as to reaching any excess in value beyond $5,000 by process in behalf of creditors of the deceased. In other words, it is claimed that to "vest absolutely in the survivor" does not mean to "vest absolutely," but to vest subject to the right of the creditors of the deceased to reach any excess of $5,000 in value. Such, in our opinion, is not the meaning of the section. We must read the sections of the Codes together for the purpose of arriving at the intent and purpose of any particular provision. It is provided in the Civil Code, under the title relating to homesteads (section 1265), as follows: "From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this title." This section adds the provision "subject to no other liability than such as exists, or has been created under this title," and again emphasizes the intention of the Legislature by adding, "but in no case shall it be held liable for the debts of the owner, except as provided in this title." These provisions must be read into section 1474, Code of Civil Procedure.

We must, then, look to the liabilities created by the title on homesteads (Civ. Code, § 1241), and we there find the following: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained: (1) Before the declaration of homestead was filed for record and which constitute liens upon the premises. (2) On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, material men's or vendors' liens upon the premises. (3) On debts secured by mortgages of the premises, executed and acknowledged by husband and wife, or by an unmarried claimant. (4) On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." The creditors' claim in this case does not come within the class enumerated in said section, and therefore the homestead is not subject to this liability.

It is claimed that the latter part of section 1474, Code Civ. Proc., which provides: "In either case it is not subject to the payment of any debt, or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband and wife, except as provided in the Civil Code"—is sufficient to show that the intention was to allow general creditors to reach the excess in value over $5,000. In our opinion such is not the proper construction of the statute. It evidently means the provisions of section 1241 of the Civil Code hereinbefore quoted. The particular provision of the Code herein quoted, with reference to homesteads upon the death of the husband or wife, is the particular provision of the Civil Code that governs. It is a special provision relating to the very question as to where the title to the homestead vests in case of the death of the husband or wife.

Section 1476 of the Code of Civil Procedure seems to contemplate that, if the homestead exceeded in value the sum of $5,000 at the time it was selected and recorded, the excess over $5,000 may be reached. This is evidently upon the theory that a homestead could not be valid upon premises which exceeded $5,000 in value at the time of the selection. It is not necessary to decide the question in this case, for the reason that it is not pretended that the premises were of the value of

$5,000 at the time of the selection of the homestead. It is true that under the construction herein given the creditors of a deceased person would not have the right to reach the value of the homestead in excess of $5,000, which they could have reached during his lifetime, and are thus placed in a worse position by his death; but for this reason we cannot change the statute. A creditor is presumed to know the law, and its provisions in relation to homesteads and exemptions. The homestead being of record, and the Code making provision as to where it should vest on the death of deceased, the debts were contracted with reference to the law and to the right of the widow to take the homestead free from such debts. The homestead was free from liability to general creditors at the time it became such. It continued so during the lifetime of deceased, unless it became of greater value than $5,000. It vested in the survivor entirely free from such liability, no matter what its value at the time of the death. The wife held in the nature of a joint tenant, with the right of survivorship.

The order is affirmed.

We concur: HALL J.; KERRIGAN, J.

(7 Cal. App. 206)

ZIPPERLEN et al. v. SOUTHERN PAC. CO. (Civ. 380.)

(Court of Appeal, Third District, California. Dec. 24, 1907. Rehearing Denied by Supreme Court Feb. 20, 1908.)

1. TRIAL—WITNESSES — CREDIBILITY — QUESTION FOR JURY.

Where inconsistency or apparent inconsistency in testimony is developed through cross-examination, it is for the jury to determine whether the witness is unworthy of belief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 334–335.]

2. RAILROADS—STREET CROSSING ACCIDENT—LIABILITY.

If plaintiff before undertaking to cross railroad tracks at a street crossing exercised reasonable and ordinary care, and if, after the engineer or fireman on an approaching engine applied steam to the engine, the horse plaintiff was driving became frightened and stood upon the track on which the engine was moving, and plaintiff attempted to urge the horse forward, but could not do so, the company's employés were bound to keep a lookout and to ascertain whether the crossing was clear, and if they failed to do so, and plaintiff was injured in consequence without any fault on her part, the company is liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 988.]

3. APPEAL—REVIEW—VERDICT — CONCLUSIVENESS.

A verdict on a substantial conflict of evidence will not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935–3937.]

4. RAILROADS—STREET CROSSING ACCIDENT—EVIDENCE—SUFFICIENCY.

Evidence, in an action against a railway company for injury to one driving across tracks at a street crossing and struck by an engine, *held* sufficient to sustain a verdict and judgment for plaintiffs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1138–1150.]

5. WITNESSES—CONTRADICTION—WHEN PROPER.

The rule authorizing the contradiction of one's own witness is, in its application, like the rule as to impeachment, attended by more or less danger of producing injustice, and hence should never be exercised except where the exigencies of the situation clearly warrant it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1268.]

6. SAME—EFFECT OF TESTIMONY.

Code Civ. Proc. § 2049, prohibits a party to impeach his own witness by evidence of bad character, but provides that he may contradict him by other evidence, and may also show that he has made inconsistent statements with his present testimony, as provided in section 2052. Section 2052 provides that a witness may be impeached by evidence of inconsistent statements, but that he must be first given a chance to refresh his memory by having his attention called to the circumstances of times, places, and persons present when such statements were made. *Held*, that though the effect of admitting testimony to contradict one's own witness may be practically the same as if offered for impeachment, the only purpose for which the testimony may be given is merely to explain the manifestly awkward position in which a party has been placed through unexpected testimony of his own witness; section 2049 not authorizing the "impeachment" of one's own witness in the true legal sense of that term, the reference to section 2052 merely meaning that, before being permitted to prove that his witness has made inconsistent statements, the party must lay the foundation as provided by section 2052.

7. SAME.

The rule under the express terms of Code Civ. Proc. § 2049, that one may contradict his own witness or show that he has made inconsistent statements is subject to the qualification that the witness must give testimony damaging to the party calling him, and that it must appear that such party has been misled and taken by surprise and had reason to believe that the witness would give favorable testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1268.]

8. SAME.

A party will not be permitted under guise of the rule that one may contradict his own witness or show that he has made inconsistent statements to present to the jury mere hearsay declarations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1268.]

9. SAME.

If, in an action against a railway company for injury to one struck by an engine at a street crossing, it was plaintiff's theory that the engineer was negligent in failing to keep a lookout, the engineer's testimony, as her witness, that he saw her approaching the crossing was adverse to plaintiff as affecting her right to show that he had made an inconsistent statement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1268.]

10. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

If, in an action against a railway company for injury to one struck by an engine at a street crossing, plaintiff relied on the last clear chance theory, the admission of testimony for plaintiff rebutting the engineer's testimony, as her witness, that he saw her approaching the crossing was harmless to the company; it appearing that if the jury found on that theory the verdict was based largely upon the engineer's testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4175.]

11. TRIAL—PRELIMINARY QUESTIONS OF FACT—QUESTIONS FOR JURY—WITNESSES—CONTRADICTION.

Whether a party whose witness has given unfavorable testimony was surprised as affecting his right to show inconsistent statements by the witness is a question for the court.

12. WITNESSES—CONTRADICTION.

Though in determining whether a party has been surprised by unfavorable testimony of his own witness, as affecting his right to show an inconsistent statement of the witness, the better practice is to receive evidence through sworn witnesses, much is left to the trial court's discretion, and there was no abuse of discretion in accepting as a basis for evidence of an inconsistent statement unsworn statements of the party's counsel that the unfavorable testimony was different from that which the party's attorneys understood it would be.

13. RAILROADS—STREET CROSSING ACCIDENT—LIABILITY.

If an engineer did not see one crossing the track until she was in a position of danger, and then could have avoided injuring her, he was negligent in not doing so, though she was primarily negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1096-1099.]

14. EVIDENCE—RES GESTÆ.

In an action against a railway company for injury to one struck by an engine while crossing a track, evidence that, in the injured person's presence and immediately following the accident, the engineer asked the fireman "Why didn't you tell me to stop?" was admissible as part of the res gestæ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 351-368.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Personal injury action by Minnie Zipperlen and another against the Southern Pacific Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

L. L. Cory, for appellant. G. W. Cartwright and Edgar S. Van Meter, for respondents.

HART, J. Action for damages for personal injuries. The verdict of the jury was in favor of plaintiffs for the sum of $4,125, and, agreeably to said verdict, judgment was entered in their favor for that sum. The appeal, supported by a bill of exceptions, is from said judgment.

The defendant corporation, at the time plaintiff, Mrs. Zipperlen, received the injuries for which reparation in damages is sought through this action, operated a steam railway through and over certain public streets in the city of Fresno. On the 13th day of February, 1900, said plaintiff was traveling in a conveyance, drawn by a single horse, along Tuolumne street, in said city. The complaint alleges that said street was "a regularly laid out, open, and traveled public highway in the said city of Fresno from the west part of said city to the east part thereof," and that said street crosses the railroad tracks of defendant at a point between G and H streets in said city. While the plaintiff was attempting to cross said tracks on said Tuolumne street, the vehicle in which she was riding was struck by a locomotive or "yard engine," used by defendant for "switching purposes," with the result that she was thrown with great violence to the ground, sustaining a fracture of the thigh, or, technically, the femur bone, and other less serious injuries. The plaintiff alleges that the injuries suffered by her were due to the negligence of the defendant. The claims of the plaintiffs are resisted by the defendant upon the ground of contributory negligence. A reversal of the judgment is insisted upon for the following reasons: (1) "That the evidence discloses, without substantial conflict, that the accident was occasioned by the contributory negligence and want of care of the plaintiff;" (2) "the court erred in allowing in evidence, as against this defendant, a certain conversation of the engineer of the defendant long after the accident occurred;" (3) "errors of the court in allowing, and refusing to give, certain instructions to the jury."

From the nature of the instructions submitted to the jury by the court, it is evident that the case was tried upon two distinct and diametrically opposite theories, viz.: (1) Knowledge on the part of the engineer of the perilous position of Mrs. Zipperlen and his failure to exercise the care imposed upon him under such circumstances to prevent the accident resulting in the damage. (2) Want of knowledge on the part of the engineer that any one at all was attempting to make the crossing, due to his gross carelessness and negligence in not looking, before and while the engine was moving toward the crossing, to ascertain whether or not it was clear. The first-stated proposition, it will be noted, involves what is known as the doctrine of the "last clear opportunity"—that is, that the engineer, having discovered Mrs. Zipperlen's perilous situation before damage was done, failed to exercise ordinary care to prevent the accident. Bennichsen v. Market St. Ry. Co., 149 Cal. 22, 84 Pac. 420. The second proposition involves the contention that the engineer moved his engine toward the crossing without exercising any care whatever, or in total disregard of the duty as to care imposed upon him—that is, without looking down the track on which his engine was moving to learn whether the crossing was clear or in use by some traveler. In order that a clear understanding may be conceived of two of the points urged against the validity of the judgment—insufficiency of the evidence to sustain the verdict of which the judgment is predicated, and errors in the giving of certain instructions—it will be necessary to review the evidence to some extent.

The testimony of the engineer Mosier (introduced as a witness by the plaintiff) is to the effect that, just previous to the accident, his engine was standing, according to his best judgment, about 2,000 feet north of the

Tuolumne street crossing; that he was sitting on the right hand side of the cab at the time; that, after he started the engine, and was going in the direction of and approaching said street, he was looking toward the crossing. He proceeded: "I was keeping a close lookout upon the track in the direction in which the engine was moving to see that the crossing was clear. My fireman was on the left hand side of the engine, and at that time was ringing the bell. * * * I came down the Collis main line from the roundhouse. It is the first track west of the main line, which would be the third line coming from the west. * * * In crossing the railroad from G street upon Tuolumne street I think a cart would cross the two tracks before reaching the track I was on. I should judge I was backing up about four or five miles an hour. There were automatic brakes and reverse upon this engine. I ought to stop it in five or six feet, or eight feet, anyway, at the rate I was then going. I cannot say just when was the first time I saw the horse and cart of Mrs. Zipperlen, it was quite a distance when I saw her coming. She was then coming down from G street and was traveling east. In order to see her I would not have to look across where the fireman was sitting on that engine. I could sit up there and look on both sides, as it had a low tender. I could see the whole front all the time and the whole situation. I could see the track back of the tender. I would say I could see the track back of the tender as far as across this courtroom here. I could see a horse or buggy crossing the track as far away as across this courtroom by looking over the tender. I could look over the tender and could see Mrs. Zipperlen coming in the cart. There was no time after I first saw her that it would have been impossible for me to see her before the accident, and I watched her, and I watched her during the whole time. When I first saw her she was going east coming down Tuolumne street." The witness Stoner, who was driving toward Tuolumne street, and was some 30 or 40 feet back of Mrs. Zipperlen when the latter started across the tracks, testified that "when she got to the crossing she looked up and down to see if there were any cars, and saw a clear track and started to go across. The engine was then about 50 yards from the crossing on Tuolumne street, and was standing. I saw the fireman when it started to back down on the track. The fireman was sitting in his seat looking east. I did not watch the engine continuously until it arrived at the crossing. The rear end of the tender was about six or eight feet from the buggy when I saw it next. I should judge the engine was going about three miles an hour. Mrs. Zipperlen did not stop traveling or check up her horse to see whether the track was clear, and did not stop at any time after until the accident. She could not have stopped without my observing it. There was no time while Mrs. Zipperlen was driving along upon that track that she crossed entirely over the track upon which the engine and tender were backing, prior to the accident. She could not have done that without my seeing her. I did not observe her horse backing into the engine, * * * I did not see the engine slack speed before the collision. * * * The fireman was not looking in Mrs. Zipperlen's direction, that I saw. He was not ringing the bell, and no bell was rung. I am positive no bell was rung. I could see the engineer's head sticking up over the cab. I might if I looked, but I do not think it would have been possible for the engineer to sit on that side without my observing him. I have acted as a fireman on the railroad. At the time of the collision the cart had just come on the first rail; the horse's ears were about past the tender. I am sure of that. Just as the collision took place the engineer started the engine the other way." Mrs. Zipperlen testified that she had been familiar with the crossing at Tuolumne street for about eight years, and that when she reached the crossing and before starting to pass over it she "paused to see that the track was clear"; that she observed that the engineer was standing on one of the tracks, about 75 or 100 feet from the crossing, and then started across. "I was perhaps 12 feet, or something like that, from the track that the engine was standing on. When I saw the engine standing still I started to cross. I was traveling at a slow, little trot. As I started to cross the engine started to back up, and then the engine struck the cart. I tried to back—back her off—but of course the engine frightened the horse and I could not do anything with her. She was badly frightened. I was not driving with a whip, and had no whip in my hand, and I heard no bell ringing. When I first saw the engine I saw the fireman. He was then on the west side of the cab. I did not see the engineer. I think I could have seen the engineer if he had been in the cab and high enough to have seen me over the tender. I do not think the fireman saw me. I observed the engine as it came on down. I did not notice the fireman looking in my direction as long as I looked. Of course, after the horse became unmanageable, I had all I could do to watch her. I do not think at any time I crossed entirely over the crossing upon which the engine was backing. I did not see the engineer or the engineer's face at any time. I did not hear the whistle blow. I do not think the engine was coming back very fast. After the engine struck the cart and I was thrown out upon the ground, I was lying right along side of the engine, or along side of the track rather. I could not see exactly how far the engine was from me when I saw it moving towards me. Possibly it was the length of this room, maybe not quite so far. When the engine struck the cart the horse reared up to one side—toward the right. The tender did not strike me. When the engine struck the wheel, it threw me out. I rather think I fell backwards. The engine, tender, and wheels, just at the moment I struck the ground, were beside me. I was lying pretty close to the track, as close as I could possibly be without being injured by the wheels. The engine then ran on ahead, and I think the engineer sent the fireman to get it. I first saw the engineer when he stooped to pick me up about a couple of minutes afterwards." Mosier, the engineer, testifying for the defense, repeated that he saw "Mrs. Zipperlen at all times from the time she started to cross until she got across"; that he "could see the whole rig until I got as close as the width of this room to it—about 30 feet." He stated that Mrs. Zipperlen had crossed the track the engine was on, when her horse became frightened and began to "buck and back," and backed onto the track on which the engine was moving. He declared that when the engine was six or eight feet from the cart, and the moment the horse began backing toward the track the engine was on, he stopped the engine as soon as he could, "put on the brakes and reversed the engine." The horse kept on backing, he continued, until it struck the engine, causing Mrs. Zipperlen to be thrown to the ground. E. F. Phillips testified for the defendant that he saw the engine backing down the track toward the crossing over which Mrs. Zipperlen attempted to pass. He said that "the best of my recollection is that the locomotive was backing down, without any stop whatever from the roundhouse, and I heard its bell ringing as it was backing down. The locomotive came on down, and when the engineer saw her crossing the tracks it slowed up very perceptibly. I cannot say now whether it made a full stop or not, but I think it did. I think it kept on coming very nearly to a stop. Then her horse crossed the track that the locomotive was approaching on, and got the cart wheels, as far as I could see from where I was, between the rails of the track beyond the track that the locomotive was approaching on; then her horse got unmanageable. She had no whip to strike him with. She did all she could with the lines to urge him on, and, instead of his going forward as she wished he would, he commenced backing, and backed in a quarter circle until the wheel of the cart was struck by the approaching locomotive, with just enough force to upturn the cart onto the other wheel and threw her from the vehicle."

The foregoing constitutes the substance of the testimony given on direct examination of the principal witnesses introduced by both sides. The cross-examination of the witnesses, particularly that of Mrs. Zipperlen, revealed some discrepancies and inconsistencies which were of a character to make them peculiarly a matter for the jury to settle to its own satisfaction. A written statement, obtained from Mrs. Zipperlen a few hours after the accident happened, by Dr. Maupin, the defendant's local surgeon, and to which statement the husband of Mrs. Zipperlen signed the name of his wife, contained a declaration that the horse she was driving was wholly to blame for the accident. This writing was shown to Mrs. Zipperlen, and she was asked, on cross-examination, if she made the statement. Her reply was that, while she was able to recall that Dr. Maupin had called to interview her on the day of the accident, she had no recollection of making the declarations which the written statement indicated she had made. But, as before declared, whatever inconsistency or apparent inconsistency might have been developed in her testimony through her cross-examination, it was, after all, for the jury, and not for this court, to determine whether her evidence had been thus shaken or shown to be unworthy of belief.

It is, however, plain to be seen from the evidence, of which we think we have given a fair conspectus, that either of the two theories upon which the case was tried in the court below is supportable by the proofs. From the testimony of Stoner, a strong inference may be drawn that neither the engineer nor his fireman saw Mrs. Zipperlen at any time, and knew nothing of her presence upon the crossing until the engine had collided with the cart. The jury would have been warranted from the engineer's testimony, and from the circumstance that the engine proceeded to move down the track toward the crossing after she started over the crossing, and from the probability that, had the engineer seen Mrs. Zipperlen in the act of passing over the crossing when he claimed that he did, he would have stopped his engine long before he reached the crossing, and remained at a standstill until she got beyond any possibility of danger, in adopting the view that the negligence of the defendant consisted in the failure of the engineer to look for the purpose of determining whether the crossing was clear. Upon this theory, the following instruction, of which particular complaint is made, contains a clear declaration of the law, and was, therefore, proper and pertinent: "If you believe from the evidence that plaintiff Minnie Zipperlen before undertaking to cross the railroad, at said time, exercised reasonable and ordinary care, and if you believe that, after the engineer or fireman gave steam to their engine, the horse which the said Minnie Zipperlen was driving became frightened and stood upon the track on which the engine and tender were so moving towards her, and that plaintiff Minnie Zipperlen endeavored to urge the horse forward, but could not do so, then the court charges you that the law imposed upon the servants of the defendant the duty of keeping a lookout and to observe and ascertain whether the crossing was clear, and if they failed to do so, and the said Minnie Zipperlen was injured in consequence of their failure so to do, without any fault on her part, your verdict should be for the plaintiff, and you should assess such damages as you may deem just under all the circumstances, not exceeding the amount prayed for."

There is nothing in the case of Bennichsen v. Market Street Ry. Co., 149 Cal. 18, 84 Pac. 420, in conflict with the views herein expressed. The instruction given to the jury in that case was upon the assumption that there was evidence showing that the motorman saw the plaintiff in a situation of danger, and declared that she was entitled to recover "if the defendant's employés could have avoided the injury by the exercise of ordinary care." The Supreme Court reversed the case, because there was no evidence disclosed by the record "that the motorman 'had an opportunity' to avoid injuring the plaintiff, or that he discovered her in a perilous situation." If the record in that case had contained evidence justifying it, the instruction would not, of course, have been subject to criticism. There is no claim that the instruction challenged here does not contain a correct statement of the law, and if, as we have suggested is the case, there is evidence to which it was applicable, then no valid objection can be urged against it.

Upon the theory of the "last clear opportunity"—that is, that the engineer saw and realized Mrs. Zipperlen's perilous situation, and had ample opportunity to have avoided the accident by the exercise of reasonable caution and care—the evidence presents, we think, a substantial conflict, so that with the verdict, even if we could say that that was the theory adopted by the jury, we are powerless to interfere. The engineer, we have seen, testified that he saw Mrs. Zipperlen all the time—from the moment she started to cross the tracks; that she had passed over the track over which the engine was backing just before the engine reached the crossing. The latter statement was designed to furnish the inference that the accident would not have occurred but for the fact that the horse became frightened and unmanageable and backed upon the track in use by the engine, and backed into the engine, thereby causing the accident. But Stoner says that "there was no time while Mrs. Zipperlen was driving along upon that track that she crossed entirely over the track upon which the engine and tender were backing, prior to the accident." From this testimony it was within the province of the jury to conclude that Mrs. Zipperlen had not crossed over the track occupied by the engine, and, from all the circumstances, find that the engineer knew such to be the fact. We are not concerned, it is true, with the reasoning of the jury upon the evidence by which it reached its verdict, but we may call attention to the testimony for the purpose of illustrating how it might have reached its conclusion and have been justified under the evidence in so doing. We think the evidence is sufficient to support the verdict and judgment.

It is claimed that the court erred in permitting the plaintiffs to introduce evidence for the purpose of showing that one of their own witnesses had, prior to the trial, made a statement with reference to the accident inconsistent with his testimony at the trial. The witness Mosier, having been called as a witness by the plaintiffs, testified to the facts to which we have already adverted with some particularity, and was then asked if he did not, addressing the husband of Mrs. Zipperlen, on the evening of the day of the accident, and alluding to the accident, say: "Ben, don't blame me for that. I was not to blame. I didn't see that horse until its ears projected past the end of the tender." To this question he replied in the negative. In rebuttal, and over the objection of the defendant, Bernhard Zipperlen was allowed to testify that Mosier made the statement embodied in the question. The court below, as well as counsel for respondents, appear to have assumed that the testimony was admissible for the purpose of impeachment; but we are of the opinion that, while its effect may practically be the same as if offered for impeachment, the only reason for which such testimony may be given is merely to explain the manifestly awkward position in which a party has been placed by reason of statements made by a witness, produced by himself, contrary to what he expected to prove by said witness, and which are calculated to operate against the interests of his cause. It must be conceded that the rule authorizing the contradiction of one's own witness is, in its application, like the rule as to impeachment, attended with more or less danger of producing injustice, and, therefore, should never be invoked or allowed to be exercised by the court except where the exigencies of the situation and the circumstances of the alleged betrayal clearly warrant it. When enforced on appropriate occasions in a proper way, it undoubtedly produces a wholesome and just result.

The authority by which a party in this state is allowed to contradict his own witness, or show that he has made, at other times, statements "inconsistent with his present testimony," is found in section 2049 of the Code of Civil Procedure. That section also provides that "the party producing a witness is not allowed to impeach his credit by evidence of bad character." And, as seen, we think that the section was not intended as authority for the impeachment by any means of one's own witness, in the true legal sense of that term. The reference in that section to section 2052 of the same Code merely means, we think, that, before being permitted to prove that his witness has made previous inconsistent statements, the party must lay the foundation as provided by the last-mentioned section—that is, must give the witness a chance to refresh his memory by calling his attention to the "circumstances of times, places, and persons present," when and before whom such alleged inconsistent statement is claimed to have been made.

There are, however, certain qualifications to the rule established by section 2049, supra, and which it is indispensably necessary should be strictly observed, lest some other important rule of evidence be violated. First, the witness must give testimony damaging to the party producing him. Secondly, it must appear that the party by whom the witness has been produced has been misled and taken by surprise, and that he had reason to believe that the witness would give testimony favorably to his side. A party producing a witness virtually stands as an indorser of the character of such a witness, and by the act of calling him to testify in his behalf in effect declares to the court and jury that the testimony of said witness will strengthen and support his contention; so, when the witness gives evidence which tends to destroy, rather than build up, the cause of the party who has presented him to the court and jury as a person possessing information valuable and material to his side of the controversy, the law steps in, and says that no litigant should thus be placed at the mercy of such treachery, and authorizes the party to explain why he called him as a witness, and thereby acquit himself of the otherwise disadvantageous imputation of contributing toward making out a case against himself. But a party, under the guise of the rule in question, will not be suffered to present to the jury mere hearsay declarations—declarations admissible neither under the rule of res gestæ nor as having been made in the presence and hearing of the party against whom they are offered. The statement, the admission of which under the indicated circumstances is here claimed to have been prejudicially erroneous, could not, it is obvious, have gone into the record either as part of the res gestæ or as a declaration in the presence and hearing of the opposite party. If it was not admissible for the purpose of "contradicting the witness," or of showing that he at another time made statements "inconsistent with his present testimony," to the end that the party might explain why he introduced him as a witness, then it was incompetent for any purpose, because, if admitted, though a mere naked hearsay declaration, it would erroneously go before the jury as independent evidence. We are aware that some early cases were disposed to hold that such testimony was admissible under no circumstances. We have not taken the trouble to ascertain whether, at the time of the filing of the opinions to which we refer, section 2049 of the Code of Civil Procedure, as it now reads, was a part of our law of evidence; but we would be unable to reconcile the intimation in those cases with the language of the section as it now exists. There is no reason upon principle why a party should not be allowed to contradict his own witness if the latter has betrayed such party, and by his unexpected testimony placed the party producing and standing sponsor for him in a false light before the court or jury. There is every reason in principle why such a practice should be upheld, where it is clear that it has not been abused. Moreover, the Legislature has recognized the soundness of the principle.

The questions, then, determinative of the admissibility of the testimony here are: Did the witness give testimony adversely to the plaintiffs, for whom he was called to testify? If so, does it reasonably appear that the plaintiffs were taken by surprise because of the nature of the testimony given by said witness? The plaintiffs undoubtedly sought to prove by Mosier that he did not see Mrs. Zipperlen until the accident occurred, and that, therefore, he was not, when moving his engine toward the crossing, exercising the care and caution with which he was charged by the law. But the engineer declared he did see her all the time, the effect of such declaration being that he was approaching the crossing in a careful, prudent, and cautious manner. It was then that counsel for plaintiffs asked him if he did not state to Bernhard Zipperlen that he did not see his wife until about the time the collision occurred. We doubt not that the sole theory of the plaintiffs, up to the time Mosier was called by them and testified as their witness, was that the engineer's negligence, if there was negligence, was due to his total failure to look down the track toward the crossing to learn whether it was clear or being used by some traveler. In this view and upon this theory his testimony was certainly adverse and damaging to plaintiffs. But, assuming that the evidence shows the other theory to be the correct one, the theory for which the testimony of Mosier given as a witness for plaintiffs was undoubtedly the inspiration—that is, the last clear opportunity theory—and that the jury adopted that view, then the testimony of Bernhard Zipperlen rebutting the statements of Mosier was, it is manifest, altogether immaterial and harmless, for if the jury found in accordance with the last-suggested theory it no doubt based its verdict largely upon the evidence of the engineer himself, said evidence tending more to establish that theory than the other.

The solution of the second question determinative of the competency of the testimony appears to be fraught with greater difficulty than the first, yet it seems to us, as the first part of this sentence implies, that the difficulty is more apparent than real. Were the plaintiffs surprised by the character of the testimony given by Mosier? There is nothing in the record showing that the court received evidence upon which to found its determination of this preliminary question. The question is one addressed solely to the judgment of the court, for it is a question of law with which the jury is not concerned. The record does show, however, that Mr. Cartwright, one of the attorneys for the plaintiffs, stated to the court, when objection was made to questions to Mosier for the purpose of laying the foundation for Bernhard's testimony, that the statement of Mosier "is entirely different from what we had expected," and when it was sought to show the alleged contradictory statements through said Bernhard, Mr. Van Meter, for the plaintiffs, declared to the court that Mosier's testimony "was different from that which the plaintiffs' attorneys understood that it would be," and requested the court to instruct the jury that "this quesion is asked solely for the purpose of impeaching" Mosier, and "not for the purpose of showing any affirmative fact other than the impeachment." The statute does not expressly point out the procedure to be adopted in such a case, nor has our attention been directed to any appellate court opinion in which any suggestion as to the proper procedure is ventured. It is obviously true that the court must be put in possession of facts from which it can say whether testimony contradicting one's own witness may be introduced, and we think that there can be no doubt that the better practice would be to present evidence through sworn witnesses upon the question. But in any event much should be left to the sound discretion of the trial court. In the case at bar the course suggested was not pursued, the court evidently being satisfied with the unsworn statements of counsel that Mosier's testimony was "different from that which the plaintiffs' attorneys understood that it would be." We cannot say that the court below abused its discretion in allowing the evidence upon the statements of counsel. To assume that counsel were not acting in good faith with the court—that they knew that Mosier would testify as he did, and that they called him as a witness for no other purpose than to furnish a mere pretext for introducing evidence otherwise absolutely incompetent and inadmissible—would be tantamount to accusing counsel of resorting to the veriest pettifoggery. The judge of the court below is presumably well acquainted with plaintiffs' counsel, and without apparent hesitation exercised for the court a discretion favorable to their contention, and, as before suggested, we cannot say abused it.

We have reviewed the record before us in extenso because the case, like nearly all cases of personal injury, presents important questions. The state of the evidence is such (as we believe and have held) as to make it a case peculiarly for the jury, with whose function under the law there would be, we think, unwarranted interference were we to hold that the evidence is insufficient to justify its conclusion. There is evidence, as will be perceived by an examination of the record, showing that Mrs. Zipperlen, before proceeding to start over the crossing, stopped for an instant and looked to see if the track was clear, and that when she started to cross the tracks the engine was at a standstill. If the engineer, as he declared was the fact, saw her all the time, there appears no reason why he should not have exercised a greater degree of care and caution than the evidence discloses. If he did not see her until she was in a position of danger, and then had the opportunity of avoiding the accident, as the jury was justified in finding, he was at fault in not doing so, even if it should be admitted that she herself was primarily negligent.

There are other assignments of alleged error which are, we think, undeserving of special or extended notice.

The question addressed to the fireman by the engineer, in the presence of Mrs. Zipperlen, immediately following the accident, "Why didn't you tell me to stop?" was asked so near the time the accident occurred as to make it a part of the transaction, and therefore admissible under the rule of res gestæ. The mere fact that the accident preceded the question does not, necessarily, take it out of that rule. Heckle v. S. P. Co., 123 Cal. 442, 56 Pac. 57—the opinion by McFarland, J., giving a clear exposition of the rule.

We are unable to discover any just reason for disturbing the judgment, and, for the reasons herein discussed, it is affirmed.

We concur: CHIPMAN, P. J., and BURNETT, J.

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7 Cal. App. 231

QUINN v. NEVILLS. (Civ. 396.)

(Court of Appeal, First District, California. Dec. 26, 1907. Rehearing Denied by Supreme Court Feb. 20, 1908.)

1. Appeal and Error — Review—Conflicting Evidence.

The question of residence or domicile is a mixed one of law and fact, and the determination thereof by the trial court on conflicting evidence is conclusive on review.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3316–3330.]

2. Domicile—Evidence.

Neither voting nor registration as a voter is conclusive on the question of domicile.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John J. Quinn against William A. Nevills. From an order denying defendant's motion for a change of venue, defendant appeals. Affirmed.

Carter & Ricketts and McClellan & McClellan, for appellant. Albert M. Johnson and Hiram W. Johnson, for respondent.

HALL, J. This is an appeal from an order denying defendant's motion for a change of the place of trial of the action from the city and county of San Francisco to the county of Tuolumne. The demand and motion were upon the ground that defendant resided in Tuolumne county at the time of the commencement of the action. In opposition to the motion, plaintiff filed and read his affidavit, which set forth facts tending strongly to support the view that defendant resided and had resided in the city and county of San Francisco continuously for several year immediately preceding the commencement of the action. The affidavit sets forth in detail that during the years 1900, 1901, 1902, and 1903 defendant resided and had his dwelling place in a private family dwelling owned and occupied by him at No. 2224 Washington street in said city and county. That during the entire year 1904 (the action was commenced November 9, 1904) defendant maintained and kept his actual residence at the Palace Hotel in said city and county, and that he continuously and permanently occupied a suite of rooms there, furnished in part with the personal effects, paraphernalia, bric-a-brac, house furnishings, and family portraits of himself and wife. The affidavit set forth other details tending to show that defendant resided and had continuously resided in San Francisco as his home for several years, and that his visits to Tuolumne county were for business purposes only. On the other hand, defendant, by his own affidavit and others, presented evidence tending to show that his legal residence was in Tuolumne county. Especial stress is laid on the evidence that he always claimed Tuolumne county as his place of residence, and was there registered as a voter, and in fact voted there the day before the action was commenced.

The case is a typical one of a conflict of evidence, and of inferences to be drawn from the facts, and we cannot disturb the order of the trial court. The question of residence or domicile is a mixed question of law and fact, and the determination of the trial court upon conflicting evidence is conclusive upon this court. 14 Cyc. 865, and cases there cited; Estate of Weed, 120 Cal. 634, 53 Pac. 30.

Appellant has cited Shelton v. Tiffin, 6 How. (U. S.) 185, 12 L. Ed. 387, as authority for the contention that the fact of registration and voting in a given county is conclusive evidence of domicile. An examination of the case discloses that it cannot be held to be an authority on this point. Shelton was sued in the United States Circuit Court in Louisiana by a citizen of another state, and pleaded want of jurisdiction in that he was not a citizen of Louisiana, but was a citizen of Virginia. The evidence showed that he had formerly resided in Virginia, but for two years had resided on and cultivated a plantation in Louisiana, but had not voted there. It was held that the evidence was sufficient to sustain a finding that he was a citizen of Louisiana. The court did say that the exercise of the right of suffrage was conclusive on the question of intention, but as Shelton had not exercised such right, and no such fact was in the case, what the court said was clearly obiter.

Neither voting nor registration as a voter is conclusive on the question of domicile. Easterly v. Goodwin, 35 Conn. 285, 95 Am. Dec. 237; Enfield v. Ellington, 67 Conn. 459, 34 Atl. 818; Smith v. Croom, 7 Fla. 81; Hewes v. Baxter, 48 La. Ann. 1303, 20 South. 701, 36 L. R. A. 531; Clark v. Territory, 1 Wash. T. 68; East Livermore v. Farmington, 74 Me. 155.

The order is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

QUINN v. NEVILLS et al. (Civ. 397.)

(Court of Appeal, First District, California. Dec. 26, 1907. Rehearing Denied by Supreme Court Feb. 20, 1908.)

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John J. Quinn against William A. Nevills and another. From an order denying a motion for change of venue, defendants appeal. Affirmed.

Carter & Ricketts and McClellan & McClellan, for appellants. Albert M. Johnson and Hiram W. Johnson, for respondent.

HALL, J. This is an appeal from an order denying defendants' motion for a change of venue, and presents the same question as is presented by the case of John J. Quinn v. Wm. A. Nevills (No. 396; this day decided) 93 Pac. 1055, and for the same reason the order is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 194

YOUNG v. CLARK et al. (Civ. 398.)

(Court of Appeal, First District, California. Dec. 23, 1907.)

1. Trial—Findings—Sufficiency.

A finding that all the allegations of the complaint are true is sufficiently definite and certain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 783.]

2. Bankruptcy—Debts Discharged—Debts Created in "Fiduciary Capacity"—Act Construed.

The term "fiduciary capacity," as used in Bankr. Act July 1, 1898, c. 541, § 17, subd. 4, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1907, p. 1026] excepting from debts released by a discharge in bankruptcy those created by fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity, applies only to technical trusts, such as those arising from the relation of attorney, executor, or guardian, and not to debts due by a bankrupt in the character of an agent, factor, commission merchant and the like.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 794–807.

For other definitions, see Words and Phrases, vol. 3, pp. 2755–2760; vol. 8, p. 7663.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by A. J. Young against W. F. Clark and another. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Franklin P. Nutting, for appellants. Heller & Powers, for respondent.

KERRIGAN, J. The complaint alleges that at the time of the transactions set forth defendants were commission merchants, and were in the employ of La Sociedad Anonima de Hilados y Tejides de Cantel, Lda, a corporation (plaintiff's assignor), as its agents; that plaintiff's assignor deposited with its said agents certain moneys, to be paid out on its order; that said agents expended a portion of these funds on said assignor's account; and that the money claimed by plaintiff is a balance remaining in the agents' hands after such expenditures had been made, which balance plaintiff alleges the defendants refuse to pay over. Upon the issues framed by the pleadings, judgment was entered for plaintiff, from which judgment this appeal is prosecuted.

1. Appellant claims that there is no finding on the issue of the assignment of the claim to the plaintiff. There is no special finding on the subject, but it is covered by the following general finding: "That all of the allegations of plaintiff's complaint and answer to the affirmative allegations of defendants' answer and cross-complaint are true." The part of this finding relating to the allegations of the answer is open to criticism for uncertainty; but the finding is definite and certain—and therefore sufficient —wherein it states "that all the allegations of plaintiff's complaint * * * are true." Gale v. Bradbury, 116 Cal. 40, 47 Pac. 778.

2. Appellants' special demurrer to the complaint was overruled, and that ruling is now assigned as error. We think there is enough uncertainty in the complaint to have warranted the court in sustaining the demurrer on that ground; but the action of the court in this regard is not of sufficient importance to demand a reversal of the judgment. Alexander v. Central L. & M. Co., 104 Cal. 536, 38 Pac. 410.

3. During the trial defendants were permitted to amend their answer by pleading in bar of the action their adjudication in bankruptcy in the United States District Court; Whereupon plaintiff amended his pleadings by alleging that his cause of action was to recover moneys held in trust by defendants for plaintiff's assignor, which would not be released by a discharge in bankruptcy, and that said district court had granted permission to plaintiff to continue the prosecution of this action. The court found these allegations to be true, and a judgment was accordingly entered. Appellants contend that the trial court reached an erroneous conclusion in holding that respondent's claim was of such a trust character that it would not be released by defendants' discharge in bankruptcy. We agree with this contention. Section 17 of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1907, p. 1026], prescribes what debts are exempt from the operation of the bankrupt's discharge. The only part of that section applicable to this case reads: "Sec. 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." It has been often held that the term "fiduciary capacity" as used in this subdivision of section 17 applies only to technical trusts, such as those arising from the relation of attorney, executor, or guardian, and not to debts due by a bankrupt in the character of an agent, factor, commission merchant, and the like. In Re Basch (D. C.) 97 Fed. 761, it was held that a debt due by a bankrupt who, being a commission merchant, has received goods for sale upon a contract to return the same or the proceeds thereof, is not one of those described in section 17 (subdivision 4). In Knott v. Putnam (D. C.) 107 Fed. 907, a broker having, upon a customer's order, bought and then sold cotton, it was held that the obligation to pay over the proceeds of such sale is a debt from which the bankrupt will be freed by his discharge.

The United States Supreme Court, in speaking of a factor who had wrongfully retained the money of his principal, says: "If the act embraces such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and indeed all cases in which the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of the trust. But his is not the relation spoken of in the first section of the act. The cases enumerated, 'defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied, but special, trusts, and the 'other fiduciary capacity' mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act." Chapman v. Forsyth, 2 How. (U. S.) 202, 11 L. Ed. 236.

In Palmer v. Hussey, 119 U. S. 96, 7 Sup. Ct. 158, 30 L. Ed. 362, where the bankrupt had received certain bonds "as the agent and broker" of the plaintiff, and had converted them to his own use, the same court held that there was no such fraud in the creation of the debt, and no such trust in respect to the possession of the bonds by the defendant, as to bar the operation of the discharge.

In Upshur v. Briscoe, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931, it was held by the same court that an instrument appointing a person as attorney to receive moneys for the benefit of another, and to pay the interest annually to such other, and at her death to pay the principal sum to her legal issue, or in default of such issue the said sum to revert to the maker of the instrument, did not create between the attorney and the beneficiary a trust in its technical sense, nor a debt of a "fiduciary character" within the meaning of the bankruptcy act, although the obligation was called a "trust," and the attorney a "trustee," in the instrument. The court says (page 377 of 138 U. S., page 317 of 11 Sup. Ct. [34 L. Ed. 931]) that, within the meaning of the exception in the bankruptcy act, the debt is not created by a person while acting in a fiduciary character, merely because it is created under circumstances in which trust or confidence is reposed in the debtor, in the popular sense of these terms.

In the case of Noble v. Hammond, 129 U. S. 65, 9 Sup. Ct. 235, 32 L. Ed. 621, the record showed that the defendant was a produce dealer, and had been requested by certain parties to collect money for them, and to keep it until it should be called for. After collecting the money, he deposited it in bank in his own name, and before he paid it over was forced into bankruptcy. The court held that the parties' claim against him was not created by the fraud of the bankrupt, or by his defalcation while acting in any fiduciary character within the meaning of the bankruptcy act; and that, even if the agreement might be construed as creating a trust in some sense, it was not such a trust as comes within the provisions of the bankruptcy law.

Most of the above decisions arose under former bankruptcy acts, but section 17 of the act of 1898 is practically identical with the corresponding provisions of the earlier acts, and has received the same construction in such cases as have arisen since its enactment. In re Basch (D. C.) 97 Fed. 761.

In Bracken v. Milner (C. C.) 104 Fed. 522, decided under the act of 1898, where defendant had received money from another to be loaned for that other's account, and was authorized to receive payments of the interest or principal of such loans, and remit the same to the owner, and afterward became bankrupt without having paid over the moneys, it was held by the Circuit Court that the defendant had not received the money in a fiduciary capacity within the meaning of the statute, but merely as an agent; and that the plaintiff's claim for the money was one from which the defendant was released by a discharge in bankruptcy.

The judgment is, therefore, modified by striking therefrom the following: From paragraph 1 thereof the words, "and plaintiff's assignor's claim therefor was not such a claim as would be released by a discharge of defendants in bankruptcy," the words "in trust" occurring in the phrase "to be held in trust by defendants," and the word "trust" occurring in the phrase "entitled to the return of said trust moneys." And from paragraph 2 thereof the following: "And since said assignment said defendants have been and now are holding said sum and interest thereon in trust for this plaintiff, and plaintiff's claim therefor is not such a claim as would be released by a discharge of defendants in bankruptcy."

As so modified, the judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

7 Cal. App. 178

BURKE v. SUPERIOR COURT OF CALIFORNIA, IN LOS ANGELES COUNTY, et al. (Civ. 410.)

(Court of Appeal, Second District, California. Dec. 21, 1907.)

1. DEPOSITS IN COURT—APPLICATION FOR ORDER—CORPORATIONS—DISSOLUTION—FUNDS.

Plaintiff alleged that the directors of a corporation, desiring to wind up its affairs, authorized him to pay its debts and distribute its assets, and alleged that defendants owed certain sums on stock subscriptions, to which defendants by cross-complaint alleged that plaintiff, as an officer of the corporation, had a certain sum which he held as funds of the company, and asked that he be required to deposit the amount in court. Plaintiff's answer to the cross-complaint admitted having received such sum, but set up a claim for disbursements and expenses and for compensation for services. *Held*, that these allegations were deemed denied under Code Civ. Proc. § 462, and therefore plaintiff's title to that part of the fund which he claimed constituted an issue to be tried in the ordinary manner, and it was error to order him to pay the same into court under section 572, authorizing an order for such payment when it is admitted by the pleading or shown that a party has in his possession any property, the subject of litigation, held by him as trustee for another party or which belongs to another party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deposits in Court, § 1.]

2. PROHIBITION—JURISDICTION.

Where the pleadings did not disclose the requisite facts necessary to confer jurisdiction on the superior court to make an order requiring a party to pay money into court under Code Civ. Proc. § 572, such an order was void, and, the court having no jurisdiction to entertain subsequent proceedings for contempt based thereon, the writ of prohibition would issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, §§ 37-56.]

Application by Edmund Burke for writ of prohibition against the superior court of the county of Los Angeles and Hon. Frederick W. Houser, Judge. Writ granted.

Edmund Burke, in pro. per. Henry J. Stevens and O'Melveney, Stevens & Millikin, for respondents.

SHAW, J. Soto Heights Land & Improvement Company is a corporation of which the petitioner is the secretary, as well as a member of the board of directors. A complaint was filed by plaintiff, wherein it is alleged that the board of directors of the corporation determined to abandon the prosecution of the business for which it was incorporated, and authorized petitioner to take such steps as might be deemed necessary to obtain an accounting and wind up its affairs, pay its debts, and distribute the remaining assets to the stockholders in proportion to their respective rights. A number of persons alleged to have subscribed for stock, upon whose subscriptions a balance was due, were made party defendants, against whom judgments were asked for such sums as might be found due the corporation, and praying that an order be made directing payment of the amount which might be found due to plaintiff and other creditors of the corporation; it being alleged that said corporation was indebted to plaintiff and others for services, money advanced, salary, disbursements, office rent and legal expenses, as well as for other purposes. In answer to this complaint, the defendants California Cornice Works, Pacific Coast Planing Mill Company, and Arletta F. Davenport, alleged in the complaint to be indebted to said corporation for moneys due on their subscriptions to stock, filed cross-complaints wherein, among other things, they alleged that plaintiff, as an officer of the corporation, had in his hands as such officer the sum of $2,050, which he held as funds of the company and for its use and benefit, and asked for judgment that said plaintiff be required to deposit said sum of $2,050 in court. In his answer to these cross-complaints plaintiff admits that he did receive of the funds of said corporation the sum of $2,050, and that prior to the commencement of the action said cross-complainants and the other defendants authorized him, as trustee, in his and their behalf, to take such steps as he deemed proper to wind up the affairs of the said corporation, and to that end collect amounts due, pay its obligations, and divide the residue among those found to be entitled to the same; that pursuant to such authorization he, among other things, instituted this action, and is maintaining the same for said purpose. It is then alleged that said corporation is indebted to plaintiff in various sums, for advancements and disbursements actually made for and on its behalf, amounting in the aggregate to several hundred dollars, as well as for salary as secretary of the corporation since the date of its incorporation at $150 per month; and alleging, further, that he claims the right to deduct from the funds in his possession the amount due him from said corporation, and asks that the rights of all parties to said action be adjudicated therein. Upon these pleadings the cross-complainants, upon notice duly given, moved the court for an order requiring plaintiff to deposit in court the sum of $2,050, the ground therefor being that he had in his possession such sum of money belonging to said corporation; whereupon the court granted said motion and ordered plaintiff forthwith to pay into court the sum of $2,050. Thereafter a motion was made by plaintiff to vacate and annul said order, or modify the same to the extent of crediting plaintiff with the amount of cash expended for and in behalf of said corporation as its secretary, which motion the court denied, and on June 21, 1907, the court made an order requiring petitioner to appear before it on June 28, 1907, then to show cause why he should not be adjudged guilty of contempt for disobeying said order requiring him to pay into court said sum of $2,050, and why he should not be punished for such disobedience.

The order requiring petitioner to deposit this $2,050 in court was made under and by virtue of section 572 of the Code of Civil Procedure, which is as follows: "When it is admitted by the pleading, or shown upon examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court."

The court's jurisdiction to make the order requiring petitioner to deposit in court the sum of $2,050 was, under the provisions of said section, dependent upon whether or not petitioner by his pleading admitted having in his possession said sum of money belonging to the corporation. If he did not make such admission, then it would seem clear that the court was without jurisdiction to make such order. Petitioner in his answers to the cross-complaints admits having received funds of the corporation to the amount of $2,050, but as against this he sets up a claim for several hundred dollars on account of disbursements made and expenses incurred by him for and on behalf of the corporation, and also claims compensation for services rendered since the incorporation of the company as secretary thereof. These allegations, under the provisions of section 462 of the Code of Civil Procedure, are deemed to be denied; and therefore petitioner's title to that part of the fund which he claimed by way of compensation for services rendered as secretary, and on account of disbursements made for the corporation, constituted an issue to be tried, not in this summary manner, but in the usual and ordinary action wherein a verdict of the jury or finding of the court could be had thereon. His answer showed that petitioner claimed the right to part of the fund in his possession, and the court was without jurisdiction to compel him to surrender to another what he claimed to be his property, until there had been a judicial determination, upon the hearing of all the facts, that he had no right to it. To justify the making of the order, the admission in the pleadings of having money in possession belonging to another must be free from any claim thereto. "If money is ordered to be brought in which is not clearly due, very gross injustice may be done, as the defendant may be put to great inconvenience, and afterwards be told that his view of the case was correct." Hagall v. Currie, L. R. 2 Ch. App. 449.

Furthermore, the fund must, under the provisions of said section, be the "subject of the litigation." "If the money in the possession of the party is not the subject of the litigation, but its payment is an incident thereto, dependent upon the judgment to be rendered in the action, as in the case of an action for * * * accounting * * * the provisions of this section do not authorize such order." Green v. Duvergey, 146 Cal. 379, 80 Pac. 234. The pleadings clearly show the action to be one having for its purpose the procuring of an accounting between the corporation and its stockholders, and to determine the amount of money in the possession of any of the parties to the action belonging to the corporation, with a view of having it paid into court and winding up the corporate affairs.

In our judgment the pleadings do not disclose the requisite facts necessary to confer jurisdiction upon the court to make the order requiring a deposit of the money in court. The order is therefore void, and, being void, it follows that the court had no jurisdiction to entertain any subsequent proceedings based thereon and instituted for the purpose of having the petitioner adjudged guilty of contempt for disobedience of such order.

Our conclusion renders it unnecessary to pass upon other alleged points affecting the validity of the order.

The alternative writ of prohibition heretofore granted is made peremptory.

We concur: ALLEN, P. J.; TAGGART, J.

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7 Cal. App. 151

CAMPBELL v. FREE. (Civ. 440.)

(Court of Appeal, First District. California. Dec. 19, 1907.)

1. Elections—Contest—Votes for Ineligible Candidate—"Plurality."

Under Const. art. 20, § 13, providing that a plurality of the votes given at an election shall constitute a choice, and Pol. Code, § 1066, providing that the person receiving at any election the highest number of votes for any office to be filled at such election is elected thereto, a candidate not receiving a plurality of votes given at an election was not entitled, in order to secure his own election, to have disregarded the votes cast for an ineligible candidate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 207-215.]

2. Same—Costs.

Under the express provisions of Code Civ. Proc. § 1125, where an election is annulled and set aside, judgment for costs must be rendered against the party whose election was contested in favor of the party contesting the same.

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Proceeding by James H. Campbell against Arthur M. Free to contest an election. From a judgment declaring void the election of Free, but refusing to declare contestant elected, contestant appeals. Modified as directed in opinion, and, as modified, affirmed.

John E. Richards, C. C. Coolidge, and Jas. P. Sex (H. S. Bridges, of counsel), for appellant. Rogers, Bloomingdale & Free, for respondent.

COOPER, P. J. This proceeding was brought by plaintiff as contestant to determine the question as to who, if any one, was elected to the office of district attorney of the county of Santa Clara at the general election held in November, 1906, and to have it declared that the election of respondent be anulled and set aside. The trial court, upon its findings, ordered judgment, annulling and setting aside the declaration of the official board of canvassers and declaring void the alleged election of respondent, but refused to declare the appellant elected to said office. This appeal is from the judgment so entered.

Respondent does not question the judgment annulling the election as to him. Appellant contends that it should have been further adjudged that he was duly elected to the said office. The record contains many questions as to rulings on ballots, and as to whether or not certain ballots were properly rejected or counted. It is, however, to the credit of counsel, conceded that, if the ruling of the court was correct on the main question, the ballots concerning which the rulings are questioned, however counted, would not change the result. All other questions are therefore eliminated, except the single one as to whether or not the appellant was elected to the office of district attorney at the said election.

The facts material to the question, as found by the court, are as follows: Respondent received at said election 5,840 legal votes, and appellant 5,748. The respondent at the time of said election held the office of postmaster at Mountain View, with a compensation exceeding $500 per annum, and was therefore ineligible to the office. The Constitution provides (article 20, § 13) that a plurality of the votes given at an election shall constitute a choice; and the Political Code (section 1066) states that "the person receiving at any election the highest number of votes for any office to be filled at such election is elected thereto." The appellant did not receive the plurality of the votes given at the election. He contends that the votes cast for respondent should not be considered in any manner in the count, for the reason that the respondent was ineligible; that the case should be determined in the same manner as if the votes respondent received had been cast for the King of England or the Man in the Moon. To such doctrine we cannot accede. The respondent was a citizen of the state, a resident and elector of the county, and it does not appear that he even knew of his own ineligibility. The law contemplates that the electors shall decide the question as to who shall be elected to an office, and that it is necessary to a choice that some one legally qualified shall receive a plurality of the "votes given at the election." The appellant did not receive such plurality. The votes cast for respondent were votes given at the election. It is not necessary to discuss the question as to the effect of votes given for a name in mythology, or to some one whose name has come down in history, as Julius Cæsar, or Mohammed. In such case the elector would clearly appear not to have intended to express his choice as to who should hold the office. The electors usually take a pride and an interest in casting their votes for the person or candidate of their choice, not as an idle act, but with a view of giving the office, with its honors and emoluments to such person or candidate. If the person for whom such votes are cast is ineligible, the votes are not to be counted for the next highest candidate on the list. If a majority of the voters, either by mistake of law or of fact, happen to cast their ballots for an ineligible candidate, it does not follow that the next highest on the list would receive the office. The votes, if given in good faith for a person who is a candidate for the office, and who afterwards is found to be ineligible, are notwithstanding legal votes. It sometimes happens, notwithstanding all care, that a political convention nominates a person to an office who is afterwards found to be ineligible,and that such fact was not only unknown to the convention which nominated him and to the voters, but also unknown to himself. In such case it is consistent with the theory of our institutions, and the right of the people to have officers of their own choosing, to consider the election void, because it is not an expression of the will of the people by a plurality of the votes cast. Any other rule might result in giving an office to a very incompetent or dishonest man who received only a few votes. In the case at bar one Brandt received 407 votes out of about 12,000 cast for the office of district attorney. Suppose the appellant was also ineligible to that office, if his views are correct the courts would have to declare Brandt the duly elected district attorney.

The views we have expressed are supported by decisions in our own state. Saunders v. Haynes, 13 Cal. 145; Crawford v. Dunbar, 52 Cal. 36; People v. Rodgers, 118 Cal. 373, 46 Pac. 740, 50 Pac. 668. In the latter case it is said: "The election of appellant was declared void, and was annulled by reason of his ineligibility to the office; but inasmuch as he received a majority of the votes cast at the election, the court was not authorized to declare that any other person was elected." The same rule prevails in Pennsylvania. Commonwealth v. Cluley, 56 Pa. 270, 94 Am. Dec. 75. It is there said: "Even in England it has been held that votes for a disqualified person are not lost or thrown away, so as to justify the presiding officers in returning as elected another candidate having a less number of votes, and, if they do so, a quo warranto information will be granted against the person so declared to be elected on his accepting office. Under Constitutions such as ours there are even greater reasons for holding that a minority candidate is not entitled to the office, if he who received the highest number of votes is disqualified." And in New York (People v. Clute, 50 N. Y. 451, 10 Am. Rep. 508); and in Michigan (Crawford v. Molliter, 23 Mich. 341); and in Kentucky (Howes v. Perry, 92 Ky. 260, 17 S. W. 575, 36 Am. St. Rep. 591); and in West Virginia (Dryden v. Swinburne, 20 W. Va. 89); and in Arkansas (Sweptson v. Barton, 39 Ark. 549); and in Missouri (State v. Walsh, 7 Mo. App. 142; State v. Vail, 53 Mo. 97). In Indiana the rule appears to be to the contrary, but we do not approve of the doctrine as laid down in the cases from that state.

In the judgment, after annulling and setting aside the election of respondent, the court directed "that each party pay their own costs." This is not in accord with the plain mandate of the statute in regard to election contests (Code Civ. Proc. § 1125), which provided at the time of this contest that, "if the election is annulled and set aside, judgment for costs must be rendered against the party whose election was contested in favor of the party contesting the same."

The trial court is directed to modify the judgment by striking therefrom the portion quoted, and inserting in lieu thereof "and the contestant is entitled to judgment for costs against respondent"; and, as so modified, the judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

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7 Cal. App. 155

CAMPBELL v. BOARD OF SUP'RS OF SANTA CLARA COUNTY et al.

(Civ. 447.)

(Court of Appeal, First District, California. Dec. 19, 1907. Rehearing Denied by Supreme Court Feb. 17, 1908.)

1. OFFICERS—PUBLIC OFFICE—"INCUMBENT."

Under Pol. Code, § 996, providing that "an office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent * * *"—one who has been elected to an office, but who fails to qualify by filing the bond, is in the sense of the statute the incumbent, though he never was in possession of nor performed any duty in connection with the office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 82.

For other definitions, see Words and Phrases, vol. 4, pp. 3518, 3519.]

2. SAME—VACANCY.

Under Pol. Code, § 996, providing that "an office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent. * * * (10) The decision by a competent tribunal declaring void his election or appointment" —an office became vacant on the decision of the court declaring void an election on the ground that the person elected, but who had not taken possession of the office, and who failed to qualify and take his official oath, was ineligible to take the office at the time of the election, in proceedings to contest the election under Code Civ. Proc. § 1111, providing that the right of any person declared elected may be contested when he was not at the time of the election eligible to the office, and section 1122, providing that, after hearing the proofs and allegations of the parties, the court must pronounce judgment either confirming or annulling and setting aside such election.

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by James H. Campbell against the board of supervisors of the county of Santa Clara and others to enjoin defendants from declaring a vacancy in the office of district attorney of said county and then filling such office by appointment, and also to enjoin the county clerk from issuing a certificate of appointment to any person appointed by the board to such office. Judgment for plaintiff, and defendants appeal. Reversed.

Rogers, Bloomingdale & Free, for appellants. James H. Campbell (John E. Richards, of counsel), for respondent.

COOPER, P. J. This action was brought to enjoin the board of supervisors of Santa Clara county and the several members thereof from declaring a vacancy in the office of district attorney of said county and then filling such office by appointment, and also to enjoin the county clerk of said county from issuing a certificate of appointment to any person who might be appointed district attorney of said county by said board of supervisors. Judgment was entered for plaintiff as prayed for, and this appeal is from the judgment.

At the general election held in November, 1902, plaintiff was duly elected district attorney of said county for the term of four years, his term to commence on the first Monday of January, 1903. He duly qualified, entered upon the discharge of the duties of his office, and ever since has continued in possession of said office and in the discharge of the duties thereof. At the general election held in November, 1906, the plaintiff and one Arthur M. Free were each candidates for the said office of district attorney. Free received a plurality of the votes cast at such election, and was declared by the board of supervisors duly elected to such office. He declined and refused to file his official bond and take the oath of office. After the declaration by the board of supervisors to the effect that Free had been duly elected, the plaintiff instituted proceedings in the superior court of said county to contest the election of said Free, which resulted in a judgment declaring that at the time of the election Free was ineligible to the office by reason of the fact that he held a lucrative office under the United States government, the compensation of which exceeded $500 per year, and annulling his election for this reason. The judgment, besides declaring that at the time of his election Free was ineligible to the said office, in effect adjudged that plaintiff was not elected to said office. This judgment has this day been affirmed here. Campbell v. Free (No. 440) 93 Pac. 1060. The question therefore resolves itself into whether or not there is a vacancy in the office of district attorney of said county, which the board of supervisors are authorized to fill by appointment.

It is provided in the Code of Civil Procedure (section 1111) that the right of any person declared elected may be contested when the person was not at the time of the election eligible to the office. The Code evidently contemplates that cases may arise in which the person declared elected, and who receives the highest number of legal votes, was at the time of his election ineligible to the office. In many cases the evidence as to the ineligibility of a candidate is conflicting, and it requires a careful weighing and analysis of the evidence by the trial court to determine the ultimate fact. The Code in such case provides for a contest as to the right of a person declared elected to an office, although he be at the time of the election ineligible. It provides (section 1122) that after hearing the "proofs and allegations of the parties the court must pronounce judgment in the premises, either confirming or annulling and setting aside such election." We must then look to the Political Code as to when an office becomes vacant. It is there provided (section 996): "An office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent. * * * (10) The decision by a competent tribunal declaring void his election or appointment."

The court declared void the election of Free before the expiration of his term, and the question therefore narrows itself to the one as to whether or not he was the incumbent. It has been held, and is the rule in this state, that one who has been elected to an office, but who fails to qualify by filing the bond, is in the sense of the statute the incumbent, although he never was in possession of nor performed any duty in connection with the office. The office in such case has been held to become vacant by his refusal to file his official oath or bond within the time prescribed. People v. Taylor, 57 Cal. 620. The court in that case, after a careful consideration of section 996 of the Political Code, said: "This provision of the Code regards the person duly elected to an office as the incumbent of that office from the time of the commencement of the term for which he was elected until the expiration thereof, whether he qualifies or not." The difference between that case and the one at bar is that there the person elected neglected and failed to qualify after his election, and here he neglected to qualify by making himself ineligible before election. There the person elected was ineligible at the time his term began because he did not comply with the statutory mandate as to qualifying; here he was ineligible because at the time he was elected he had neglected to resign his office of postmaster. In the one case the person elected did not do that which the law declared that he must do after his election in order to be qualified to get title to the office; in the other he neglected to do that which the law required that he should do in order to be a person qualified to be elected to the office. In both cases the officer was elected. In neither was he entitled to the office when the term commenced. In the case cited the court held that the person elected was not eligible to take the office at the time the term began; in the case at bar the court held that the person elected was not eligible to take the office at the time of the election. We think that it would be a distinction without a substantial difference to hold that in the case cited the party elected was the incumbent, and that in this case he was not. We therefore conclude that the office became vacant upon the decision of the court declaring void the election of Free.

The decision in People v. Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668, supports the conclusion we have reached in this. In that case Rodgers was elected chief of police of the city of Sacramento, and received his certificate of election. He was ineligible at the time of his election, but at the commencement of his term he, without the consent of Drew, his predecessor in office, intruded into and obtained possession of the office. After Rodgers had so taken possession of the office, a proceeding was instituted by an elector of the city, contesting his right to hold the office, which resulted in a judgment duly made, setting aside his election by reason of his ineligibility at the time of such election. After the judgment so made, the board of supervisors appointed Rodgers to the office. It will thus be seen that the only difference between the two cases is that in that case the party declared elected, but who was ineligible, had taken possession of the office, and in this case the predecessor is still holding. The court, after a statement of the facts, and a reference to subdivision 10, § 996, of the Political Code, said: "There was thus presented the precise circumstances contemplated by the above provision of the Political Code. The election of the defendant had been contested on the ground that he was ineligible to the office, and a competent tribunal had decided that the election was void. * * * An election to fill the office, regular in all respects, had been held, and the electors of the city had at that election chosen the defendant by a majority of their votes to be the successor of the relator, and he had qualified for the office and entered upon its duties. By reason of certain extrinsic facts he was held not to be entitled to retain the office, but he had nevertheless been elected as the successor of the relator, and had qualified for the office and entered upon its duties."

In the case at bar Free did not qualify nor enter upon the duties of the office; but we cannot see any reason for holding that an office becomes vacant in a case where an ineligible officer, who has been elected, enters into possession of it, and a judgment is afterwards entered, declaring his election void, that would not apply with equal force to a case where, under like circumstances, the ineligible officer has not taken possession of the office. The question as to who is in the actual possession of the office is not made a factor by the provisions of the Code. Nor would the fact that Free failed to qualify and take the oath of office make any difference. In Adams v. Doyle, 139 Cal. 678, 73 Pac. 582, the question was as to whether or not there was a vacancy in the office of sheriff of Tuolumne county at the time the board of supervisors appointed Adams to that office. Adams had been a candidate for the office at the preceding election, had received the highest number of votes, and had received his certificate of election. He did not file his bond and take the oath as prescribed by law. His predecessor in office continued to be the incumbent after the term of Adams had begun and before the board of supervisors appointed him to the office. Adams had not only failed to qualify after his election, but had not taken possession of the office. The board of supervisors declared the office vacant, and appointed Adams to the very office to which he had been elected, and for which he had failed to qualify. He qualified under the appointment so made, and the court held that there was a vacancy, and that his title under the appointment was valid. The court there said: "The incumbent, in the sense of the statute, is the person declared elected to hold the term, who holds title to it, subject to forfeiture by failing to qualify, although it is not yet begun. The fact that the prior incumbent, in order that the public business may be done, is allowed and directed to continue to discharge the duties in the meantime, and until some person is lawfully invested with title to the term, does not affect the question of there being a vacancy in the sense intend-

ed. The vacancy is in the term of four years just beginning. The prior incumbent does not claim title to this term, and he has none but is a mere locum tenens, holding for public convenience until the vacancy in the term is filled."

The conclusion we have reached does not injure the plaintiff. He has enjoyed the full benefit of the term for which he was elected. He was not elected for the term he is seeking to hold. The question involved is one of public concern. The office having become vacant, the ordinary machinery of the law cannot be enjoined from filling such vacancy by appointment.

The judgment is reversed.

We concur: HALL, J.; KERRIGAN, J.

7 Cal. App. 190

MAHLER v. DRUMMER BOY GOLD MIN. COMPANY et al. (Civ. 412.)

(Court of Appeal, Third District, California. Dec. 21, 1907.)

VENUE—CHANGE—AFFIDAVITS.

On a motion for change of venue, plaintiff filed a counter affidavit stating that at the commencement of the action against defendant corporation and E., its secretary, the residence of said E. was unknown to plaintiff; that E. had given his address as San Francisco, and had written from that place, and also from other places, but that letters sent by plaintiff to such address had received no answers or had been returned; that plaintiff had no other means of finding out the residence of said E.; that he was informed by employés of the corporation located where the action was brought that they could get no answers to letters written to E.; that plaintiff was informed and believed that the B. Company could not find said E. at such address in order to serve summons on him, and that, being unable to learn the address of said E. and his residence being unknown, plaintiff designated the county where the mine was as the county in which to bring action. *Held*, that the affidavit was insufficient to permit plaintiff to name a county in which to sue, under Code Civ. Proc. § 395, requiring the action to be tried in the county in which defendants reside, but providing that, if defendants' residence is unknown to plaintiff, the same may be tried in any county which plaintiff may designate.

Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by Fred W. Mahler against the Drummer Boy Gold Mining Company and another. From an order refusing a motion for change of venue, defendants appeal. Reversed.

Coburn & Collier and Charles G. Nagle, for appellants. J. H. Magoffey and Taylor & Tebbe, for respondent.

CHIPMAN, P. J. Motion to change the place of trial. Plaintiff commenced the action in Siskiyou county to recover from defendants for services as superintendent of certain quartz mines in said county. It is alleged in the complaint that plaintiff was employed by defendants on August 1, 1905; that he commenced work on October 20, 1905, and "continued to work for defendants as superintendent until the 5th day of March, 1906." The complaint was filed April 13, 1906. Plaintiff "prays judgment against defendants and each of them." Defendants moved the court to change the place of trial from Siskiyou county to the city and county of San Francisco, on the ground that at the commencement of the action the latter place was and ever since has been their place of residence. At the hearing of the motion it appeared from the uncontradicted affidavit of defendant Emmons that defendant corporation at the commencement of the action was a corporation organized under the laws of this state, with its principal place of business at the city and county of San Francisco, which was then and is now its residence and its principal place of business. Affiant also deposed that he was at the commencement of the action and ever since has been and now is a resident of said city and county; that he was at all times the secretary of said corporation; that each of said defendants has fully and fairly stated the case in said action to his and its attorney, and after such statement each of said defendants was advised by said attorney and verily believes "that they and each of them have a good and substantial defense to said cause on its merits." A general demurrer to the complaint was filed, with the demand by both defendants for a change of the place of trial. Plaintiff in the action filed a counter affidavit, in which he stated "that at the time of the commencement of the action the residence of said defendant Emmons was unknown to plaintiff"; that at the time of employing plaintiff as superintendent of said mines Emmons "gave this plaintiff his address as San Francisco; that thereafter he wrote this plaintiff from San Francisco, and also from Portland, Or.; that for the period of several months before the commencement of this action this plaintiff addressed letters to said Emmons at his last-named address in San Francisco; that he received no answers to several of said letters, and then one or two letters were returned to him by the Post Office Department as undelivered letters; that thereupon this plaintiff sent a registered letter to said Emmons, and that said registered letter was returned by the postal department to this plaintiff as undelivered; that this plaintiff had no other means of finding out the residence of said Emmons." Affiant then states that he was informed by the men working at the mine that "they could get no letters from said Emmons in answer to their letters sent to him at his last address"; that affiant was "informed and from such information believes that the Bee Hive Company, of Yreka, could not find said Emmons at such address in order to serve summons upon him"; that being "unable to learn the residence of said Emmons, and his residence being unknown, plaintiff designated the county of Siskiyou as the county in which to bring said action, said county being the county in which the cause of action accrued." There is no brief on file by respondent.

Under section 395 of the Code of Civil Procedure all the defendants must join in the motion to change the place of trial (McKenzie v. Barling, 101 Cal. 460, 36 Pac. 8; Quint v. Dimond, 135 Cal. 574, 67 Pac. 1034); and the section has been complied with in the present case. But plaintiff seeks to retain the case in the court where it was commenced, under the provisions of said section which read as follows: "* * * The action must be tried in the county in which the defendants, or some of them reside at the commencement of the action; or, if none of the defendants reside in the state, or if residing in this state, and the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint. * * *" We presume that at the hearing of the motion plaintiff was successful in convincing the court that his affidavit was sufficient to show that the residence of defendant Emmons was unknown to plaintiff, and hence he had the right to designate the county in which to bring the action. The right to thus designate the place of trial is not an arbitrary right, or optional with plaintiff, upon a mere statement that the residence of defendant is unknown to him. He must state facts sufficient to show that he has resorted to such means to ascertain the defendant's residence as would be expected of a reasonable man seeking in good faith to make the discovery. The practice act, as amended in 1858 (St. 1858, p. 82, c. 103), contained a provision similar to that in section 395 of the Code of Civil Procedure. It was said in Loehr v. Latham, 15 Cal. 418: "But this provision must receive a reasonable construction. A willful or careless ignorance of the residence of the defendant does not put it in the power of the plaintiff to sue him in any county of the state, however remote from his residence; for, if this were so, the effect of the rule would be practically to repeal this provision requiring suit to be brought in the county of the residence of defendant. It would be putting it in the power of the plaintiff, by keeping ignorant of the facts, or feigning ignorance, to sue where he pleased, and thus fraud would be encouraged and oppression practiced. To resist the application of the defendant, the plaintiff should have shown that he used proper diligence to ascertain the residence of defendant before suit, and failed." In Thurber v. Thurber, 113 Cal. 607, 45 Pac. 852, speaking of the opinion in Loehr v. Latham, supra, the court said: "This decision has not been overruled or questioned, so far as we are informed. The reasons for enforcing the rule enunciated by Mr. Justice Baldwin are aptly put and cogent, and the practice indicated should be upheld and enforced."

Tested by these rules the affidavit of plaintiff was insufficient. At the time the action was commenced Emmons was a resident of San Francisco, as shown by his undisputed affidavit; and this was but a few weeks after plaintiff quit work. Emmons was known to plaintiff to be the secretary of the defendant company, and yet plaintiff made no inquiry of any of its officers or at its place of business in San Francisco; nor is any explanation given why he made no such inquiry, or that, if made, it would not have availed anything; nor is it shown that the address of the company's place of business was unknown to plaintiff. The letters alleged to have been sent to San Francisco were not sent to any street address, nor does affiant state that such address was unknown to plaintiff. In stating that he sent letters to Emmons' last-known address, plaintiff fails to state where that was; nor is the time stated when these letters were sent. The registered letters, as in the case of the others, were doubtless addressed to the general delivery. As superintendent of a mine being operated by the defendant corporation, and serving in that capacity under its direction and employment, there should have been no difficulty in finding the address of the secretary by inquiring of the officers of the company or at its place of business; and if, for any reason, the information by these obvious means could not be had the affidavit should have so shown. Plaintiff makes like indefinite statement that he was informed by the Bee Hive Company, of Yreka, that that company could not find Emmons. But when he made inquiry, or from what persons connected with that company, or why they should know anything about Emmons, does not appear. The men working in the mine under plaintiff as superintendent, of whom plaintiff made inquiries, cannot be supposed to have known more than plaintiff of Emmons' whereabouts, and the failure of the men to impart information in no wise strengthens the affidavit. The affidavit fails to show that diligence which the law very properly demands before plaintiff will be permitted to select his own forum in which to try his case.

The order is reversed, with directions to grant the motion.

We concur: HART, J.; BURNETT, J.

MEMORANDUM DECISIONS

PEOPLE v. MORRIS. (Cr. 65.) (Court of Appeal, Second District, California. Dec. 3, 1907.) Appeal from Superior Court, Riverside County; F. E. Densmore, Judge. Gertrude Morris was convicted of a crime, and she appeals. Affirmed. Lafayette Gill and K. H. Stahl, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was charged, under section 523 of the Penal Code, with sending a threatening letter with intent to extort money from another. Upon the trial she was convicted as charged, and appeals from the judgment and order denying her motion for a new trial. No points or authorities are filed by appellant; but counsel in oral argument contends that the verdict should be reversed and a new trial ordered on the sole ground that the verdict is not supported by the evidence. The evidence is largely circumstantial, but consists of circumstances all of which tend to prove that defendant wrote the letter upon which the charge is founded. In addition to the circumstantial evidence pointing to her guilt, there is direct evidence to the effect that the letter was in her handwriting. There is nothing in the record which would justify this court in disturbing the verdict. Judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

152 Cal. 645

CITY OF LOS ANGELES v. LOS ANGELES FARMING & MILLING CO. (L. A. 1,952.) (Supreme Court of California. Feb. 21, 1908.) In Bank. On petition for rehearing. Denied.

For former opinion, see 93 Pac. 869.

PER CURIAM. Rehearing denied.

BEATTY, C. J. In recording the order denying a rehearing of this cause I desire to protest against the citation of my opinion in City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585 as authority for the affirmance of this judgment. It is true that the opinion of Justice Temple in that case, which was concurred in by a majority of the justices, furnished a precedent for the present decision; but that opinion, it will be seen by reference to page 647 of 124 Cal. and page 604 of 57 Pac., was written for the express purpose of overriding that portion of my opinion commencing on page 639 of 124 Cal. and page 600 of 57 Pac., in which I expressly deny the rights here asserted and upheld. In my opinion the paramount right of Los Angeles to the waters of the Los Angeles river is limited to that part of the present city comprised in the four leagues (about 17,500 acres) constituting the original pueblo, and cannot be asserted for the satisfaction of the wants of the additional 10,400 acres added by the amended act of incorporation, or the territory since added and that may be hereafter added by the joint action of the municipal authorities and the inhabitants of the extensive unincorporated area adjoining the city. But this is what is now decided to be the law: The city of Los Angeles, as it has been enlarged far beyond the limits of the old pueblo and as it may be indefinitely enlarged in the future, has a paramount right over all riparian proprietors above the city to the use of all the water necessary to the supply of its inhabitants. It may annex all the lands between it and the ocean, including a vast area not riparian to the Los Angeles river, and the inhabitants of this annexed territory immediately become invested with the paramount right to the water flowing in the tributaries of the river, whether above or below ground, notwithstanding they have been used for a hundred years by the grantees of Spain and Mexico, and their successors, of lands riparian to the stream. This is, I concede, the logical outcome of the decision of the court in Los Angeles v. Pomeroy; but it is a doctrine which I disclaimed in that case, and for which neither Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674, nor Vernon District v. Los Angeles, 106 Cal. 237, 39 Pac. 762, is authority.

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7 Cal. App. 237

MEYERHOLTZ v. PAXTON et al. (Civ. 404.)

(Court of Appeal, First District, California. Dec. 26, 1907.)

1. PLEDGES—ENFORCEMENT—ADMISSIBILITY OF EVIDENCE—AUTHORITY OF PLEDGOR.

In an action on defendant's note, and to foreclose a lien on P.'s stock pledged for its payment, evidence that defendant executed the note as the agent of P. is admissible to show that defendant had authority as P.'s agent to pledge the stock, although it tends to show that the note was made for the benefit of P., whose name does not appear in the note.

2. APPEAL—HARMLESS ERROR—AMENDMENT TO PLEADING.

Where an action brought on a note and to foreclose a lien on stock pledged for its payment is brought against the maker of the note and the executors of the estate of the person owning the stock, and an amended complaint waives recourse against any property of the estate excepting the stock, failure to amend the prayer and other portions of the complaint in conflict with the waiver is harmless, the case being tried without reference to the parts of the complaint in conflict with the waiver.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4106–4109.]

Appeal from Superior Court, Sonoma County; Albert G. Burnett, Judge.

Action by Henry Meyerholtz against B. W. Paxton and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Bishop, Wheeler & Hoefler (Wm. Rix, of counsel), for appellants. F. A. Meyer, for respondent.

KERRIGAN, J. This is an action to foreclose a lien on certain personal property, given to secure the payment of a promissory note. The note in suit was the last of several renewal notes given the plaintiff for a loan which was made in the year 1895. It was dated January 1, 1902, and was drawn in favor of plaintiff, and signed by the defendant B. W. Paxton (a son of the deceased) in his own name. In addition to these facts the complaint also alleges that, at the time of making the note as security for the payment thereof, a certificate for 100 shares of stock in the Santa Rosa Bank, standing in the name of H. H. Paxton, was delivered to plaintiff, by B. W. Paxton, after making the following indorsement on the back thereof: "H. H. Paxton by B. W. Paxton, her attorney in fact." The complaint further alleges that in signing the note in his own name, and in hypothecating the stock, he was acting for and on behalf of H. H. Paxton, the deceased, pursuant to a power of attorney, authorizing him to borrow money in such sums and on such terms as might seem to him best, and to pledge therefor any of the property of said H. H. Paxton. A ratification is also alleged as follows: That said H. H. Paxton was acquainted with the making, execution, and delivery of said note and the pledging of said stock, and she directed and confirmed all the transactions aforesaid; that they were made with her consent and at her request, and for her sole use and benefit. The original complaint stated a cause of action in personam against the executors, and also sought a decree directing a sale of the stock alleged therein to have been pledged as security for the note. During the course of the trial the plaintiff filed an amendment to his amended complaint, waiving all recourse against the property of the estate except the 100 shares of stock of the Santa Rosa Bank, on which he sought a foreclosure of his alleged lien. The court found specifically that all the allegations of the complaint were true. As conclusions of law the court found that plaintiff was entitled to judgment against B. W. Paxton for the amount due on said note, and for a lien upon said 100 shares of stock, and gave judgment accordingly. The court further directed that said lien be foreclosed, and the stock sold. A motion was made for a new trial by C. E. Paxton, one of the executors of the last will and testament of H. H. Paxton. The motion was denied, from which order this appeal is prosecuted.

The point most relied upon by appellants is that the court erred in admitting, over the objection and exception of appellants, evidence which tended to show that B. W. Paxton executed the note as the agent of H. H. Paxton. In support of this contention many cases are cited, to the effect that, as the name of H. H. Paxton does not appear on the face of the note, evidence was inadmissible for the purpose of charging her; that the rule that such evidence is admissible to charge an undisclosed principal has no application to negotiable instruments; that "one who takes negotiable paper contracts with the parties appearing upon its face, and parol evidence is not admissible to add a principal not so appearing." Am. & Eng. Ency. of Law, vol. 1, p. 1054, title "Agency." Conceding, without deciding, that this is the law, we fail to see wherein it has been disregarded in the present case. The judgment for the amount due on the note is against B. W. Paxton, the maker of the note as disclosed by the face thereof, and not against the estate of Mrs. H. H. Paxton. The evidence complained of was admitted, as indicated by the conclusions of the court, not for the purpose of showing that the estate of H. H. Paxton was liable on the note, but to prove that her agent was acting within the scope of his authority in pledging the stock as security for the payment of the note. Even if it were conceded that, in a suit to recover on a negotiable note, no evidence could properly be received to establish the liability of a party not appearing on such note, it does not follow that the owner of the paper cannot foreclose his lien on any personal property belonging to such person, and given him as collateral security for its payment. And while the evidence introduced to establish such lien might also tend to show that the note was made for the benefit of such undisclosed person, it should not on that ground be excluded. The complaint, as it stood at the beginning of the trial, alleged notice to creditors, the due presentation of plaintiff's claim, and prayed for judgment against the executors of the estate for the amount of the note, with interest and costs. During the trial plaintiff filed an amendment to his complaint, expressly waiving all recourse against any property of the estate, excepting the 100 shares of bank stock; but he did not amend the portions of his complaint which conflicted with the waiver, nor did he amend the prayer of his complaint. It is here claimed that the waiver is not express, as required by section 1500 of the Code of Civil Procedure, but that it is restricted and limited by other portions of the amended complaint. We pass the point that the objection is made in this court for the first time. If the respondent should have coupled with his amendment waiving recourse an amendment to other parts of the complaint his failure to do so was harmless, for the case was tried and determined as if the portions objected to were no part of the complaint.

There are several other points discussed in the briefs based upon the claim that the evidence is insufficient to sustain the findings. Upon a careful examination of the record, we are satisfied that the findings are amply supported by the evidence. The case seems to have been fairly and carefully tried, and the conclusion arrived at by the trial court fully justified.

The order denying appellant's motion for a new trial is affirmed.

We concur: HALL, J.; COOPER, P. J.

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7 Cal. App. 204

HORN v. MARTINHO. (Civ. 401.)

(Court of Appeal, First District, California. Dec. 24, 1907.)

1. JUDGMENT—CONFORMITY TO PLEADINGS.

Where, in an action for the reasonable value of labor and materials in extra work on a building constructed by plaintiff for defendant, defendant in his answer alleged that for a portion of the extra work it was agreed that the price should be a designated sum, and that the reasonable value of the work and materials furnished for the other extra work for which there was no agreed price was in a specified sum and no more, a judgment for defendant was not supported by the pleadings; the admission that extra work had been performed for which no price had been agreed of the value designated supporting a judgment for that amount at least.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 434-445.]

2. PLEADING—ADMISSIONS—CONCLUSIVENESS.

Evidence to contradict an admission in a pleading cannot be received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 81-86.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Theo. S. Horn against A. S. Martinho. From a judgment for defendant and from an order denying a motion for a new trial, plaintiff appeals. Reversed.

Barna McKinne, for appellant. Danforth & Lansburgh, for respondent.

HALL, J. This is an appeal by plaintiff from a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial. Plaintiff sued to recover judgment for the sum of $217.50, as the reasonable value of labor and materials furnished in doing extra work on a building constructed by plaintiff for defendant, and to foreclose a mechanic's lien therefor. Defendant in his answer does not deny that extra work was done on the building, but denies that no price was agreed upon therefor, but in this regard alleges that for a portion of said extra work it was specifically agreed that the price should be $129.55, "and that the reasonable value of the work performed and materials furnished at the special instance and request of said Martinho, on said building, termed in said paragraph 7 'extra work,' and on which there was no agreed price, was and is the sum of $47.25 and no more."

Upon the trial of the issues presented in the action plaintiff was called as a witness in his own behalf, and, while being examined concerning the work alleged to have been done, testified that he performed certain extra work and several things that he did not remember, and, in answer to a question as to what was the value of the work that he did remember, he testified that he could not tell offhand. Whereupon the court ordered him to leave the stand, and at once ordered judgment for defendant. Counsel for plaintiff protested at the action of the court, and not only stated that the answer admitted some things, and that he could prove by other people and the foreman of plaintiff the value of the extra work, but nowhere does it appear that he expressly reserved an exception to the action of the court.

However, the judgment must be reversed without regard to the question of exceptions reserved.

The court found all the allegations of the complaint to be untrue, and gave judgment for defendant; but this finding is contrary to the admission of the answer hereinbefore set forth, and the judgment is for the same reason erroneous as not supported by the pleadings. The admission that extra work had been performed, for which no price had been agreed, of the value of $47.25, would support a judgment for that amount at least, and no evidence could be received to contradict this admission. Hall v. Polack, 42 Cal. 218; Mulford v. Estudillo, 23 Cal. 131.

Judgment and order are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

7 Cal. App. 258

BERTELSEN v. BERTELSEN. (Civ. 450.)

(Court of Appeal, Second District, California. Dec. 31, 1907. Rehearing Denied by Supreme Court Feb. 24, 1908.)

1. TRUSTS — RESULTING TRUST — PAYMENT OF CONSIDERATION — RELATIONSHIP BETWEEN PARTIES.

In a suit to declare a trust in real estate, the evidence showed that plaintiff either made a gift to defendant of a specified sum, or paid the same to her in consideration of her continuing to illegally cohabit with him, and that defendant used the money in the purchase of property in her own name, which she exchanged for real estate, title to which she took in her own name. Plaintiff had knowledge of the transactions and acquiesced in them. *Held*, that relief was properly denied, without regard to plaintiff's intentions when he gave defendant the money, and when he permitted her to retain title to the property.

2. EVIDENCE—COMPETENCY—TESTIMONY AS TO INTENT.

A witness may be examined as to the intent with which he did a certain act where the intent is material.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 440.]

3. APPEAL—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

The error in excluding evidence which if received and given due weight could not have changed the result was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4187–4193.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Christian Bertelsen against Lena Bertelsen. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Affirmed.

P. S. McNutt and C. C. Hartley, for appellant. Davis, Rush & Willis and Adcock & Reymert, for respondent.

ALLEN, P. J. Action to have a trust declared in certain real property. Findings and judgment for defendant. Appeal from the judgment and an order denying a new trial. The record in this case illustrates the truth of an old adage. It appears that the defendant was a San Francisco manicure, and plaintiff a mature man of means living at Los Angeles. They met in San Francisco, and the first night of their meeting resulted in illicit cohabitation. Plaintiff was so impressed with defendant's charms that he at once insisted upon her removal to Los Angeles. She, as subsequent events disclose, was principally charmed with his financial standing. The parties resumed their illicit relations in Los Angeles, and continued so to do for more than a year, during which time plaintiff gave defendant at first $700, with which to buy a rooming house. This money was so expended, and shortly thereafter defendant, having title and possession of the rooming house, exchanged the same for Los Angeles real estate, taking the title thereto in her own name. This she did without any protest upon the part of plaintiff, who had knowledge of the transaction. Afterwards plaintiff gave her an additional $860, with which to buy another rooming house. This defendant purchased in her own name, and in like manner traded the same for more real estate, taking the title thereto in herself. Plaintiff seems to have acquiesced in all these trades, and at all times to have had knowledge of the condition of the title. Afterwards, in 1901, the parties concluded to marry, which they did, and after living together as man and wife for three years separated. Plaintiff never made claim to the property until after the separation, yet now seeks the aid of a court of equity to have the real estate standing in the name of defendant charged with a trust in his favor. We think the court properly refused the relief. We would not be inclined, even if the findings that the sums of money paid defendant were in the nature of a gift were not entirely supported by the evidence, to disturb the judgment. The whole transaction seems to have for its basis payments in consideration of a continued course of prostitution. But, aside from this, there is ample evidence to support the finding that the sums paid defendant by plaintiff were in the nature of a gift, from which it follows that the proceeds of such money became the defendant's property.

It is insisted, however, that the court erred in its refusal to permit the plaintiff to testify as to his intentions when he gave her the money, and his intentions in permitting her to retain title to the real property. It is true that in this the court erred. "Under our system, where all persons (practically) may testify, a witness may be examined as to the intent with which he did a certain act, where that intent is a material thing in the action." Barnhart v. Fulkerth, 93 Cal. 499, 29 Pac. 50; Kyle v. Craig, 125 Cal. 114, 57 Pac. 791. But we think the error was harmless; for if the court had received such evidence and given it due weight, the effect could not have been to change the judgment. The facts and circumstances under which the payments were made preclude either party from being relieved in connection therewith. The duty of the court was, as by it determined, to leave the parties where it found them.

Judgment and order affirmed.

We concur: SHAW, J.; TAGGART, J.

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7 Cal. App. 233

NUCKOLLS v. COLLEGE OF PHYSICIANS AND SURGEONS OF SAN FRANCISCO. (Civ. 403.)

(Court of Appeal, First District, California. Dec. 26, 1907.)

1. APPEAL—ADMISSION OF EVIDENCE—HARMLESS ERROR.

The error of admitting evidence as part of the cause of action which could be relevant only in rebuttal is harmless where it afterward became relevant in rebuttal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4173.]

2. MASTER AND SERVANT—DISCHARGE OF EMPLOYÉ—DAMAGES.

The rule that the measure of damages in case of wrongful discharge is the amount that would have been earned under the contract, after deduction of any sums that the employé has earned or with reasonable diligence could have earned during the period, has no application where the employment was for a portion only of each day and the employé could have earned the amount which he did earn during the other portion of the days, and also render the services required by the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 54–56.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by H. M. Nuckolls against the College of Physicians and Surgeons of San Francisco, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Beverly L. Hodghead, for appellant. Geo. A. Sturtevant and A. M. Nuckolls, for respondent.

KERRIGAN, J. This is an action for damages alleged to have been suffered by plaintiff by reason of his discharge from defendant's employ. Plaintiff, who is a dentist, was employed by defendant as a demonstrator of operative dentistry for one year, beginning July 1, 1902, at a salary of $50 per month. Under the terms of the contract he was to give his entire time every afternoon from 1 to 5 o'clock (except Sundays) to the service of the defendant. October 4, 1902, plaintiff was discharged. During the remaining nine months of the term of the employment, both in the forenoon and the afternoon, the plaintiff practiced his profession of dentistry. October 21, 1903, he brought this action for $450, alleging that he had been wrongfully discharged. Defendant answered, averring that plaintiff had been dismissed for sufficient cause, and as a separate defense pleaded that he had suffered no damage thereby. The cause was tried by the court sitting without a jury, and a judgment was entered in favor of plaintiff. From the judgment and the order denying a motion for a new trial defendant prosecutes this appeal.

As a part of his case, and after testifying as to his employment, respondent was asked: "Dr. Nuckolls, at the time you were discharged, was there any reason assigned for your discharge?" Over the objection and exception of appellant the witness answered: "I was informed by the dean at the time that the board of trustees of the defendant college desired to give my place to another dentist, Dr. Baldwin, who, he said, was indebted to the college." The admission of this testimony is now assigned as error. Respondent established a prima facie case when he proved his employment, the amount of his salary, and his discharge before the end of the term of his engagement, and it was no part of his case in chief to prove the reason assigned by defendant for his dismissal. But, when the appellant introduced evidence to show that he was discharged for neglect of duty, then he became entitled to rebut such defense by showing that, when he was dismissed, the appellant made a different and conflicting statement. The most that can be said against the admission of this testimony is that it was admitted out of order, which was a harmless irregularity. In Cashman v. Harrison, 90 Cal. 306, 27 Pac. 283, the Supreme Court passed on a similar point. There it was contended that the trial court had erroneously permitted the plaintiff to introduce in evidence in chief a bond from defendant to plaintiff against defendant's objection, on the ground that it was immaterial, irrelevant and incompetent; and the court said: "The bond was certainly competent, relevant, and material on the issue as to the consideration for the bill, raised by the answer, and insisted upon here. But it was at least irregular to introduce it in chief, since the bill was prima facie evidence of a sufficient consideration; but it was not objected to on the ground that it was offered out of the proper order, or that it could properly be offered only in rebuttal. That it became relevant in rebuttal there is no question; so that the error, if it was such, of admitting it out of the proper order, was harmless."

This brings us to the other point made by appellant. By way of defense, the appellant alleged in its answer that respondent, between the time of his discharge and the date of expiration of his contract, earned, in the course of the practice of his profession of dentistry, a sum greater than $450. The facts are that during his employment by appellant respondent was at his office in the forenoon of each day, and at the college of the appellant in the afternoon; that after his discharge respondent devoted his entire time to his profession; that prior to the date of expiration of the contract and subsequent to his discharge as aforesaid respondent earned by so practicing his profession in the afternoon between the hours of 1 and 5 the sum of $500; that, if respondent had not been discharged, he could have earned (as he testified) the same amount at other times than during the afternoon. The appellant claims that, as the evidence shows that respondent during the period in question earned a sum greater than his salary for such period would have been, a complete defense was established, or at least such a defense as would render the damages nominal. It is true, as contended by appellant, that the measure of damage in cases of wrongful discharge is the amount that would have been earned under the contract, after deduction therefrom of any sums that the employé has actually earned during the period mentioned, or which he might, by due and reasonable diligence, have earned. Wood on Master and Servant, § 127; 20 Am. & Eng. Ency. of Law (2d Ed.) p. 37. This rule, however, applies to cases where the contract is for the whole time and services of the employé. It certainly has no application to a case like the one at bar, where the evidence shows that the respondent could have earned the $500 in the forenoons between the time of his dismissal and the expiration of his contract, and still have rendered to the appellant the services required by such contract. This seems so clear to us on principle that we shall merely cite, without quoting therefrom, some of the cases that sustain this view, viz.: Jeffrays v. King, 34 Md. 222; Gates v. School District, 57 Ark. 376, 21 S. W. 1060, 38 Am. St. Rep. 249; Kyle v. Pon, 96 Ga. 166, 23 S. E. 114; Toplitz v. Ullman, 2 Misc. Rep. 130, 20 N. Y. Supp. 863; Allgeyer v. Rutherford (Tex. Civ. App.) 45 S. W. 623.

This action was tried twice in the court below. As the result of the first trial a judgment was entered for respondent. Appellant moved for a new trial, which was granted upon the issue of the amount of damages raised by one of the separate defenses set forth in the answer, but denied as to all the other issues. An appeal was taken from that part of the order denying appellant a new trial on the remaining issues. A new trial was thereupon had upon the issue of damages, which resulted again in a judgment for respondent. Appellant again moved for a new trial, which motion was denied, and from this order an appeal is taken. Both of these appeals are in one transcript, and have been presented in the briefs together as if but one appeal were before us, and we have so discussed them in this opinion.

In each case the judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

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7 Cal. App. 241

STUM v. HADRICH. (Civ. 447.)

(Court of Appeal, Second District, California. Dec. 27, 1907.)

1. Sales — Completeness of Contract — "Agreement to Sell and Buy."

Under Civ. Code, § 1729, providing that "an agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor," a contract by which defendant agreed to sell to plaintiff, a one-half interest in his business, in consideration of a specified amount of cash, and plaintiff agreed to devote his entire time and skill to the business, is a completed contract of sale, though plaintiff paid only a small portion of the cash at the making of the contract, and the cash to be paid is but a fraction of the real value of the interest in the business purchased.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 39-43.

For other definitions, see Words and Phrases, vol. 1, p. 285; vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

2. Same—Consideration—Presumption.

Though the cash to be paid for an interest in a business is but a fraction of the real value of such interest, nothing to the contrary appearing, it will be presumed that the labor and skill agreed to be devoted by the purchaser is sufficient to render the consideration adequate.

3. Same—Construction—Payment.

Where a contract for the sale of an interest in a business is silent as to when payment of the price is to be made, payment on delivery is implied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 230.]

4. Same — Breach of Contract — Tender of Performance.

Under Civ. Code, § 1440, providing that "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same, * * * such other party is entitled to enforce the obligation without previously performing or offering to perform," a notice by the seller to the buyer that he will not perform the contract of sale constitutes a breach, and the buyer's cause of action accrues at once, without tender of payment of the price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1157.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by John A. Stum against L. F. Hadrich. From a judgment for defendant, plaintiff appeals. Reversed.

Frank G. Bryant and D. P. Hatch, for appellant. Grant R. Bennett (F. M. Porter, of counsel), for respondent.

ALLEN, P. J. Action for damages growing out of an alleged breach of an agreement to sell personal property. Findings and judgment for defendant, from which plaintiff appeals upon the judgment roll.

The findings upon which the judgment is based recite that plaintiff, an expert confectioner and caterer, then employed in his business, on the 14th day of November, 1904, entered into an oral agreement with defendant, by which defendant agreed to sell to plaintiff, and plaintiff agreed to buy, a half interest in a confectionery and catering business in Los Angeles for $500 cash; and the further agreement that plaintiff should devote his entire energy and skill in and about the conduct of the joint business. That upon the faith of this agreement to sell plaintiff paid to defendant $50 of such purchase price. The trial court further finds that, while the remaining $450 was to be paid in cash, it was understood between the parties that plaintiff had $100 which he would pay immediately, and the remaining $350 was to be paid as soon as plaintiff could raise that amount by loan, which loan, if it could not be procured otherwise, was to be procured from one Sparks, and that plaintiff and defendant should jointly sign a note therefor, and said Sparks was to be repaid out of the profits of the business which would accrue to plaintiff. It further appears that plaintiff on the date of such agreement, and upon the faith thereof, resigned the position then held by him with a rival firm. It is further found that no delivery of the property agreed to be sold was had, and that on the day subsequent to the making of the agreement the defendant repudiated the same and notified plaintiff that he would not carry out the same, and offered to refund the $50 which plaintiff had paid. This plaintiff refused to accept. Plaintiff, after such repudiation, made no tender of payment to defendant of the residue of the purchase price. It was found by the court that the reasonable value of the business, the subject of such agreement, at the time thereof, was $6,500, and that said business produced at such time the sum of $400 per month net profit over and above all expenses, and that the same was at said date clear and free of all incumbrances. The court as a conclusion of law from these findings found that the agreement between the parties was never completed, and that the defendant was entitled to a judgment.

Section 1729 of our Civil Code provides: "An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor." The contract of the parties, as found by the court, appears to us to be a complete agreement to buy and sell under this section. While the cash to be paid was but a fraction of the real value of the subject of the agreement to sell, nothing to the contrary appearing, it will be presumed that the skill and labor agreed to be contributed by plaintiff was of itself sufficient to make the consideration adequate and the contract upon its face a fair one. It will be observed that no time was fixed in the agreement when the money was to be paid by plaintiff. The time of payment was left indefinite. The law, therefore, implies that the payment was to be made upon delivery. Section 1784, Civ. Code; Blackwood v. Cutting Packing Co., 76 Cal. 215, 18 Pac. 248, 9 Am. St. Rep. 199. No delivery being made or tendered, plaintiff was not in default under the agreement on the 15th day of November, when defendant refused to carry out the agreement. Section 1440 of the Civil Code provides: "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party." See also, Garberino v. Roberts, 109 Cal. 128, 41 Pac. 857. Not only was plaintiff not required to tender performance after the notice given him by defendant that he would not perform, but such notice constituted a breach of the agreement to sell, and plaintiff's cause of action arose immediately without reference to subsequent tender of payment. The findings clearly show a breach upon defendant's part, and section 3308 of the Civil Code prescribes the measure of damages on account thereof.

We are of opinion that the judgment of the court is not supported by the findings.

Judgment reversed and a new trial ordered.

We concur: SHAW, J.; TAGGART, J.

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7 Cal. App. 244

SCHINO v. CINQUINA et al. (Civ. 394.)

(Court of Appeal, Third District, California. Dec. 28, 1907.)

APPEAL—RIGHT OF REVIEW—PARTY AGGRIEVED.

Though, in supplemental proceedings, the court should, on evidence of an assignment of the fund sought to be reached to a person who was not a party to the proceedings, but merely present as a witness for the judgment creditor, and not called, have ordered that plaintiff might bring an action, under Code Civ. Proc. § 720, against the garnishee, to which such third person and any others claiming liens on the money might be made parties, so that all adverse claims might be settled, and all parties protected, yet the judgment debtor, claiming that such assignment was made, is not a party aggrieved by the order that the garnishee pay the money to the judgment debtor, and so may not appeal therefrom.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Michele P. Schino against Ansermo Cinquina and another. From an order in supplementary proceedings, said defendant Cinquina appeals. Affirmed.

Ben Berry, for appellant. F. G. Ostrander, for respondent.

CHIPMAN, P. J. Proceedings supplemental to execution.

It appears from the transcript: That on January 19, 1907, plaintiff recovered judgment against defendants in the superior court for $531.25. Execution issued and was returned unsatisfied. Upon the affidavit of plaintiff that defendant Ansermo Cinquina had property which he refused to apply towards the payment of said judgment, the court ordered him to appear and answer concerning his property. At the hearing on May 21, 1907, one Hayes was sworn on behalf of plaintiff, and testified that he was vice president of the Hayes Company; that defendant Ansermo Cinquina "has been working for Hayes Company, of which I am an officer, from December 16, 1906, until the present time, and there is now due from Hayes Company for the labor he has performed the sum of $132.65; the said Hayes Company does not owe Ansermo Cinquina anything by reason or otherwise of any labor performed by him for said company." He further testified that on January 16, 1907 (before the entry of judgment), the Hayes Company received a written notice of assignment and transfer by defendant Ansermo Cinquina reading: "* * * I have assigned and transferred to G. Coppellotti * * * all sums of money that may become due by virtue of my services rendered while in your employ between Jan. 16, 1907, and July 16, 1907." Hayes testified: "If such assignment is valid, then the Hayes Company does not owe Ansermo Cinquina anything for the amount due for his work from December 16, 1906. If it is invalid, then the Hayes Company owes Ansermo Cinquina the sum of $132.65." He further testified that subsequent to January 16, 1907, Coppellotti notified him "to allow Ansermo Cinquina to have what money he needed for tobacco and other necessaries, and deduct the same from the amount due for labor performed by said Ansermo Cinquina for the Hayes Company," and that he had furnished Ansermo supplies to the value of $7.35 in accordance with Coppellotti's instructions. Defendant Ansermo Cinquina testified: "I am working for Hayes Company and have been since December 13, 1906, at a wage of $1 per day, and I have not drawn any money from said company since January 16, 1907." He testified, further, to having assigned his claim for wages from said company to Coppellotti, and that at the time he made the assignment he "was owing Coppellotti." This was all the testimony in the case. It appeared from the record that Coppellotti "was present in court during the proceedings with his books of account, under subpœna issued at the instance of the plaintiff and judgment creditor, but was not called as a witness to testify by either party to the proceeding." The court ordered that the said Hayes Company pay to plaintiff, or his attorney, the sum of $132.65 upon demand by said plaintiff or his attorney. Defendant Ansermo Cinquina appeals from this order.

The garnishee, Hayes Company, did not admit an indebtedness to defendant, except it should be determined that the assignment was invalid. But that fact could not be litigated in this proceeding to which the assignee, Coppellotti, was not a party. His being present as a witness, though not called, did not make him a party nor did the order bind him. He was there only as plaintiff's witness, but was not called by either party. We think upon the evidence as it appeared the judge should have made an order to the effect that plaintiff might bring an action against the company, as provided in section 720, Code Civ. Proc., to which Coppellotti and other persons, if any, claiming liens upon the money, might be made parties, to the end that all adverse claims might be adjusted and conclusively settled in such action and all parties protected. Deering v. Richardson-Kimball Co., 109 Cal. 73, 82, 41 Pac. 801, and cases there cited. In the Deering v. Richardson-Kimball Case the garnishee, Los Angeles National Bank, among others, appealed. Expressing doubt as to the power of the court, in summary proceedings of this character, to try and conclusively settle all adverse claims to the property sought to be applied to the satisfaction of the judgment, "yet," said the court, "all known adverse claimants should have an opportunity to be heard, otherwise they would not be bound by the order made; nor would the garnishee be protected by any such order from their just claims, and might be compelled to satisfy them."

Respondent, however, makes the point that appellant's interests are not affected by the order, and that he cannot appeal. Appellant makes no reply to this point. Section 938, Code Civ. Proc., provides that "any party aggrieved may appeal in the cases prescribed in this title." Title 13. A simple and terse test as to who is an aggrieved party is given in an early case under the practice act, in Adams v. Woods, 8 Cal. 306, 315: "Would the party have had the thing, if the erroneous judgment had not been given? If the answer be yea, then the person is the aggrieved party." The "thing" in controversy was the money in the hands of the Hayes Company, and, had the court refused to order its payment to plaintiff, appellant would not have had the "thing" for he had assigned it to Coppellotti. It was, therefore, a matter of indifference to him whether the company paid what was due him to respondent or to appellant's assignee. In either case the money would be applied to appellant's indebtedness. The parties aggrieved, it seems to us, are Coppellotti and the company. Appellant is not concerned in the disposition of the money, unless the fact that he has a right to pay one creditor in preference to another (Civ. Code, § 3432) would give him the right of appeal in order to effectuate his preference—in other words, that he is aggrieved, in the sense of the statute, because his assignee is injured or put to possible inconvenience or cost. There is no evidence in the record justifying our holding that Coppellotti's assignment was obtained by actual fraud (Roberts v. Burr, 135 Cal. 156, 67 Pac. 46), if such issue was triable in the proceedings, which we doubt. The question then is: Is appellant aggrieved by the order of court in favor of the judgment creditor which affects appellant only so far as it prevents the accomplishment of his intended preference? We are unable to see that his grievance has anything of substance in it, or that any substantial injury to him can be predicated of the order. Coppellotti may complain, but appellant cannot, for he owed both of these creditors. The preference that appellant undertook to exercise may have been prompted by friendship or other purely sentimental reason entirely justifiable, but we can conceive of no consideration moving appellant in giving the preference which the law can take hold of and declare to be a substantial injury to him and that he is thus "the party aggrieved."

The order is affirmed.

We concur: HART, J.; BURNETT, J.

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7 Cal. App. 182

BRADY v. RANCH MINING CO. (Civ. 387.)

(Court of Appeal, Third District, California. Dec. 21, 1907. On Rehearing, Jan. 20, 1908; Denied by Supreme Court Feb. 17, 1908.)

1. Appeal — Harmless Error — Order of Proof.
Admission in evidence of an account stated, without sufficient preliminary proof of the agency of one who assumed to represent defendant, was not prejudicial, where proof of the agency was immediately thereafter supplied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4171–4177.]

2. Same—Discretion of Court.
The order of proof is largely within the discretion of the trial court, and its action will not be reviewed, unless there be an abuse of that discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3851.]

3. Principal and Agent — Evidence of Agency.
In an action on an account stated, evidence *held* sufficient to show the agency of one who assumed to represent defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 41.]

4. Stipulations—Amount Due—Effect.
Where, in an action on an assigned claim, it was stipulated at the trial and admitted by defendant that the amount sued on was the correct amount due, defendant could not afterward object that the signatures to the assignment to plaintiff were not proven.

5. Appeal—Objections in Lower Court.
In an action on an assigned claim, objections that the signatures to the alleged assignment were not proven, and that the paper was not an assignment but a mere request to defendant to pay the amount of the claim, should have been made in the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1079–1120.]

6. Assignments — "Equitable Assignments."
Where an order requesting payment to another related to the whole amount of the funds in the hands of the debtor belonging to the assignor, it amounted to an "equitable assignment" of the claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 99–105.

For other definitions, see Words and Phrases, vol. 3, pp. 2434–2437; vol. 8, p. 7652.]

7. Pleading—Answer — Want of Information.
A party must be held to know whether he is indebted to another, and a denial of indebtedness, on want of information and belief, raises no issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 245–248.]

On Petition for Rehearing.

8. Appeal—Review—Questions Not Raised.
Where the point was not made in the court below nor by counsel at any time that the answer was insufficient, the appellate court should not base its decision on such insufficiency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1241–1243.]

9. Same — Trivial Error — Amount of Recovery.
Where a judgment for plaintiff was for $1,000, the contention on appeal that it should be reduced to the extent of $17.70 involves the maxim of "De minimis non curat lex," especially where there is some evidence to support the finding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4547, 4548.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by J. J. Brady against the Ranch Mining Company. Judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

W. H. Mahoney, for appellant. J. C. Webster, for respondent.

BURNETT, J. The appeal is from an order denying defendant's motion for a new trial. There are 19 counts in the complaint, each presenting a separate cause of action assigned to plaintiff. The findings and judgment were in favor of plaintiff as to all the counts except 3, which were dismissed at the trial.

Appellant questions the sufficiency of the evidence only as to the first, fourth, fifth, and sixteenth counts of the complaint.

The first cause of action is upon an account stated, and the point urged in this connection is that the account was admitted without sufficient preliminary proof of the agency of one Stanford, who assumed to represent the defendant. But, granting that the ruling was erroneous, it was without prejudice for the reason that proof of the agency was immediately thereafter supplied. It is well settled that the order of proof is largely within the discretion of the trial court, and its action will not be reviewed unless there be an abuse of that discretion. Gordon v. Searing, 8 Cal. 50; Lick v. Diaz, 37 Cal. 445; Crosett v. Whelan, 44 Cal. 203; People v.

Shainwold, 51 Cal. 469. The agency was sufficiently shown by the testimony of Charles Estey "that Richard B. Stanford was a superintendent and general manager of the defendant Ranch Mining Company, his name was signed to all its checks, and he attended to all its business and had charge of its mine and mining property in Tuolumne county for two years and perhaps before September, 1905."

The fourth count relates to the assigned claim of one Joe Keeney. A paper in the following language was received in evidence: "Springfield, Cal., June 4, 1905. To the Ranch Mining Company. Please pay the amount of my time check $12.75 to Mr. Emmet Murphy and oblige. Joe Keeney. Pay to J. J. Brady. E. Murphy." Plaintiff testified that he had received this paper from Emmet Murphy, and that he had received no other assignment of the Keeney claim from any one.

Appellant now urges that the signatures of Keeney and Murphy were not proven, and that the paper is not an assignment of Keeney's claim, but a mere request to defendant to pay to said Murphy the amount of Keeney's time check. Assuming that there is ground for appellant's assertion, the point should not be considered, for the reason that at the trial "it was stipulated and admitted by defendant that the amount sued upon in plaintiff's fourth cause of action was the correct amount due." In view of that stipulation, no evidence was required in support of the claim. Besides, the objection made, being a general one, did not reach the points suggested here. The specific objections urged now for the first time should have been pointed out to the trial judge, if appellant deemed them of sufficient importance to merit consideration.

Again, as to the assignment, since the order related to the whole amount of the fund in the hands of defendant belonging to Keeney, there is authority for holding that it amounted to an equitable assignment of the claim. Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522; Pierce v. Robinson, 13 Cal. 116; Pope v. Huth, 14 Cal. 404; Curtner v. Lyndon, 128 Cal. 36, 60 Pac. 462.

In reference to the fifth count appellant states that "this assignment is in all respects similar to the Keeney assignment, the request to pay in the same form, the testimony presented of like character, and the objections to the introduction of the demand in evidence the same." It may be added that the stipulation as to the amount being due was the same, and the position taken is equally without merit.

The evidence as to the sixteenth count is unsatisfactory; but the amount involved is so trifling that we can properly invoke the maxim, "De minimis non curat lex." Besides, defendant should not be heard to complain, as it pleads its denial of the indebtedness to plaintiff upon its want of information and belief. A party must be held to know whether he is indebted to another, and such denial as aforesaid should be considered as raising no issue.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

In response to appellant's petition for rehearing, we deem it proper to say that we are satisfied with the views heretofore expressed, except as to one proposition discussed in considering the sixteenth count involving the small amount of $17.70. The point seems not to have been made in the court below nor by counsel at all that the answer is insufficient, hence, as contended by petitioner, we should not base our decision upon that ground; but we still think that, since the judgment in favor of plaintiff is for $1,000, the contention that it should be reduced to the extent of $17.70 involves the maxim "De minimis non curat lex." Besides, upon a re-examination of the record, while the evidence is not altogether satisfactory to us, we are not prepared to say that it is insufficient to support the finding of the court as to said $17.70. The witness Conlin did testify that "the Ranch Mine is indebted to me for telegraphing and expressage in the sum of $17.77," and while his cross-examination reveals some statements apparently inconsistent with this conclusion, the whole of the testimony furnishes sufficient support for plaintiff's claim, as there is no doubt of the assignment by Conlin to plaintiff.

The petition for rehearing is denied.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 221

WYATT v. ARNOT. (Civ. 369.)

(Court of Appeal, Third District, California. Dec. 26, 1907.)

1. JUDGES—LIABILITIES FOR OFFICIAL MISCONDUCT.

A party to an action in the superior court cannot maintain a suit against the judge for damages for his willful and intentional omission to decide the case after trial and submission to him for decision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, § 165.]

2. PLEADING—CONCLUSIONS OF LAW—ALLEGATIONS OF FACTS.

The complaint, in an action against a judge of the superior court, which accuses the judge of a willful, premeditated, and intentional omission of, and a refusal to, perform a duty, should allege the facts, so as to enable the court to determine whether the refusal to do a duty was willful, premeditated, and intentional.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 12–28½.]

3. TRIAL—TIME WITHIN WHICH TO DECIDE CAUSES—CONSTITUTIONAL PROVISIONS.

Const. art. 6, § 24, providing that no judge of the superior court shall be allowed to draw any monthly salary unless he shall subscribe an affidavit that no cause in his court remains undecided that has been submitted for decision for 90 days, imposes a penalty on a judge for a failure to decide causes within the time limited, but does not require him to decide a cause within the specified time after its submission to him, and the matter of time when a judge may decide a case is as much a matter of judicial discretion as a matter of how he shall decide it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 904.]

4. MANDAMUS—COMPELLING JUDGE TO DECIDE CAUSE SUBMITTED FOR DECISION.

Where a judge of the superior court abuses his discretion in the matter of the time when a cause should be decided, by delaying his decision to an unreasonable length of time, so that it may be said that his conduct involves an abuse of discretion, he may, in a proper proceeding, be compelled to decide, but not in a particular way.

5. JUDGES—LIABILITY FOR OFFICIAL MISCONDUCT.

A judge who, because of malice or corruption, renders an erroneous decision, or fails to render a decision within a reasonable time, is liable to impeachment, but in neither case can he be required to answer to a private individual in an action for damages.

6. SAME.

Since a judge has a right to give a cause such consideration as he feels may be necessary to reach a correct conclusion, a delay in deciding a cause is not of itself a basis of a charge, even in a proceeding before an appropriate forum, that he was influenced by corrupt motives, though such delay is a circumstance to be considered with other facts.

7. EVIDENCE—JUDICIAL NOTICE—ELECTION OF JUDGES OF COURTS OF RECORD.

The Court of Appeal will take judicial notice of the fact that one was elected judge of the superior court for a county at a general election under the proclamation of the Governor to fill an unexpired term of that office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 67.]

8. OFFICERS—ELECTIONS TO FILL VACANCY.

One elected to fill a vacancy in an office is entitled to qualify for and assume the discharge of the duties of the office immediately on the official declaration that he was elected.

9. JUDGES—ELECTION—QUALIFICATION.

One holding the office of judge of the superior court of a county, who is elected judge of the superior court of another county to fill a vacancy in the office, must resign his former office, if he intends to qualify as judge for the latter county.

10. SAME — LIABILITIES FOR OFFICIAL ACTS — FAILURE TO DECIDE CAUSE SUBMITTED.

The complaint in an action against a judge of the superior court for damages for his failure to decide a cause submitted to him for decision alleged that the cause was submitted on September 27th, that he was elected judge of the superior court of another county at the general election held in November of that year, and that on the 7th day of November of that year he resigned to fill the office of judge of the latter county without first deciding the cause. There was nothing to warrant the conclusion that the judge before his resignation had so mastered the record of the cause as to have justified him in deciding it. *Held*, that the complaint did not state any cause of action.

Appeal from Superior Court, Alpine County; Wm. M. Finch, Judge.

Action by W. W. Wyatt against N. D. Arnot. From a judgment for defendant, on sustaining a general demurrer to the complaint, plaintiff appeals. Affirmed.

Richard S. Miner (W. M. Thornburg, of counsel), for appellant. Geo. H. Thompson (Geo. Springmyir, of counsel), for respondent.

HART, J. The court below sustained a general demurrer to the complaint, and thereupon caused judgment to be entered in favor of the defendant. Plaintiff appeals from said judgment.

The complaint alleges that for a long time prior to and on and for some months after the 6th day of June, 1904, the defendant was a duly elected, qualified, and acting judge of the superior court of the state of California, in and for the county of Alpine; that on said 6th day of June, 1904, the appellant, as plaintiff, commenced a civil action in said superior court against one Thomas Barber by "filing a complaint in due form and substance," said action involving certain water rights claimed and owned by plaintiff in said Alpine county. A summons having been issued and served on said Barber, the latter in due time answered the complaint, and thereafter said action was ready for trial upon the issues of fact arising upon said pleadings. On August 26, 1904, the respondent, as judge, etc., made an order setting said action for trial before the court, without a jury, on Thursday, September 15, 1904, at 2 o'clock p. m. The object of said action was to obtain a perpetual injunction, restraining said Barber from diverting the waters of certain streams in Alpine county from the lands of plaintiff. According to the averments of the complaint, the respondent, having become a candidate for the office of judge of the superior court for El Dorado county, left Alpine county shortly after fixing the time for the trial of said cause, going to the first-named county for the purpose of conducting and managing his campaign for the said office of judge of the superior court for said county, and did not return to Alpine county until the 16th day of September, 1904, on which day he proceeded with the trial of said action. It is further alleged that "upon the 27th day of September, 1904, the evidence in said case being closed and arguments of counsel made, said cause was, by an order of said court, duly submitted for final decision and consideration, said N. D. Arnot then and there saying that he did not desire any authorities or briefs, but that he was then ready to submit said case for final decision, and that he would decide the same in a short time and notify the attorney for the winning side to prepare findings of facts and conclusions of law." The respondent, it is alleged, after the trial and submission of the case for decision, again departed from Alpine county, going to El Dorado county to resume his campaign for election to the office of judge of the latter county. Having been elected judge of the superior court of El Dorado county at the general election held in November, 1904, the respondent, on the 7th day of November, 1904, resigned as judge of the superior court for Alpine county, and thereafter the Governor of the state appointed the Hon. Clark Howard to fill the vacancy in said office of judge occurring through respondent's said resignation. It is declared that plaintiff was required to retry said case, and that the same was tried anew before the said Hon. Clark Howard between the dates of May 14th and 27th, 1905, the judgment being in favor of plaintiff. The gravamen of plaintiff's complaint is thus stated in paragraph 17 thereof: "That said defendant, N. D. Arnot, without the consent of plaintiff, willfully, premeditatedly, and intentionally omitted, neglected, refrained, refused, and declined to decide said cause or to render any decision therein whatsoever, and totally omitted, refused, and neglected to perform his duty in the matter of deciding said cause absolutely without any good or legal reason, cause, or excuse, to the great damage, annoyance, and wrong of plaintiff," etc.

The sole question presented by the demurrer is whether or not an action for damages by an individual will lie against a judicial officer for willful and intentional omission to perform a duty within the sphere of his authority as such judicial officer. In some of the states it has been held that, "while a judicial officer will be protected against suits for damages resulting from an erroneous exercise of judgment and power, yet, when he acts corruptly, maliciously, or beyond his jurisdiction, his office is no protection." Reed v. Taylor (a Kentucky case decided in 1904) 78 S. W. 892. The following cases maintain the same doctrine and hold that the line beyond which the principle of judicial protection will not extend and cannot be applied is where, first, a person possessing only special or limited judicial power does any act beyond the scope of his authority as such judicial officer, and, secondly, where, exercising his duly constituted jurisdiction, his act is the result of malicious or corrupt motives. Revill v. Pettit, 3 Metc. (Ky.) 314; Reed v. Taylor (Ky.) supra; Stephens v. Wilson, 115 Ky. 27, 72 S. W. 336; Gault v. Wallis, 53 Ga. 675; Cope v. Ramsey, 2 Heisk. (Tenn.) 197. But the rule as it is declared in the California cases and which, we think, is sustained by the soundest reasoning, does not go to the extent to which it is carried by the authorities cited by appellant and to which we have referred.

The earliest case in this state involving the discussion of the principle of protection to judicial officers is Downer v. Lent, 6 Cal. 94, 65 Am. Dec. 489. In that case the board of pilot commissioners revoked the plaintiff's license as a pilot, and addressed to the shipmasters and consignees notice to that effect. Plaintiff brought suit against the board for damages, and, reversing the judgment of the court below, based upon its order overruling the demurrer, the court, while not extensively reasoning the proposition, states the general principle underlying the rule as follows: "Whenever, from the necessity of the case, the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he should be protected from any consequences of an erroneous judgment."

In Turpen v. Booth, 56 Cal. 65, 38 Am. Rep. 48 et seq., where members of a grand jury, which indicted the plaintiff for illegal voting, were sued for damages for "willfully, wantonly, and maliciously" returning said indictment, the Supreme Court, affirming the judgment for the defendants, held that "a grand juror is not responsible in a civil suit for his action on the grand jury, however erroneous it may be, and however malicious the motive which produced it." The statute (section 927 of the Penal Code) at the time of the filing of the opinion in that case provided, as now, that "a grand juror cannot be questioned for anything he may say or any vote he may give in the grand jury relative to a matter legally pending before the jury," etc.; but the court held that a grand juror, in the exercise of judicial or quasi-judicial duties with which he is as such official clothed, is, independent of any statute on the subject, exempt from all liability in such an action by the principles of the common law. That case is particularly valuable because it reviews the leading cases dealing with the question before us.

Pickett v. Wallace et al., 57 Cal. 555, was an action for damages against certain members of the Supreme Court for adjudging plaintiff guilty of and committing him to jail for contempt of court. The complaint charged that the order of the court adjudging plaintiff guilty of contempt was false, willful, and malicious. A demurrer to the complaint was sustained, and the judgment affirmed. The court said: "We are not aware of any principle upon which this action can be maintained. * * * In the recent case of Turpen v. Booth, supra, we had occasion to consider a case similar to this in principle, and in which we referred to the decision of the Supreme Court of the United States in Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646, where it was held that judges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when the acts are in excess of their jurisdiction, and are alleged to have been done corruptly and maliciously."

The only distinction between the cases cited and relied upon by appellant and those cited by respondent is, it will be perceived, that in the former it is held that, where the act charged is maliciously and corruptly done, an action will lie against a judicial officer, while in the latter it is held that, even if maliciously and corruptly done, the judge is immune from liability in an action for damages.

The principle upon which the rule as laid down in this state rests is fully and clearly explained in Weaver v. Devendorf, 3 Denio

(N. Y.) 120, as follows: "But I prefer to place the decision on the broad ground that no public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally; but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to judges, from the highest to the lowest, to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power. It of course applies only when the judge or officer had jurisdiction of the particular case, and was authorized to determine it. If he transcends the limits of this authority, he necessarily ceases, in the particular case, to act as a judge, and is responsible for all consequences. But with these limitations, the principle of irresponsibilty, so far as respects a civil remedy, is as old as the common law itself. The authorities on this subject are almost innumerable."

The case of Stone v. Graves, 8 Mo. 148, 40 Am. Dec. 131, is in line with the California view, and contains an able and instructive treatment of the question. Yates v. Lansing, 5 Johns. (N. Y.) 282, Cunningham v. Bucklin, 8 Cow. (N. Y.) 178, 18 Am. Dec. 432, and Pratt v. Gardner, 2 Cush. (Mass.) 63, 48 Am. Dec. 652, are to the same effect. "If," says Chief Justice Shaw, in Pratt v. Gardner, supra, "an action might be brought against the judge by a party feeling himself aggrieved, the judge would be compelled to put in issue facts in which he has no interest, and the case must be tried before some other judge, who, in his turn, might be held amenable to the losing party, and so on indefinitely. * * * His judgment may be revised in an appellate court, and reversed or affirmed; but he himself can be liable only to an impeachment for corruption or other misconduct, if there be any"—citing cases. But it would be useless to cite further authorities, of which there are many in consonance with the rule as it is declared in this state. The California doctrine is founded upon a deeply rooted principle of the common law, and in none of the cases in which the rule is attempted to be modified or extended is there to be discovered any sound reason why the rule as it is followed in this state should be varied from.

The complaint in the case at bar, however, does not charge an affirmative act, or one of commission, involving a violation of duty on the part of respondent, but accuses him of a "willful, premeditated, and intentional omission and refusal to perform a plain duty." And therefore plaintiff contends the case here, under the pleaded facts, does not come within the rule declared in the authorities cited by the defendant. If stripped of the adjectives or epithets—"willfully," "premeditatedly," and "intentionally"—the complaint would not contain a statement of facts (except perhaps the bare inference following the allegation of respondent's resignation without first deciding the case), which could not be applied to most any judge to whom complicated cases are submitted for decision, and which is by no means inconsistent with perfect judicial propriety. The epithets referred to are, in truth, no more than mere conclusions of the pleader, and while as against a general demurrer the complaint in this respect may stand, though upon an exceedingly frail foundation, it is certain that, if it had been attacked by the more formidable weapon (a special demurrer), it could not for a moment be upheld. In other words, the facts of the complaint would, under a special demurrer, be held to state absolutely nothing, for the epithets could then be regarded as involving no more than the mere "calling names." It will be observed that the adjectives "malicious" and "corrupt" are not employed in the complaint, and, even if they were so used, the facts should nevertheless be so pleaded as to enable the court to determine for itself whether the refusal to do a duty by a judge is or was "willful," "premeditated," and "intentional," or "malicious" or "corrupt." But we are of the opinion that the demurrer was properly sustained upon the ground that in this case, as in those where a positive wrongful or malicious or corrupt judicial act has been charged, the judge is not liable in damages in an action by a litigant or private person.

We are, of course, in the dark as to the specific reason which actuated the judge's failure to decide the case before his retirement from the court over which he presided, and in which the action was tried. We are not, however, required to search for the reason, whatever it might have been, in this case. We are here only concerned with the facts as they appear in the complaint. We know of no rule of law in this state which requires a judge of the superior court to decide a case within any specified time after its submission to him. The Constitution, it is true (section 24 of article 6), provides that neither a judge of the superior court nor a justice of the appellate courts shall be allowed to draw or receive any monthly salary unless he shall take and subscribe an affidavit before an officer entitled to administer oaths that no cause in his court remains undecided that has been submitted for decision for the period of 90 days; but that provision of the organic law, while imposing a penalty upon the judge for a failure to decide within the time limited, does nothing more, and the effect of it is, when enforced, only to subject the judge to a personal inconvenience. It does not say that he shall forfeit the right to his office, or be subjected to any other penalty than that prescribed. We think it is clear that the matter of the time when a judge may decide a case submitted to him for decision is as much a matter of judicial discretion and judgment as the matter of how he may decide it. In Graves v. Stone, supra, an action for damages, the declaration charged that the defendant, as a justice of the peace, "did corruptly and willfully refuse to enter a judgment in a suit pending before him." The court says: "The rendering a judgment is purely a judicial act. The justice must determine whether the record and proceedings before him will authorize such measure, and for this exercise of his judgment he is not responsible in a civil action." If the judge abuses his discretion in the matter of the time when he decides the case, that is, if he prolongs his decision to an unreasonable length of time, so that it may be said that his conduct therein involves an abuse of discretion, we doubt not that he may through a proper proceeding be compelled to decide, but not in a particular way. If his decision is erroneous, his judgment is subject to review and correction by an appellate court. If in either case he is influenced by malice or corruption or other bad motives, then he is liable to impeachment; but in neither case can he, upon principles of public policy, be required to answer to a private individual in the nature of an action for damages.

But the complaint alleges that the respondent stated, upon the submission of the cause for decision, that he would require the citation of no authorities, but that he would render his decision in a "short time." This allegation is intended manifestly as an indication that there was no reason why he should not have rendered his decision within a brief period of time from the submission of the case. But it is a matter of common knowledg among members of bench and bar that often a judge, after hearing the facts of a case, feels that it will require little time to apply the law thereto, and that he will have no difficulty in reaching a conclusion; but it also often happens in such cases that a judge finds, upon reviewing the record, that the facts are more complicated than they at first appeared to be, and thus finds the difficulty in deciding much greater than he had expected. It will, of course, not be doubted that a judge has a right to give a case such consideration as he feels may be necessary to reach a correct conclusion, or at least a decision satisfactory to himself, and that the delay in deciding could not of itself be the basis of a charge, even in a proceeding before an appropriate forum, that the judge was, in such delay, influenced by corrupt or other bad motives. At best it could only be a circumstance, whose force would be shattered without the support of other more persuasive circumstances.

According to the complaint, the respondent, up to the time of his resignation, had the case under advisement almost a month less than the time within which a judge of the superior court is required to decide a case as a condition precedent, under the terms of the Constitution, to the drawing of his monthly salary. The complaint alleges that he resigned as judge for Alpine county on the 7th day of November, 1904. We may take judicial notice of the fact that the respondent was elected judge of the superior court for El Dorado county at the general election held in November, 1904, under the proclamation of the Governor of the state, to fill an unexpired term of that office, and in such case, under the law, unlike that where one is elected for the full constitutional term of that office, he was entitled to qualify for and assume the discharge of the duties of said office immediately upon the official declaration that he was so elected. And if the point were important in the determination of the main question, this could as reasonably as any other reason account for his resignation on November 7th as judge for Alpine county, thus enabling him to prepare to assume control of the new office to which he was elected. He had a right to resign, and, indeed, it was his duty to do so if he intended to qualify as judge for El Dorado county.

Undoubtedly, if he was prepared to do so, he ought to have decided the case which he held under advisement before his resignation as judge for Alpine; but there is to be found nothing in the averments of the complaint to warrant the conclusion that he had so mastered the record of the case as to have justified him in deciding it. In other words, the complaint fails to show that the judge was prepared to decide the case before or at the time of his resignation. And who was the proper person to determine that question? To sustain the complaint here would require us to hold that another judge or jury would be competent to determine whether Judge Arnot's mind had been satisfied as to how the cause should be decided. The absurdity of the proposition is too apparent to be mentioned. In the language of the opinion of the learned judge who heard this cause upon demurrer in the court below, "It was Judge Arnot's mind and not that of another judge or jury that was to be satisfied." And in the same opinion it is also well said: "It certainly cannot be left to another judge or jury to say that the proceedings were such as to even authorize the rendition of a judgment, much less that the case had been held under advisement for such length of time as to make it mandatory upon the judge to decide it within 41 days between its submission and his resignation."

The complaint fails to state any cause of action against the respondent, and the order sustaining the demurrer was proper.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

7 Cal. App. 186

SULLIVAN v. LUSK et al. (Civ. 408.)

(Court of Appeal, Third District, California. Dec. 21, 1907. Rehearing Denied by Supreme Court Feb. 17, 1908.)

1. EXECUTORS AND ADMINISTRATORS—ALLOWANCE FOR ATTORNEY'S FEES—EFFECT.

The court in making an allowance to an executor, administrator, or testamentary trustee for attorney's fees is not making the allowance to the attorney, nor is the allowance dependent in any way on any contract the administrator, executor, or testamentary trustee may have made with the attorney, but it is an allowance as a necessary expense of administration, and, where an attorney has any claim on the administrator, executor, or testamentary trustee by reason of any contract for compensation, he must look to the administrator, executor, or testamentary trustee as an individual.

2. INTERPLEADER—COMPLAINT—SUFFICIENCY.

A complaint in an action against two persons, which alleged that plaintiff, a testamentary trustee, had been allowed a specific sum as compensation for attorneys; that he had not paid either defendant because they made conflicting claims thereto; that one defendant claimed the whole sum, and the codefendant claimed a half thereof; that the conflicting claims were made on plaintiff without any collusion or fraud on the part of paintiff, who was willing to pay it to the parties legally entitled thereto, and which demanded that defendants be called on to interplead—stated a cause of action against both defendants under Code Civ. Proc. § 386, providing that, when conflicting claims are made on a person, the latter may bring an action against the conflicting claimants to compel them to interplead.

3. VENUE—CHANGE OF PLACE OF TRIAL.

Where any of the defendants in a case within Code Civ. Proc. § 395, providing that actions must be tried in the county in which the defendants or some of them reside, etc., reside in the county in which the suit is brought, a motion to change the place of trial to a place in which others of the defendants reside will not be granted, unless all of defendants join in the motion, or good reason is shown why they have not so joined.

Appeal from Superior Court, Butte County; John C. Gray, Judge.

Action by Daniel Sullivan against F. C. Lusk and another. From an order refusing to change the place of trial on the motion of defendant Charles F. Hanlon, he appeals. Affirmed.

F. C. Lusk and C. F. Hanlon (R. M. Royce, of counsel), for appellant. Joe D. Sproul, for respondent.

CHIPMAN, P. J. Motion to change the place of trial. The complaint sets forth: That plaintiff was a trustee under the will of Lucy C. Goodspeed of certain real property situated in Butte county, devised to plaintiff in trust for the benefit of the minor children of the said Lucy C. Goodspeed, deceased; that said real estate was distributed to plaintiff to so hold in trust by the superior court of the city and county of San Francisco in December, 1902; that said trust terminated when said children became of age, and that they have become of age; that in the matter of said trust plaintiff was represented by defendants as his attorneys; that plaintiff has filed and caused to be settled his final account as such trustee and by order of the court "this plaintiff was allowed the sum of $2,595 as compensation for attorneys employed by him in the matter of said trust"; that he has not paid the said sum to either of said defendants or to any other person, and that defendants make conflicting claims thereto, defendant Hanlon claiming the whole of said sum and defendant Lusk claiming one-half of said sum; that plaintiff has tendered said Hanlon $1,297.50, being one-half of said sum, but that he refused to receive the same, and demands the whole thereof; that "said conflicting claims are made on this plaintiff for the payment of said sum of money without any collusion or fraud upon the part of this plaintiff"; and that "plaintiff has said sum in his possession and is willing and anxious to pay it to the parties legally entitled thereto." Wherefore defendants are called upon to interplead and litigate their several claims, etc. Defendant Hanlon filed a general demurrer to the complaint, and also demurred on the ground that there was a misjoinder of parties defendant, in this: that no cause of action is stated against either of the defendants. Defendant Hanlon moved the court for an order transferring the cause to the city and county of San Francisco, on the ground that at the commencement of the action it was the place of his residence, and upon the further ground that defendant Lusk is not a necessary or proper party to the action, and should not be joined as defendant with defendant Hanlon. It appeared by the affidavits, used at the hearing of the motion, that defendant Hanlon was at the commencement of the action a resident of San Francisco, and that defendant Lusk was a resident of Butte county, where the action was commenced. The court denied the motion, and defendant Hanlon appeals from the order.

The action is brought under section 386 of the Code of Civil Procedure, which reads, in part, as follows: "* * * And whenever conflicting claims are or may be made on a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and applicant or plaintiff discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another."

The position of appellant is thus stated: "The defendant Hanlon, according to the complaint, demands from Sullivan as pay for the work which Sullivan hired him to perform the sum of $2,595 and defendant Lusk demands of Sullivan for the work he, Lusk, performed the sum of $1,297.50. These two independent claims aggregate $3,892.50 and Sullivan is seeking to escape all liability by paying $2,595, instead of paying $3,892.50." Appellant, on this assumption, proceeds to argue that plaintiff, if he had judgment in his favor, would plead it against all subsequent demands of appellant; that the conflicting claims are simple claims on contract in which Hanlon and Lusk have no joint interest, Hanlon claiming $2,595 and Lusk claiming $1,297.50, and therefore Lusk had no interest in Hanlon's claim. It is hence argued that there is no cause of action stated against Lusk, and it follows that the place of trial should have been changed to Hanlon's place of residence. Appellant misconceives the obvious purpose of the action and the nature of the fund in litigation. The allowance made to plaintiff was as trustee to compensate the defendants, who were his attorneys, and its amount rested wholly in the discretion of the judge who was settling the trust estate. There was no contractual liability, express or implied, such as ordinarily exists between attorney and client where professional services are performed for the latter by the former. It is settled law in this state that the court in making an allowance to an executor or administrator for attorney's fees (and we think the rule is the same as to a trustee of such an estate as we have here) is not making it to the attorney, nor is it dependent in any way upon any contract the administrator or executor may make with his attorney, but it is an allowance as a necessary expense of administration. If the attorney has any claim upon the administrator or executor by reason of any contract for compensation, he must look to the administrator or executor as an individual, and not in his representative capacity; and an action to enforce such a contract would not lie against him in the latter capacity. Briggs v. Breen, 123 Cal. 657, 56 Pac. 633, 886; McKee v. Hunt, 142 Cal. 526, 77 Pac. 1103; Estate of Kruger, 143 Cal. 141, 76 Pac. 891. It is an erroneous assumption on appellant's part that an adjudication by the court as to the amount of the fund in question to which each of the interpleaders is entitled could be pleaded in bar of any right of action appellant may have on any contract made by him with plaintiff as an individual. The subject-matter here relates exclusively to the particular fund allowed plaintiff in the settlement of his account with the beneficiaries of the trust. This and no other is involved in the action. See cases, supra. We think the complaint states a cause of action against both defendants under section 386 of the Code of Civil Procedure.

The motion for a change of venue was made under section 395 of the Code of Civil Procedure, and it is well settled that where any of the defendants, in a case coming under that section, reside in the county in which the suit is brought, a motion to change the place of trial to a place in which others of the defendants reside will not be granted, unless all of the defendants join in the motion or good reason is shown why they have not so joined. McKenzie v. Barling, 101 Cal. 459, 36 Pac. 8; Quint v. Dimond, 135 Cal. 572, 67 Pac. 1034. Here the complaint states a cause of action against both defendants, and, this being so, Lusk has a right to have the action tried in the county of his residence. Appellant admitted at the argument, and seems to do so by his brief, that the trial must be had in Butte county, unless it appears from the complaint that no cause of action is stated against Lusk, or that he is merely a nominal party. But we think the cause of action is as much against the one defendant as against the other, and the trial judge was correct in his conclusion.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

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7 Cal. App. 186

SULLIVAN v. LUSK et al. (Sac. 1,532.)

(Supreme Court of California. Feb. 17, 1908.)

VENUE—CHANGE OF PLACE OF TRIAL.

Where the complaint in an action against two defendants, one of whom resided in the county in which the suit was brought, stated the same cause of action, if any, against both, the nonresident defendant could not on his own motion obtain a change of place of trial to the county of his residence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 62.]

In Bank. Appeal from Superior Court, Butte County; John C. Gray, Judge.

Action by Daniel Sullivan against F. C. Lusk and another. From an order denying the motion of defendant Charles F. Hanlon to change the place of trial, he appeals. Affirmed.

F. C. Lusk and C. F. Hanlon (R. M. Royce, of counsel), for appellant. Joe D. Sproul, for respondent.

PER CURIAM. The application for a hearing in this court, after decision in the District Court of Appeal for the Third District, is denied. It is immaterial upon this appeal whether or not the complaint states any cause of action, and we express no opinion as to the views of the District Court of Appeal thereon. It is obvious that, if it states a cause of action against the appellant Hanlon, it equally states one against the other defendant Lusk, and, this being so, defendant Hanlon cannot, unless Lusk joins in the motion, have the place of trial changed from the county in which said Lusk resides.

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153 Cal. 10

PEOPLE v. MANASSE. (Cr. 1,381.)

(Supreme Court of California. Feb. 7, 1908.)

1. CRIMINAL LAW—EVIDENCE—PROOF OF OTHER OFFENSES.

Where, in a homicide case, it appeared that accused and his wife lived near the home of decedent; that, on the night of the killing decedent, accused's wife, and a third person were at decedent's house; that accused came there, and asked that his wife return home; that she refused; that accused in a few minutes returned and killed decedent, and immediately assaulted the third person—evidence of the assault of the third person was admissible to support the theory that accused came to the residence of decedent with the intent of killing both decedent and the third person, and to disprove the claim that the killing of decedent was done in self-defense, though it also showed the commission by accused of another crime.

2. WITNESSES—CORROBORATIVE EVIDENCE.

Where, in a homicide case, a witness testified that accused assaulted him immediately after the killing of decedent, and shot him in the back, the admission in evidence of the clothing worn by the witness at the time was proper if the clothing was in such condition that its production supported the testimony of the witness, and, if its appearance did not strengthen the testimony, the admission of the garments was not prejudicial to accused.

3. CRIMINAL LAW—EVIDENCE—ADMISSION BY ACCUSED—SILENCE.

The ordinary rule is that mere silence is not a fact to be used against accused unless the circumstances were such as to call for some statement from him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 898.]

4. WITNESSES—EXAMINATION—CROSS-EXAMINATION—EXTENT.

On cross-examination, a considerable degree of latitude is permitted for the purpose of testing the memory, bias, accuracy, or sincerity of the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 931.]

5. SAME.

The cross-examination of accused must be limited to subjects concerning which he testified on direct examination, but within such limits he may be asked any questions having a tendency to shake the effect of his direct testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 949–954.]

6. SAME.

Where, on a trial for homicide defended on the ground of self-defense, accused on direct examination stated that his wife had told him at various times that decedent had made threats against his life, it was proper to permit the state to ask him on cross-examination as to whether he ever told any one about any threats that decedent had made against him, as a negative answer might be considered in determining whether or not the alleged threats had been communicated to him as stated.

7. CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

The adding to a correct definition of "reasonable doubt" that a reasonable doubt is a doubt based upon reason, and growing out of the testimony and evidence in the case, is not erroneous as requiring the jury to be able to assign a reason for their doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1904–1922.]

In Bank. Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

Edward Manasse was convicted of murder in the first degree, and, from an order denying a motion for a new trial, he appeals. Affirmed.

C. H. S. Bidwell and Maurice E. Finn, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

SLOSS, J. The appellant, charged with the murder of one John K. Cook, was found guilty of murder of the first degree, and judgment of death was pronounced against him. He appeals from the judgment and from an order denying his motion for a new trial. The fact of the killing was admitted; the appellant seeking to justify his act on the ground of self-defense. The finding of the jury against this plea is fully sustained by the evidence, and the only points now made by the appellant are that the trial court erred in overruling two objections to offered testimony, and that its charge to the jury embodied an incorrect definition of "reasonable doubt."

1. It appeared that the defendant, with his wife and others, lived in what was known as "The Big House," at the junction of the American and Sacramento rivers. The deceased, Cook, lived near by in a scow moored in the American river. On the night of December 23, 1906, Cook, together with the defendant's wife and one Hopkins, were in Cook's room on the scow. Hopkins testified that the defendant came to the scow, and asked his wife whether she was going up to the Big House with him. Upon her answering in the negative he left. After a few minutes he returned, carrying a shotgun. Saying to Cook, "You are the first man," he fired the fatal shot at Cook, who was lying in his bed. He then said "Hop" (meaning the witness Hopkins), "you are the next man." Hopkins, according to his testimony, then seized the barrel of the gun, and he and Manasse fought their way off the scow onto the bank, where the defendant got the gun away from Hopkins. Hopkins started to run, and defendant shot him in the back. Hopkins identified an undershirt and an outershirt as the ones worn by him at the time of the shooting, and these garments were admitted in evidence over defendant's objection that they did not "tend to prove any of the issues in this case, to prove the guilt of the defendant as charged, or to prove the murder." There is nothing in the record to show what the condition or appearance of the shirts was. If we assume, as is assumed by the appellant in his brief, that the appearance of the shirts indicated that their wearer had received a violent injury, the effect of admitting the shirts in evidence was to corroborate the testimony of Hopkins that the defendant had shot him. Such corroboration was proper, if the fact of such shooting was itself admissible. The attacks upon Cook and upon Hopkins were parts of a single transaction, and every element of defendant's conduct in that transaction could be shown to the jury for the purpose of illustrating his motive and intent in committing the act which was the basis of the charge against him; i. e. the shooting of Cook. The fact that, after shooting Cook, the defendant attempted to and did shoot Hopkins, had a direct tendency to support the theory that he had come to the scow with the intent of killing both Cook and Hopkins, and in like manner tended to disprove the claim that the

killing of Cook was done in self-defense. The evidence of the shooting of Hopkins being relevant, it was not rendered inadmissible merely because it may also have shown the commission by defendant of a crime other than the one for which he was being tried. People v. Walters, 98 Cal. 138, 32 Pac. 864; People v. Smith, 106 Cal. 81, 39 Pac. 40; People v. Craig, 111 Cal. 460, 44 Pac. 186; People v. Suesser, 142 Cal. 363, 75 Pac. 1093; People v. Soeder (Cal. Sup.) 87 Pac. 1017. If, then, the shirts were in such condition that their production supported Hopkins' testimony, they were properly admitted for the purpose of corroboration. If, on the other hand, their appearance did not strengthen this testimony—and, in view of the record, this may well be assumed—we cannot see how the admission of the garments could possibly have injured the appellant.

2. The defendant testified in his own behalf. On direct examination he stated that his wife had told him at various times that Cook had made threats against his life. On cross-examination he was asked: "Did you ever tell anybody about any threats that Cook had made against you?" An objection to this question as irrevelant, immaterial, and incompetent and not proper cross-examination was overruled, and defendant excepted. The question was answered in the negative. No doubt the ordinary rule is that mere silence is not a fact to be used against a party, unless the circumstances were such as to call for some statement from him. Wilkins v. Stidger, 22 Cal. 231, 83 Am. Dec. 64. But, on cross-examination, a considerable degree of latitude is permitted for the purpose of testing the memory, the bias, the accuracy, or the sincerity of the witness. It is true that, in the case of a defendant charged with crime, his cross-examination must be limited to subjects concerning which the witness testified on direct examination. But within the limits of such subjects the defendant who has offered himself as a witness may be asked any questions which have a tendency to shake the effect of his direct testimony. While the defendant was not bound to tell any one of threats made against him, a jury might reasonably conclude that one going about in fear of his life would be likely to mention the cause of his fears to some one. That he made no such mention, though in no way conclusive, is a circumstance fairly to be considered in determining whether or not the alleged threats had been communicated to him as he stated, and is therefore a proper subject of cross-examination.

3. The court correctly instructed the jury regarding the presumption of innocence, and the obligation of the people to prove the guilt of the defendant beyond a reasonable doubt. In explaining the term "reasonable doubt," the court gave to the jury the well-known definition of Shaw, C. J., in Commonwealth v. Webster, 5 Cush. (Mass.) 320, 52 Am. Dec. 711. In addition to this, the charge included the following language: "A reasonable doubt is a doubt based upon reason, and growing out of the testimony and evidence in the case." It is argued that the portion of the charge which is quoted is erroneous, in that it requires the jury "to be able to assign a reason for their doubt." If the language of the court were fairly open to the interpretation so put upon it, there might be some basis for the criticism. There are cases holding it to be erroneous to charge that a reasonable doubt is a doubt "for having which the jury can give a reason." Cowan v. State, 22 Neb. 519, 35 N. W. 405; Carr v. State, 23 Neb. 749, 37 N. W. 630; Morgan v. State, 48 Ohio St. 371, 27 N. E. 710; People v. Steubenvoll, 62 Mich. 329, 28 N. W. 883. Even these cases do not all go to the extent of deciding that the giving of such an instruction constitutes error sufficient in and of itself to justify a reversal. But that question is not presented here. The jury were not told that a reasonable doubt was a doubt for which they could give a reason, but that it was a doubt based upon reason. This is no more than a paraphrase, and a not incorrect one, of the term "reasonable doubt." An instruction substantially similar to the one under discussion was sustained by this court in People v. White, 116 Cal. 17, 47 Pac. 771; as it had been in People v. Shaughnessy, 110 Cal. 604, 43 Pac. 2. The reversal of the judgment in People v. Paulsell, 115 Cal. 6, 46 Pac. 734, was based, not on the giving of this instruction, but on the refusal of the court to define "reasonable doubt" in the language used in the Webster Case. It was held to be the right of a defendant, where he requested it, to have this definition, so often approved by this court, given to the jury. Here the instruction refused in the Paulsell Case was given, and the defendant has no ground of complaint because the court amplified it by the addition of a sentence which was neither incorrect nor misleading.

An examination of the entire record discloses no error.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.

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153 Cal. 1

TITLE INS. & TRUST CO. v. INGERSOLL.

(L. A. 1,977.)

(Supreme Court of California. Feb. 1, 1908.)

1. Husband and Wife—Community Property—Contracts as to Separate Property.

A husband and wife may by contract transmute the separate property of either or both into community property.

2. Same—Evidence as to Character of Property.

Where a husband, with the consent of his wife, acquires possession of her separate property, and subsequently manages and controls it, the presumption is that he takes it in trust for her, and the burden is on the husband to show the contrary, which may be shown by the nature of the transaction or the surrounding circumstances.

3. WITNESSES—IMPEACHMENT—GOOD CHARACTER—EVIDENCE TO SUSTAIN.

Code Civ. Proc. § 2053, provides that evidence of the good character of a party is not admissible in a civil action until it is impeached, or unless the issue involves his character. Sections 2051 and 2052 provide that a witness can be impeached by contradictory evidence, or evidence that his general reputation is bad, or that he has been convicted of a felony, or has made inconsistent statements. *Held*, that a defendant whose character has not been impeached except by evidence contradicting his testimony cannot introduce evidence of his good character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1282.]

4. SAME—CHARACTER OF HUSBAND—ENFORCEMENT OF TRUST.

The character of a husband, sued by his wife to enforce an alleged trust in property he has received from her, is not involved, so as to render evidence of his good character admissible under Code Civ. Proc. § 2053.

5. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE OF CHARACTER.

In an action by a wife against her husband to enforce an alleged trust in property received from her, where defendant's contention that the property so received was to be treated as community property is supported almost entirely by defendant's evidence, the admission of evidence of defendant's good character, no attack having been made upon it, is prejudicial error, and is not rendered harmless because in harmony with the presumption in Code Civ. Proc. § 1847, that a witness speaks the truth.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

6. TRUSTS — FOLLOWING TRUST PROPERTY — IDENTIFICATION — SEPARATE PROPERTY OF WIFE.

In an action by a wife against her husband to enforce an alleged trust in property received from her, if a portion of the property was clearly traced, and there was no change in the status of such property as separate property, plaintiff was entitled to the relief asked for that portion, even if she could not obtain relief as to the portion not traced.

Department 1. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by the Title Insurance & Trust Company, executor of the estate of Rosetta S. Ingersoll, against C. K. Ingersoll. Judgment for defendant, and plaintiff appeals. Reversed.

Stephens & Stephens, for appellant. Valentine & Newby, for respondent.

ANGELLOTTI, J. This action was instituted October 16, 1903, by Rosetta S. Ingersoll against her husband, C. K. Ingersoll, to enforce an alleged trust as to certain real and personal property standing in the name of defendant, and to obtain an accounting from defendant as trustee, and a judgment against him for any money that should be found due plaintiff thereon. Mrs. Ingersoll died prior to the trial of the action, and the executor of her will has been substituted as plaintiff. This is an appeal by plaintiff from the judgment given in favor of defendant and from an order denying a motion for a new trial.

The theory of plaintiff's case, as shown by the complaint, was that the property in controversy was the proceeds of money constituting separate property of Mrs. Ingersoll, and that such money had been received by defendant, with her acquiescence and consent, upon the understanding and agreement that he should receive and hold the same and all property in which the same might be invested, if invested in his name, in trust for her use and benefit. The defendant, by his answer, admitted the acquisition by his wife by gift, bequest, or devise of some $20,000 or thereabouts, and the receipt and subsequent control and possession of a large portion thereof by himself, but denied any agreement that he was to hold the same in trust for her. He alleged, on the contrary, that the understanding was that all the money so delivered to him should thenceforth be treated as community property, and that it was always so considered and treated, and that his wife converted it into community property. The trial court found in favor of defendant upon these matters. There can be no doubt that a husband and wife may by contract transmute the separate property of either or both into community property. Yoakam v. Kingery, 126 Cal. 30, 32, 58 Pac. 324; Estate of McCauley, 138 Cal. 550, 71 Pac. 458. These findings are vigorously attacked on this appeal.

We are of the opinion that the evidence cannot be held legally insufficient to support these findings. It may be conceded that the mere acquirement of the possession of a wife's separate property by the husband, and his subsequent management and control of the same, all with her consent, do not show any intent on the part of the wife to make a gift of the property to the husband, or to change its status from separate to community property. The presumption in such a case appears to be that the property continues to be the separate property of the wife, and that the husband takes it in trust for his wife. Under such circumstances it devolves on the husband claiming a gift or change in the status of the property to show the same. This is the well-settled rule as to the corpus or principal (see Stickney v. Stickney, 131 U. S. 227, 9 Sup. Ct. 677, 33 L. Ed. 136; Denny v. Denny, 123 Ind. 240, 23 N. E. 519; Chadbourn v. Williams, 45 Minn. 294, 47 N. W. 812; Carter v. Becker, 69 Kan. 524, 77 Pac. 264; Jones v. Davenport, 44 N. J. Eq. 33, 13 Atl. 652), a distinction being recognized by some of the authorities between the corpus or principal and rents or profits thereof. But it is not essential in such a case for the husband to show any express agreement on the part of the wife. The gift or change in the status of the property may be shown by the very nature of the transaction or appear from the surrounding circumstances. See Black v. Black, 30 N. J. Eq. 215; Reed v. Reed, 135 Ill. 482, 25 N. E. 1095; In re Schmidt's Estate, 56 Minn. 256, 57 N. W. 453;

Crumrine v. Crumrine, 50 W. Va. 226, 40 S. E. 341, 88 Am. St. Rep. 859. Mr. Perry says: "If a husband receive the capital fund of his wife's separate property, there is no presumption that she intended to give or transfer it to him, but he is prima facie a trustee for her, and a gift from her to him will not be presumed without clear evidence; * * * but, if the husband uses the property in his business, or for the support of his family, with her knowledge and assent, a gift may be inferred in the absence of a contrary agreement." Perry on Trusts, 666. The question in such cases is whether the evidence of the transaction and its surrounding circumstances clearly shows the intention of the wife to change the status of the property. There was evidence on the part of the husband in this case that some of this property was deposited by the wife immediately on its receipt to the credit of a running account kept by the husband in the local bank, an account to the credit of which he generally deposited all money coming into his hands, and upon which he drew in payment of all general expenses both of himself and wife, and for purposes of investment; that the great bulk of the property when received by her was immediately delivered to her husband and deposited by him with her knowledge, to the credit of the same account; that this general fund, composed of the moneys thus mingled, was resorted to by the husband for the purchase in his own name of property, with her knowledge and consent; that it was generally understood between them without any express words to that effect that this was a common fund, to be used indiscriminately for the benefit of the community; that these conditions continued for some 15 years without objection of any kind on the part of the wife, without any assertion of ownership by her of any part of the fund, and without any demand for any accounting. There were some minor circumstances detracting in some degree from the effect of all this, but they were not of sufficient force to preclude the trial court from inferring the intention of the wife to effect the change in the status of the property.

It is manifest, however, that the defendant's evidence was most material in the determination of the questions embraced in these findings. In fact, defendant's case rested almost entirely upon that evidence. The case, viewed in the most favorable light to defendant, was a close one on the facts, and the lower court could not determine the issue in his favor, unless it gave full faith and credit to his positive statements as to many matters discussed by him in his testimony, and as to which there was no other evidence in support of the findings. We say this much as a preliminary to the discussion of a ruling of the court admitting certain evidence, which, under the peculiar circumstances detailed, we consider prejudicially erroneous, if erroneous at all.

Defendant offered evidence in support of the character of the defendant as to truth, honesty, and integrity, and over the objections of plaintiff that no attempt had been made to impeach the character of defendant, and that the evidence was incompetent, irrelevant, and immaterial, defendant was allowed to introduce the evidence of three witnesses to the effect that his reputation in the respects mentioned was good. As a matter of fact, no impeachment of the character of the defendant had been attempted, other that such impeachment as was involved in the production of evidence contradicting that of the defendant on some of the issues in the case in some minor respects. This evidence, really offered for the purpose of bolstering up the evidence of defendant, was, in our opinion, clearly inadmissible. Our statute provides: "Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character." Code Civ. Proc. § 2053. The issue in this case did not involve the character of defendant as a party (see Van Horn v. Van Horn, 4 Cal. App. 701, 91 Pac. 260), and no attempt had been made to impeach his character. It is true that sections 2051 and 2052 of the Code of Civil Procedure provide that a witness can be impeached "by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad," or by evidence that he has been convicted of a felony, or has made inconsistent statements; but it does not follow that every impeachment of a witness thus enumerated is an impeachment of the character of the witness. The statute allows such evidence only when the character of the witness is impeached. Evidence that the general reputation of a witness for truth, honesty, and integrity is bad is, of course, an impeachment of the character of the witness, and may be met by rebuttal evidence to the contrary. There is much authority for the proposition that proof that the witness has been convicted of a felony is an assault upon his character, justifying the admission in rebuttal of evidence of good reputation for truth, honesty, and integrity. It has so been held in this state. People v. Amanacus, 50 Cal. 233. Some courts have held that proof of declarations by the witness, inconsistent with the testimony given by him, constitutes such an assault upon his character, but this rule can by no means be held to be a generally accepted one. This court has held that proof to the effect that a witness had made overtures to the parties against whom he testified to testify for them if he was paid for it was such an attack warranting evidence of good character in rebuttal. People v. Ah Fat, 48 Cal. 63. The court was, however, careful to state that, if the testimony had been directed to mere proof of contradictory statements of the witness upon matters relevant to the issues being tried, the propriety of evidence of character to sustain the testimony of the witness "would have been, to say the least, questionable." In People v. Bush, 65 Cal. 129, 3 Pac. 590, a judgment was reversed because of the giving of an improper instruction and the admission of evidence on the part of the prosecution in support of the character of a witness. It does not clearly appear in the opinion whether the impeachment of the witness was merely by evidence contradicting his testimony, or by proof of previous statements by him inconsistent with such testimony, which Mr. Justice Sharpstein said in his concurring opinion amounted to nothing beyond contradictory evidence. In any event, a majority of the court concurred in the view that under section 2053 of the Code of Civil Procedure evidence of the reputation of the witness to prove good character is admissible only when the character of the witness has been attacked by evidence that his reputation for truth, honesty, and integrity is bad, which to some extent is inconsistent with the two earlier cases. But so far as it forbids the introduction of such evidence where the only impeachment is one by contradictory evidence, it is not inconsistent with either, and is in full accord with nearly all the decisions in other states. Mr. Wigmore says that no court favoring admission under such circumstances seems to have attempted a reasoned justification of its policy, and the great majority of jurisdictions agree in excluding such evidence. See 2 Wigmore on Evidence, § 1109, and note, and generally, sections 1104 to 1108. The distinction is clearly made by the cases between a mere assault upon the credit of a witness and an assault upon his character, and cases like the one under consideration are placed in the former class.

Learned counsel for defendant contend that for certain reasons this evidence was not prejudicial to plaintiff; but we see no force in their claim. It is said that such testimony was merely in harmony with the presumption that a witness speaks the truth (Code Civ. Proc. § 1847), and did not affect the result of the trial. The presumption that a witness speaks the truth is one that may be repelled by the manner in which he testifies and by the character of his testimony. Same section. It is impossible for this court to say how much weight and influence this evidence of good reputation of the witness had upon the mind of the trial judge in determining the amount of credit to be given to his testimony. As has been said before, under the peculiar circumstances of this case, it "may have been all-powerful to that effect," and may have been the factor that turned the scale in favor of defendant upon the matters embraced in the findings we have discussed. Counsel for defendant evidently thought it was important evidence, or they would not have offered it, and the trial judge evidently considered it material, or he would not have admitted it. If the trial court was led to place more reliance upon the testimony of defendant by reason of such evidence of reputation than he would otherwise have done, and we cannot say that this was not the result, plaintiff was clearly prejudiced by the rulings admitting it. See, generally, Rulofson v. Billings, 140 Cal. 460, 74 Pac. 35, Short v. Frink (Cal. Sup.) 90 Pac. 200, and cases there cited. The fact that the defendant was called and examined as a witness by plaintiff we regard as of no importance in this connection. Bearing in mind the rule that the receipt of his wife's separate property by him being shown, which was a fact admitted by the pleadings, the burden was on him to show a change in its status from such separate property, it is clear that the admission of evidence of good reputation to bolster up the testimony given by him in support of a claim of such change must be held to have been prejudically erroneous.

The record shows that some of the money of the wife that came into the hands of the husband was clearly traced into certain property by evidence that was practically without conflict, and in this respect the findings of the court that the money could not be traced are not fully sustained by the evidence. If there was no change in the status of the wife's separate property, and a portion thereof was clearly traced, plaintiff was entitled to the relief asked for that portion, even if under the pleadings as they now stand it could not obtain relief as to the portion not traced, which is the claim of defendant. We do not, however, desire to be understood as conceding the correctness of this claim.

The objection that some of the findings involved in our discussion of the case are not attacked by specification of insufficiency is not well taken.

While some other questions are discussed by counsel, we deem it unnecessary to consider any of them on this appeal.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.

153 Cal. 15

LOS ANGELES INTERURBAN RY. CO. v. MONTIJO et al. (L. A. 2,133.)

(Supreme Court of California. Feb. 8, 1908.)

ADVERSE POSSESSION—EXTENT OF POSSESSION—POSSESSION UNDER CLAIM OF RIGHT WITHOUT COLOR OF TITLE.

Where, after claim by adverse possession had ripened into title, claimant surrendered possession to another, but gave no deed or anything more than a receipt for the money, claimant's successor is within Code Civ. Proc. § 324, declaring that an occupant of land under a claim of right not founded on a written instrument, judgment, or decree is deemed to have held adversely land actually occupied and no other, and section 325, providing that, under such circumstances, land is deemed to have been actually occupied only where it has been protected by a substantial inclosure, or has been usually cultivated or improved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 542–546.]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Los Angeles Interurban Railway Company against Manuel Montijo and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Wm. Crawford, for appellants. Bicknell, Gibson, Trask, Dunn & Crutcher (Edward E. Bacon, of counsel), for respondent.

HENSHAW, J. Plaintiff sued defendants to quiet title to certain land situated in the city of Los Angeles. After trial the court gave judgment for plaintiff for the lands in controversy, excepting a lot 40 feet in width, title to which was decreed to be in Manuel Montijo, and quieted Montijo's title to this lot against the plaintiff and against his codefendants. From this judgment, and from the order denying their motion for a new trial, the defendants jointly appeal.

It is admitted that the land in controversy was originally a part of the pueblo land of Los Angeles, and, as such, was covered by the patent of the United States to the city of Los Angeles. Plaintiff's title is a record title, derived by mesne conveyances from the city of Los Angeles. On behalf of defendants, it was shown that one Duron resided upon the land from 1860 to 1881. The land was uninclosed and unimproved, excepting for a "tule shack" in which Duron lived. Such title as Duron acquired was therefore by adverse possession. In 1881 defendant Montijo paid Duron $50, and Duron surrendered possession to him. He had no deed from Duron; nothing more than a receipt for the money. Since that time Montijo has lived upon the land, still uninclosed and unimproved, except for the house built by Montijo upon the site of the tule shack. It may be conceded that Duron's claim by adverse possession ripened into a title before the amendment to section 325 of the Code of Civil Procedure, requiring the payment of taxes. Montijo, his successor, is in the position of an occupant of land under a claim of title not founded upon a written instrument, judgment, or decree. His situation is that contemplated and provided for by section 324, Code Civ. Proc., which declares that under such circumstances the land actually occupied, and no other, is deemed to have been held adversely. What land under such circumstances is deemed to be actually occupied is defined by the following section 325. It is land which has been protected by a substantial inclosure, or land which has been usually cultivated or improved. In the case at bar it is not shown that there is a substantial, or any, inclosure. It is not shown that there was any cultivation or any improvement, saving that of the original tule shack, followed by the house which Montijo built upon its site. It is disclosed by the record that the court took evidence, under agreement of the parties, by visiting and viewing the premises, after which it decreed to Montijo a lot forty feet in width. It cannot be successfully argued that he was entitled to more.

All of the defendants, as has been stated, joined in the notice of appeal. So far as the respondent is concerned, it is sufficient to say that it does not appear that any of Montijo's codefendants established any interest in the property adverse to it, and whatever interest they may have in the property decreed to Montijo adverse to him in no way concerns the respondent.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; McFARLAND, J.

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153 Cal. 17

BEST v. WOHLFORD et al. (L. A. 1,839.)

(Supreme Court of California. Feb. 8, 1908.)

1. Taxation — Tax Deeds — Description of Property—Sufficiency.

A tax deed, having theretofore given a description of a parcel of land, and stated that the collector offered for sale the least quantity thereof to pay the assessments, etc., and that grantee was the bidder who was willing to take the least quantity thereof, and pay the assessments, etc. (Act March 7, 1887; St. 1887, p. 39, c. 34, § 27), stated that the said least quantity or smallest portion of the land described was struck off to grantee, and that the land was sold for assessments and subject to redemption. The granting clause stated that the collector thereby granted "all that lot, piece, or parcel of land so sold and hereinbefore and lastly described in this deed." *Held*, that the deed showed that the whole of the lot was the least quantity which any bidder was willing to take, and that such whole was in fact sold and conveyed by the deed, and that the deed was not open to the objection that it purported to convey the "least quantity or smallest portion," without designating what it was.

2. Same—Recitals.

Act March 7, 1887 (St. 1887, p. 39, c. 34, § 27), requires a certificate of tax sale to specify the time when the purchaser will be entitled to a deed. Section 30 (page 40) of the same act, and section 48 of Act March 31, 1897 (St. 1897, p. 271, c. 189), require matters stated in the certificate of sale to be recited in the deed. A tax deed recited that the certificate of sale stated that, unless the real estate was redeemed within 12 months from the date of sale, the purchaser thereof would be entitled to a deed, and that the certificate bore the date of the sale. *Held*, that the deed sufficiently showed by the certificate that the purchaser would be entitled to a deed at the expiration of 12 months from the date of sale.

3. Same—Effect as Evidence.

Under Act March 31, 1897 (St. 1897, p. 271, c. 189, § 48), making a tax deed prima facie evidence that the property was assessed as required by law; that the assessments were levied in accordance with law, and not paid; that the property was sold as required by law, and not redeemed; and that the person who executed the deed was the proper officer, and making such deed conclusive evidence of the regularity of all the proceedings from the assessment to the execution thereof—an objection resting entirely on matters not shown on the face of the tax deed is not a good objection to the introduction of the deed, as prima facie evidence, of the correctness of prior proceedings.

4. TRIAL—RECEPTION OF EVIDENCE—EVIDENCE IN REBUTTAL.

Where the court had refused to admit any evidence by defendant in support of a tax title, it was error to allow plaintiff to introduce evidence in rebuttal to show that the tax deed was invalid because of defects in the proceedings.

5. TAXATION—SALE—NOTICE OF—SUFFICIENCY.

A notice of tax sale, as to description, was as follows:

Name and Description
[Name of owner] lot 2 b 170 R R Del Diablo
5 acres
imp
[Name of owner] lot 4 b 178 " " " "
14 42-100 acres.

The notice described many subdivisions as being of the "R R Del Diablo," and specified that certain "abbreviations throughout the advertisement are used as follows: * * * 'R R Del Diablo' for Rancho Rincon Del Diablo." *Held*, that the notice, as to the description of lot 4, block 178, of the Rancho Rincon Del Diablo, was sufficient.

6. WATERS — IRRIGATION DISTRICTS — ASSESSMENTS—SALE.

Act March 7, 1887 (St. 1887, p. 44, c. 34, § 41), provides that the directors of an irrigation district may call a special election and submit the question whether a special assessment shall be levied, and that the assessment, if voted, shall be entered on the assessment roll, and corrected as other assessments provided for. The act provides that the delinquent list must contain "the amount of the assessments and costs due opposite each name and description," and requires the certificate and deed to give "the amounts and the year of the assessment, and the amount paid." The assessment book of an irrigation district had one column for the amount of assessment for the bond fund, which the directors were required to levy annually, and one for the special assessment. In these columns, opposite the name of each taxpayer, were placed the respective amounts due on each assessment. The notice of sale gave simply the aggregate of the two assessments, and the penalty and costs. The certificate of sale stated that the assessment were levied for a year specified; the amount thereof being the aggregate of the two assessments, and that the sale was to pay such assessments, and the deed was the same as the certificate. *Held*, that the fact that the sale was made on two separate assessments, and the amount of each was not separately stated in either notice of sale, certificate of sale, or deed, did not avoid the proceedings.

In Bank. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by A. Lester Best against A. W. Wohlford and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded for new trial.

See 144 Cal. 733, 78 Pac. 293.

Cassius Carter, Withington & Carter, for appellants. Luce, Sloane & Luce, for respondent.

ANGELLOTTI, J. This is an appeal by defendants from a judgment given in favor of plaintiff in an action of ejectment involving the title to lot 4, in block 178, of the Rancho Rincon Del Diablo, in San Diego county, Cal. Plaintiff was the owner of such property unless defendant Sadie B. Wohlford had succeeded to the title under a deed of conveyance, dated October 25, 1897, executed to her by E. J. Hatch, collector of the Escondido irrigation district, in pursuance of a sale for the nonpayment of irrigation district taxes for the year 1894. Plaintiff having shown acquirement of the title to the property, defendants offered the tax deed in evidence. Objection was made to its admission on various grounds, which will hereafter be considered, and ruling on such objection was reserved by the court. The defendants, then introducing further evidence, which was admissible for the purpose of showing, and which established, under the decision upon a former appeal (Best v. Wohlford, 144 Cal. 733, 78 Pac. 293), that the description of land contained in the deed and assessment sufficiently identified the land, apparently rested. Plaintiff then offered evidence in rebuttal consisting of the assessment, the notice to the assessment payers, the delinquent list and notice of sale, and the certificate of tax sale, for the purpose of showing defects in the proceedings, and, objection by defendants being made thereto, the court reserved its ruling. Subsequently, in the absence of the parties and their counsel, the court sustained plaintiff's objection to the tax deed, admitted the evidence offered by plaintiff in rebuttal, and gave judgment for plaintiff.

1. The grounds of objection to the tax deed were substantially as follows: (1) That the deed designated no map or other data by which the identity of the land can be determined. (2) That the deed does not contain any description of the real estate conveyed, or, at least, is ambiguous and uncertain as to such description. (3) That the deed does not specify the time when the purchaser at the sale was entitled to a deed. (4) That it appears from the assessment roll of the year 1894 on which the sale was made that there were two assessments, the regular assessment for the bond issue and a special assessment voted by the people of the district for expenses for the year, and these assessments are not separately set out either in the notice of sale, or in the certificate of sale or in the deed. The first ground of objection was answered by the evidence showing that the description was in fact sufficient to clearly identify the land. Best v. Wohlford, supra. See, also, Baird v. Monroe (Cal.) 89 Pac. 352. The second ground of objection is based on the claim that the deed does not show what portion of or interest in the described premises was sold; the law providing that "the person who will take the least quantity of the land * * * and pay the assessments and costs due, including two dollars to the collector for the duplicate certificate of sale, is the purchaser." Section 27, Act March 7, 1887 (St. 1887, p. 39, c. 34). A labored effort is made in this behalf to show that the deed purports to convey the "least quantity, or

smallest portion of the said land," without designating what such least quantity or smallest portion is; thus leaving the deed without description of the exact property conveyed. Such, however, is not a fair or reasonable construction of the provisions of the deed. The deed, having theretofore given a description of the parcel of land, and stated that the collector offered for sale the least quantity or smallest portion thereof to pay the assessments, etc., and that P. J. Anshutz was the bidder who was willing to take the least quantity thereof and pay the assessments, etc., stated "that the said least quantity or smallest portion of the said land lying and being within the said Escondido irrigation district, county and state aforesaid, described as follows, to wit: Lot four (4) block one hundred seventy eight (178), 14.42 acres, Rancho Rincon Del Diablo, was by said William Beckeler, collector aforesaid, struck off to the said P. J. Anshutz, who paid the full amount of said assessments, costs and charges, and therefore became the purchaser of the last described piece or parcel of land. That the said real estate last aforesaid was sold for assessments, and subject to redemption. * * *" The granting clause stated that the collector thereby granted, etc., "all that lot, piece or parcel of land so sold and hereinbefore and lastly described in this deed." To our minds this clearly shows that the whole of said lot 4 was the least quantity which any bidder was willing to take and that such whole was in fact sold, and was intended to be conveyed by the deed. The objection that the deed did not specify the time when the purchaser at the sale was entitled to a deed evidently meant that it was defective in not showing that the certificate of sale contained a sufficient specification of the time when the purchaser would be so entitled, for there was in the law applicable no other requirement in this behalf. The law required the certificate to specify, among other things, the time when the purchaser will be entitled to a deed (section 27, Act March 7, 1887 [St. 1887, p. 39, c. 34]), and also that the matters stated in the certificate must be recited in the deed (section 30 of same act, and section 48, Act March 31, 1897 [St. 1897, p. 271, c. 189]). The recital in the deed in this connection was: "And, whereas, said certificate stated that unless the said real estate was redeemed within twelve months from date of such sale, the purchaser thereof would be entitled to a deed thereof. That said certificate of sale bears date the 18th day of February, 1895, the day of said sale." This shows a plain statement in the certificate that the purchaser would be entitled to a deed at the expiration of 12 months from the 18th day of February, 1895, which sufficiently complied with the requirement of the statute in that behalf. The fourth objection rested entirely on matters not shown on the face of the tax deed, and was not a good objection to the introduction of the deed as prima facie evidence of the correctness of the prior proceedings. Section 48, Acts 1897 (St. 1897, p. 271, c. 189). It thus appears that none of the objections to the admission of the deed in evidence was good. It should have been received, and so received would have made a prima facie case for defendants.

2. It should be needless to say that the trial court having refused to admit any evidence in support of the tax title, it was error to allow plaintiff to introduce evidence in rebuttal for the purpose of showing that the tax deed was invalid by reason of defects in the proceedings. In view of the ruling of the court on the tax deed, there was no case for plaintiff to meet so far as the alleged tax deed was concerned. Plaintiff, however, urges that the evidence so admitted shows that the attempted conveyance under the tax sale was invalid, and no prejudice therefore could have accrued to defendants by reason of the exclusion of the deed, and, also, that, if the judgment must be reversed on account of the ruling on the deed, this court should for the purposes of a new trial pass upon the objections presented by the evidence admitted in rebuttal. This we will proceed to do.

One of the two objections presented upon this evidence was that there was an insufficient description in the notice of sale of the property to be sold. It may be conceded that such notice was a thing to which the taxpayer was absolutely entitled, and that he could not be precluded from showing want of legal notice by the conclusive evidence provision as to the effect of a deed. The property was assessed to one J. Mirandetti. The notice of sale, so far as is necessary to show the facts upon which this objection is based, was as follows:

Name and Description	Valuation. $	Taxes Perc'tg Costs. $
Miller E S lot 2 b 170 R R Del Diablo		
5 acres	175	6 97
imp	600	22 18
Mirandetti J lot 4 b 178 "		
14 42-100 acres	505	19 17

The "ditto" marks, which are of universal usage and which could not be misunderstood, and the letter "b" which in the connection in which it appears could mean nothing but "block," show the property to be lot 4 in block 178 R R Del Diablo. The notice, which is set forth in full in the transcript, describes many subdivisions as being of the "R R Del Diablo," and makes it apparent that it constituted a large part of the irrigation district. We do not see how the owner of lot 4 in block 178 of the Rancho Rincon Del Diablo could have failed to know therefrom exactly what property was referred to, and, if this be true, the description was sufficient. In addition, the notice specified, immediately after the specification of the date upon which the sale would be made, that certain "abbreviations throughout the advertisement are used as follows: * * * 'R R Del Diablo' for Rancho Rincon Del Diablo."

We know of no reason why the taxpayer was not required to observe this part of the notice, which left no room for conjecture or surmise as to the meaning of the abbreviation. The notice sufficiently complied with the law.

The only remaining objection to the validity of the proceedings was that the evidence introduced by plaintiff showed that the sale was made on two separate assessments and levies and that the amounts of these are not separately stated in either notice of sale, certificate of sale, or deed. The assessment book of the district for the year 1894 had two columns, one being for the amount of assessment for the bond fund which the trustees were required to levy annually, and the other being for the special assessment for the purpose of paying expenses of organization, including salaries of officers and employés. In these columns opposite the name of each taxpayer and the description and valuation of his property were placed the respective amounts due on each assessment; the entries in the case of Mirandetti being in the bond assessment column $14.04, and in the special assessment column $3.74. In the notice of sale, as we have seen, there was no specification of these separate amounts; the statement being simply that the amount of taxes paid, percentage and costs due was $19.17, which was the aggregate of the $14.04 and $3.74, and the penalty for delinquency and accrued costs. The certificate of sale stated that the assessments were levied for the year 1894, the amount thereof being $17.78 (the aggregate of the two assessments), and that the sale was to pay such assessments, amounting to $17.78, and the further sum of $3.39 costs, including $2 for the duplicate certificate of sale. The deed was the same in this respect as the certificate.

We find nothing in the law applicable to these proceedings which required either notice of sale, certificate of sale, or deed to state separately the amount of each of these assessments. The special assessment provided for is one which the directors are required, if the same is voted by the electors, to levy at the time of the annual levy, and, when so levied, it is to be entered in the assessment roll by the secretary of the board, "and collected at the same time and in the same manner as other assessments provided for herein." Section 41, Act 1887 (St. 1887, p. 44, c. 34). A single proceeding for the collection of the aggregate amount due on the various assessments shown by the assessment book for the year was contemplated. The statute in regard to delinquent list and notice simply provided that the delinquent list must contain "the amount of the assessments and costs due opposite each name and description." A statement of the aggregate amount of all assessments, percentage for delinquency, and costs appears to be a literal compliance with this requirement. It has been held in regard to state and county taxes that under a statute requiring the delinquent list to state "the amount of taxes, penalties, and costs due, opposite each name and description," it is not necessary to state separately the items of taxes, penalties, and costs; a statement of the total amount being all that the law requires. Chapman v. Zobelein (Cal.) 92 Pac. 188. The certificate and deed were required to give simply "the amount and the year of the assessment, and the amount paid." This means the total assessment charge shown by the roll for the year. Both certificate and deed showed this amount to be $17.78, the costs to be $3.39, and the amount paid to be $21.17. We think the statute was fully complied with in this matter.

The judgment is reversed and the cause remanded for a new trial.

We concur: SHAW, J.; McFARLAND, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

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BELL et al. v. SAN FRANCISCO SAVINGS UNION et al.

In re BELL'S ESTATE. (L. A. 1,913, 1,927.)

(Supreme Court of California. Feb. 14, 1908. Rehearing Denied March 16, 1908.)

1. APPEAL—NOTICE—RIGHT TO.

Where the notice of intent to move for a new trial was addressed to and served upon a party in the original action, he became a party to the proceeding for new trial, entitling him, if an adverse party appellant from the order denying the new trial, to service of notice of the appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2137, 2138.]

2. SAME—DISMISSAL—FAILURE TO SERVE NOTICE.

An appeal from an order denying a motion for a new trial will not be dismissed for failure to serve one of the parties to the main action with notice of the appeal, where he was not a party to the proceedings for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error. § 2173.]

3. NEW TRIAL—COMMENCEMENT OF PROCEEDINGS—NOTICE OF INTENT.

The filing and service of notice of intention to move for a new trial is the initiation of the proceedings for the new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 276.]

4. SAME—PARTIES.

In so far as a proceeding for a new trial is a new statutory proceeding collateral to the main action, the parties to such proceeding are determined by the notice of intent to move for a new trial, and jurisdiction of the parties other than the moving party is obtained by the service upon them of such notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 276.]

5. SAME—DEATH OF PARTY.

Where a party to the main action was served with notice of intention to move for a new trial, he became a party to that proceeding, and did not cease to be such a party by reason of his death before the hearing of the motion.

6. APPEAL—NOTICE—SERVICE—DEATH OF PARTY—SERVICE ON ATTORNEY.

Notice of appeal from an order denying a motion for a new trial could not, after the death of a party adverse to the parties appealing, be served upon the attorneys who had represented him during his life.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2153.]

7. SAME—NECESSITY OF SERVICE—DEATH OF ADVERSE PARTY—EFFECT.

The necessity of serving a notice of appeal upon an adverse party is not obviated by the death of such party.

8. SAME—PARTIES TO BE SERVED.

After the death of an adverse party to an appeal, service of the notice of appeal must be made upon the personal representatives of the decedent, and if the appellant is unable to procure the appointment of a personal representative, and to serve such representative within the required time, his appeal is lost.

9. SAME—JURISDICTION OF APPEAL—APPEARANCE.

An appellate court may obtain jurisdiction of an appeal as well by voluntary appearance by an adverse party as by the service of a notice of appeal upon him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2184–2190.]

10. SAME.

Notice of appearance by an executor of an adverse party to an appeal, filed after service upon appellant by motion of respondent to dismiss the appeal, and after the expiration of the time within which the appeal could have been taken, was not effectual to confer jurisdiction of the appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2183.]

11. SAME—NOTICE OF APPEAL—SERVICE—"ADVERSE PARTY."

An adverse party, within the meaning of section 940, Code Civ. Proc., providing for the service of notice of appeal on the adverse party, is one whose interest in the subject-matter of the appeal is adverse to, or will be affected by the reversal or modification of, the judgment or order from which the appeal has been taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2137, 2138.

For other definitions, see Words and Phrases, vol. 1, pp. 224–227; vol. 8, pp. 7567, 7568.]

12. SAME—DISMISSAL.

Where a judgment can be modified in any manner, favorable to a party appealing therefrom without injuriously affecting the interests of a party not served with notice of the appeal, the appeal will not be dismissed, but the court will decide the case as to the interests of the other parties, so far as it may be done without injuring the interests of the party not served.

13. SAME—REVERSAL.

A judgment conferring a legal advantage upon a party not served with notice of appeal therefrom will not be reversed where such advantage would be destroyed by a reversal.

14. SAME—MOTIONS TO DISMISS—QUESTIONS CONSIDERED—PRESENTATION IN RECORD.

Where the record on appeal shows that a certain party not served with notice of the appeal was an adverse party, the necessity for service upon him cannot be obviated by acts or omissions of other parties not appearing in the record, and occurring after the time for appeal had expired, so as to defeat a motion to dismiss, since such motion must be disposed of upon the record.

15. JUDGMENT—TRIAL OF ISSUES—DETERMINATION OF ALL ISSUES—OTHER ACTION PENDING—QUESTIONS IN ADJUDICATION.

Where questions as to the relations and indebtedness existing between certain parties are in the course of judicial determination in a pending action, the court, in another action, will not determine those questions, but will reserve them for adjudication in the pending action.

16. INTEREST—INTEREST ON INTEREST—RATE.

A note as an installment of interest falling due before the maturity of the principal provided for interest on interest at a greater rate than that borne by the principal. It further provided that, after the maturity of the note, the rate of interest was to be the same for principal and unpaid interest. *Held*, that the provisions for interest on installments falling due before maturity was in conflict with Civ. Code, § 1919, providing that the parties to any contract for the payment of a debt may agree that if the interest is not punctually paid it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt.

17. SAME.

An agreement for interest on interest at a greater rate than is allowed by statute is illegal and void in its entirety, and not merely as to the excess over the legal rate.

18. BILLS AND NOTES—TIME FOR PAYMENT—EXTENSION—EFFECT.

The effect of an agreement between parties to a note extending the time for its payment is to waive past default in the payment of principal, and to postpone the maturity of the note until the date to which the extension was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 334, 335.]

Department 1. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Kate M. Bell and another against the San Francisco Savings Union and others. From a judgment for defendants, and from an order denying motions for new trial, plaintiffs appeal. Motion to dismiss appeal denied. Order on motions for new trial affirmed, and cause remanded, with directions to modify judgment.

J. L. Crittenden and T. Z. Bakeman, for appellants. Canfield & Starbuck, for respondents.

SLOSS, J. This action involves the rights of the parties in two tracts of land in Santa Barbara county, containing, respectively, 10,000 and 4,000 acres. Many of the facts here presented have been before this court in Bell v. Staacke, 141 Cal. 186, 74 Pac. 774, and 91 Pac. 322, and we refer to the opinions on those appeals for a general history of the transactions leading up to this litigation.

The present action was brought by Kate M. Bell, James L. Crittenden, and Sidney M. Van Wyck, Jr., claiming as successors in interest of John S. Bell, against the San Francisco Savings Union, its trustees and the successors in interest of Thomas Bell, deceased, to obtain a decree quieting the title of the plaintiff in and to the 10,000-acre tract referred to in the above-mentioned opinions. The San Francisco Savings Union, which was not a party to the action of Bell v. Staacke, was brought into this case by reason of the fact that it had advanced upon the promissory note of George Staacke, guaranteed by Thomas Bell, the sum of $60,000, and had taken as security for the payment of said note a deed of trust of the 10,000-acre and the 4,000-acre tracts, executed by Staacke to Henry C. Campbell and Thaddeus D. Kent, as trustees.

Prior to the conveyance to Campbell and Kent, the legal title to this property was vested in George Staacke. Staacke claimed no beneficial interest whatever, but was holding purely as trustee. The controversy in Bell v. Staacke, supra, was as to the nature of the trust upon which he held; the claim of the plaintiff in that action (John S. Bell) being that Staacke held solely as trustee for him as to the 10,000-acre tract, it being conceded that he held the 4,000-acre tract as trustee for Thomas Bell. The estate of Thomas Bell contended, in the case of Bell v. Staacke, that the 10,000-acre tract was held by Staacke in trust, first, for the repayment to Thomas Bell of certain advances made by him to John S. Bell, the surplus only after such payment to go to John S. Bell. This controversy was, as the result of the two trials in Bell v. Staacke, finally determined in favor of the Thomas Bell estate. The plaintiffs, claiming as successors in interest of John S. Bell, renew in this case his former contention, and, in addition, claim that the deed of trust executed by George Staacke to Campbell and Kent, as trustees for the San Francisco Savings Union, was made by Staacke without the consent of John S. Bell, the beneficiary of the trust, and that the savings union and its trustees had notice, before the payment of any part of the loan of $60,000, and before the execution of the deed of trust, that John S. Bell was the owner of the 10,000-acre tract.

Campbell and Kent, as trustees for the San Francisco Savings Union, have been succeeded by the Mercantile Trust Company of San Francisco, a corporation. The savings union and its trustees answered, denying that at the time of the advance of the $60,000 and of the acceptance of the trust deed they had any notice of the alleged rights or claims of John S. Bell, and alleging that John S. Bell knew of the transaction at the time and received the benefit of the loan, the amount of which had been, with his consent, credited upon his indebtedness to Thomas Bell by the latter. Staacke, who was named as one of the parties defendant in the complaint, answered individually and as executor of the will of Thomas Bell, deceased, denying the material allegations of the complaint. After filing this answer Staacke was removed as executor of the last will of Thomas Bell, and was succeeded by Teresa Bell as administratrix of the estate of Thomas Bell, deceased, with the will annexed. As such administratrix, Mrs. Bell filed an amendment to the answer filed by Staacke, as executor, by which she claimed that the lien of the Thomas Bell estate upon the 10,000-acre tract was prior to the claim of the San Francisco Savings Union, and that the proceeds of any sale should be applied first to the payment of the indebtedness of John S. Bell to Thomas Bell. Thereafter, a cross-complaint was filed by the savings union and those who had acted and were acting as trustees under the deed of trust to secure its note, together with Staacke, asking that the court "take under its direction and control the execution by said defendant Mercantile Trust Company of the trust created by said grant [the deed of trust to Campbell and Kent] * * * and direct, instruct, and supervise said defendant in executing said trust." The United States Oil & Land Company, claiming as a successor in interest to the plaintiff, James L. Crittenden, was brought in by amendment as an additional defendant to the cross-complaint. By the various answers to the cross-complaint, the parties representing the John

S. Bell interest and the Thomas Bell interest raised substantially the same issues as those which had been raised by the pleadings heretofore discussed, and, in addition, it was pleaded that the note held by the savings union was barred by the statute of limitations, and that the right of the cross-complainants to any affirmative relief was barred by limitation.

The cause was tried upon these issues, and findings were made in accord with the contention of the San Francisco Savings Union. The court did not make any finding as to the statute of limitations, but the judgment contained an adjudication that the enforcement of the trusts declared in the deed from Staacke to Campbell and Kent "is not barred by any statute of limitations of this state." The decree directed the Mercantile Trust Company to sell both tracts of land, selling the 10,000-acre tract first, and to pay out of the proceeds of sale to the San Francisco Savings Union the amount found to be due to it on its note, and the balance of the proceeds, if any, to the defendant Staacke, his heirs and assigns. It is also adjudged that the plaintiffs take nothing by the action.

The plaintiff Crittenden, who had acquired Van Wyck's interest, and the defendant United States Oil & Land Company moved for a new trial, which was denied, and they now appeal from the judgment and from the order denying their motion for a new trial. The defendant Teresa Bell, as administratrix, moved for a new trial as to the issues arising upon the pleadings between said Teresa Bell, as administratrix, and the defendant San Francisco Savings Union, its trustees, and George Staacke. This motion being denied, said administratrix appealed from the order denying her motion, and from the judgment, except that portion of it adjudicating that the plaintiffs and the defendant United States Oil & Land Company take nothing by the action.

The respondents San Francisco Savings Union and its trustees move to dismiss all four of these appeals upon the ground that the defendant George Staacke was an adverse party to all of the appellants, and that no notice of appeal was ever served upon him, or upon any one representing him.

Staacke died on the 12th day of April, 1905. Both appeals from the judgment and both appeals from the orders denying the motions for new trial were taken after his death. No service of any of the notices of appeal upon any representative of Staacke was shown. Each of the notices of intention to move for a new trial was addressed to Staacke, among other parties, and each was served on his attorneys and filed before his death. If this made Staacke a party to the proceedings for new trial, he was, if an adverse party, entitled to service of notice of appeal from the order denying a new trial. If he was not a party to such proceedings, failure to serve him with notice of appeal would not justify a dismissal of that appeal, but the order denying the motion would have to be affirmed, because he had not been a party to the proceedings for new trial in the court below. Est. of Ryer, 110 Cal. 556, 42 Pac. 1082; Herriman v. Menzies, 115 Cal. 15, 26, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81; Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719; Johnson v. Phenix Ins. Co. (Cal.) 92 Pac. 182. We have no doubt that Staacke did become a party to both proceedings for a new trial, by reason of the fact that the notice of intention to move for a new trial was in each instance addressed to and served upon him. The filing and service of such notice of intention is the initiation of a proceeding for a new trial. Code Civ. Proc. § 659. In so far as the proceeding for a new trial is a "new statutory proceeding, collateral" to the main action (Fowden v. Pac. Coast S. S. Co., 149 Cal. 151, 86 Pac. 178), the parties to such collateral proceeding are determined by the notice, and jurisdiction of the parties, other than the moving party, is obtained by the service upon them of such notice. Staacke was so served by each of the parties moving for a new trial, and he did not cease to be a party to the proceeding by reason of his death after the service and filing of the notice, and before the hearing of the motion. If he was an adverse party, it was as necessary to serve him with notices of appeal from the orders denying the motions for new trial as it was to serve him with notices of appeals from the judgments.

If Staacke was an adverse party, upon whom the service of notice of appeal was requisite in order to vest this court with jurisdiction, such service could not, after his death, be made upon the attorneys who had represented him in the action during his life. His death terminated the authority of the attorneys to represent him, and service of the notices of appeal upon them was not effectual so far as his interest was concerned. Judson v. Love, 35 Cal. 463; Moyle v. Landers, 78 Cal. 99, 20 Pac. 241, 12 Am. St. Rep. 22; Pedlar v. Stroud, 116 Cal. 461, 48 Pac. 371; Churchill v. Flournoy, 127 Cal. 355, 59 Pac. 791; Estate of Turner, 139 Cal. 85, 72 Pac. 718. The necessity of serving a notice of appeal upon a respondent who is an adverse party is not obviated by the death of such party. Judson v. Love, supra; Moyle v. Landers, supra; Pedlar v. Stroud, supra. The appellant must, within the time allowed for taking an appeal, serve his notice of appeal upon all adverse parties. If any of said parties have died, service must be made upon the personal representatives of the decedent, and if the appellant is unable to procure the appointment of a personal representative, and to serve such representative within the required time, his appeal is lost. Williams v. Long, 130 Cal. 58, 62 Pac. 264, 80 Am. St. Rep. 68; Estate of Turner, supra.

The appellant, Teresa Bell, as administratrix, has sought to overcome the effect of a failure to serve her notices of appeal upon Staacke or his representative, by filing in this court a notice of appearance on behalf of George Henry Howard, as executor of the last will of George Staacke, deceased. This notice of appearance was filed on April 23, 1907, after the service upon the appellant of the respondent's motion to dismiss her appeals, and after the expiration of the time within which appeals could have been taken. Such voluntary appearance was not effectual to confer jurisdiction of the appeals upon this court. Niles v. Gonzales (Cal.) 92 Pac. 74. It is no doubt true, as contended by the appellant Teresa Bell, that the appellate court may obtain jurisdiction of an appeal as well by voluntary entrance of appearance by an adverse party as by the service of a notice of appeal upon him. Hibernia S. & L. Soc. v. Lewis, 111 Cal. 519, 44 Pac. 175; Valley Lumber Co. v. Struck, 146 Cal. 268, 80 Pac. 405; Burnett v. Piercy, 149 Cal. 183, 86 Pac. 603. In none of these cases, however, was the court dealing with the question of an appearance made after the time of taking an appeal had passed. The service of notice of appeal has a twofold purpose: First, to give the appellate court jurisdiction of the person of the respondent; and, second, to give the appellate court jurisdiction of the subject-matter of the appeal. Jurisdiction of the person may be conferred by a voluntary appearance at any time, but inasmuch as jurisdiction of the subject-matter can never be conferred by consent, the voluntary appearance by the respondent must be made within the time in which a service of notice upon such respondent would be effectual to vest jurisdiction of the appeal in the appellate court. An "adverse party," within the meaning of section 940 of the Code of Civil Procedure, is one "whose interest in the subject-matter of the appeal is adverse to, or will be affected by the reversal or modification of, the judgment or order from which the appeal has been taken." Senter v. De Bernal, 38 Cal. 637. If a judgment may be modified in any manner favorable to the appellant without injuriously affecting the interest of the party not served, the appeal will not be dismissed. In such case, the court will, notwithstanding the failure to serve a party, "decide the case with respect to the interests of the other parties, so far as it may be done without injuriously affecting" the interests of the party not served. Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603; Williams v. Santa Clara Min. Ass'n, 66 Cal. 195, 5 Pac. 85. If any of the contentions of the appellants here can be sustained without detriment to the rights of Staacke, the appeals must be retained. But such points as cannot be determined in favor of an appellant without injury to the interests of Staacke's estate must be disregarded without consideration of their merits.

One of the points urged by the appellanc Teresa Bell, as administratrix, and available also, we think, to the other appellants, is that the court, in fixing the amount due to the San Francisco Savings Union on its note, erred in allowing an excessive amount of interest. A modification of the judgment, by reducing the amount to be paid to the savings union out of the sale of the land, could in no way injuriously affect the interests of the Staacke estate. Indeed, a reduction of the amount of the claims of the savings union could only be a benefit to the Staacke interest, since it would tend to lessen the possible ultimate liability of that interest on the $60,000 note. It may be questionable whether the point as to excessive allowance of interest arises properly on the appeals from the judgment or from the order denying a new trial. For reasons to be stated, we think that it certainly can be raised on the appeals from the judgment, and that the right of the appellants to raise it on the other appeals, also, is sufficiently clear to justify the retention of those appeals as well as the appeals from the judgment. But, while the court may review the action of the lower court in figuring interest on the $60,000 note, we think the judgment and order appealed from cannot be reversed, nor can it be modified in any other particular, without detriment to the interests of Staacke or his estate.

The contention of the appellants Crittenden and United States Oil & Land Company is that Staacke held the 10,000-acre tract in trust solely for their predecessor, John S. Bell, and that, as such trustee, he had no power to make the deed of trust of that tract to the trustees for the San Francisco Savings Union. The effect of a reversal may be to vest the 10,000-acre tract in John S. Bell, free of any claim of the savings union. Staacke, however, as a maker of the note which is secured by the deed of trust to the trustees of the savings union, is directly interested in having the property applied to the payment of this note. If it should eventually be held that, as these appellants contend, the San Francisco Savings Union has no interest in the land, or that the right of its trustees to sell is barred by limitation, Staacke or his estate may be compelled to pay the $60,000 note. The estate is directly interested in avoiding this liability by maintaining the present judgment which directs the sale of the property for the purpose of satisfying this note.

Nor do the appeals of Teresa Bell, as administratrix, occupy any different position. Her contentions are, in substance, that the claim of the savings union, if it had any, is subordinate to the claim of the estate of Thomas Bell, and that the proceeds of any sale of the property must be applied first to the satisfaction of the claim of the Thomas Bell estate. She also contends that the right of the savings union and its trustees to have any affirmative relief is barred by the statute of limitations. Her success on either of these propositions would manifestly be a detriment to Staacke in his capacity as maker of the note to the savings union. If the savings union be prevented from having a sale of the property for the purpose of satisfying its note, it may be, as above stated, that Staacke's estate would become liable for such note. Or, if the proceeds of such sale be applied first to the payment of John S. Bell's indebtedness to Thomas Bell, it may be that there will not be sufficient surplus to satisfy the claim of the savings union, and in this way Staacke's estate may become liable for a portion or the whole of that indebtedness. It is clear, therefore, that this judgment, in directing the sale of the property for the purpose of satisfying a claim upon which Staacke is personally liable, confers upon him a legal advantage which would be destroyed or impaired by a reversal of the judgment or the order denying a motion for a new trial. These conclusions are in no way affected by the fact, conceded by all the parties, that Staacke, in borrowing the money from the San Francisco Savings Union and making a deed of trust, acted, not in his own interest, but as agent for Thomas Bell, who guaranteed the note. As between him and Thomas Bell, Bell was primarily, and Staacke merely secondarily, liable. But he did, by executing the note, make himself personally liable to the savings union, which, in the event of its inability to collect the amount of its note from the land or the estate of Thomas Bell, would unquestionably be entitled to hold Staacke's estate for any deficiency. That it did not ask for any such deficiency in this action is of no consequence. It has, on the record as it here appears, the right to pursue Staacke's estate for the amount of the note, and the latter is entitled to insist that a judgment, which confers upon it the advantage of having the property in question applied to the payment of any such liability, shall not be set aside without its being before the court and being heard. If the necessary effect of a reversal or modification as to any party is to take away this right, the judgment and order assailed must stand as to all parties. The affidavit offered by the appellant Teresa Bell, to show that the savings union has not, within the time allowed for the presentation of claims, presented any claim upon this note to the executor of the will of George Staacke, cannot be considered here. The motion to dismiss for want of service on an adverse party must be disposed of on the record. Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103: Estate of Ryer, supra; Kenney v. Parks, 120 Cal. 22, 52 Pac. 40. On that record Staacke appeared to be an adverse party, and the necessity for serving him could not be obviated by acts or omissions of other parties not appearing in the record, and occurring after the time for appeal had expired.

In the foregoing discussion we have said nothing as to the contention of the appellants Crittenden and United States Oil Company that the court erred in denying them any priority as against the estate of Thomas Bell. It is found, however, that the action of Bell v. Staacke, the pendency of which was set up in the pleadings, was still pending at the time of the decision, and that the question of the relations between John S. Bell and his grantees, on the one hand, with Staacke and the estate of Thomas Bell, on the other, in respect of the indebtedness of John S. to Thomas Bell and of the 10,000-acre tract, are involved in said action, and "are in course of judicial determination and settlement therein." The judgment, accordingly, made no adjudication of the rights of John S. Bell and Thomas Bell (or their successors) as between each other, leaving the question of those rights to be determined in Bell v. Staacke. If it could be said that Staacke had no interest in this controversy as to priorities between John S. Bell and Thomas Bell, the finding as to the pending action (which is not attacked) clearly made it the duty of the court to reserve for adjudication in that action the matters therein involved. Casey v. Jordan, 68 Cal. 246, 9 Pac. 92, 305.

There remains the question whether the amount allowed as interest on the note of the San Francisco Savings Union was excessive. The court found that the principal of the promissory note of Staacke has not been paid, and that no interest thereon has been paid except the interest to the 1st day of November, 1896, and that the amount due on said note for principal and interest, to the date of the decision (March 1, 1905), is $148,052.52. The note, so far as is material to the present inquiry, reads as follows: "San Francisco, February 1st, 1892. On the first day of February, 1893, I promise to pay to the San Francisco Savings Union the principal sum of sixty thousand dollars. And I further promise to pay interest on said amount, at the monthly rate of two-thirds of one per cent., on the first day of each and every month till payment of the principal, the first payment to be made this day. And, further, I agree that in case of default in the payment of any of the amounts of principal or interest above stipulated then such amounts shall bear interest from the date of their maturity until the day of payment, at the rate of one per cent. per month. George Staacke."

Section 1919 of the Civil Code provides that "the parties may, in any contract in writing, whereby any debt is secured to be paid, agree that if the interest on such debt is not punctually paid, it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt." Under this section, unpaid interest cannot be made to bear interest at a rate greater than that borne by the principal debt (Savings & Loan Soc. v. Horton, 63 Cal. 105; Dean v. Applegarth, 65 Cal. 391, 4 Pac. 375), and an agreement for interest on interest at a greater rate than that so allowed by the statute is illegal and void in its entirety, and not merely as to the excess over the rate that might have been agreed upon. Yndart v. Den, 116 Cal. 533, 48 Pac. 618, 58 Am. St. Rep. 200. By the note in question the maker agrees to pay interest on the principal at the rate of two-thirds of 1 per cent. per month (8 per cent. per annum) until maturity, and thereafter at the rate of 1 per cent. per month. Overdue installments of interest are to bear interest at the rate of 1 per cent. per month. As to installments of interest falling due before the maturity of the principal, interest on interest is fixed at a rate greater than that borne by the principal. After the maturity of the note, the rate of interest is the same for principal and unpaid interest. The provision for interest on installments falling due before maturity is therefore in conflict with the statute. This should not, however, be held to affect the validity of the agreement in so far as it provides for interest on interest falling due after maturity. Any such installments bear the same rate as the principal, and as to them there is no violation of section 1919. The provision of the note for payment of interest on unpaid installments of interest is, in its relation to section 1919, severable. In so far as it allows interest on interest at a rate greater than is borne by the principal it is void. For the period during which it allows interest at the same rate as the principal it is good.

In computing interest in this case, the court allowed interest on the principal from November 1, 1896 (to which date interest had been paid), to the date of the decison, at the rate of 1 per cent. per month, and on each year's interest, so figured, at the same rate. Under the views above expressed, this would, on the face of the note, have been proper, since all such interest, both on principal and interest, accrued after maturity, at a time when the note fixed interest on principal and on unpaid interest at the same rate. All interest accruing prior to the maturity of the note had been paid. As to this, the agreement was executed, and no question of the validity of such executed agreement was before the court. But it was found that on December 22, 1896, John S. Bell and George Staacke agreed with the San Francisco Savings Union that the time for the payment of the principal of said promissory note should be extended until the 22d day of December, 1898. This finding follows an allegation of respondents in their cross-complaint, and is binding upon them. The effect of such agreement was to waive any past default in the payment of principal, and to postpone the maturity of the note until December 22, 1898. Until that date, there was no default in the payment of the principal, and the condition on which the rate of interest was to be increased from 8 to 12 per cent. per annum had not arisen. It follows that interest on interest during this period could not exceed 8 per cent. per annum, and as the only contract for interest on interest was for 12 per cent. per annum, interest on unpaid installments prior to December 22, 1898, could not be allowed at all. The judgment was, therefore, excessive, in allowing interest on principal at the rate of 12 instead of 8 per cent. per annum from November 1, 1896, to December 22, 1898, and in allowing any interest on the installments of interest that fell due during this period. The overcharge on the first of these items amounts to $5,139.86; on the second to $11,539.99. Inasmuch as the findings set out the terms of the note, the payments of interest, and the extension agreement, this error is apparent on the face of the judgment roll, and can be corrected by a modification of the judgment.

For the reasons above stated, the motion to dismiss the appeal is denied. The order denying both motions for a new trial is affirmed. The cause is remanded to the lower court, with directions to modify the judgment by deducting from the amount directed to be paid to the San Francisco Savings Union the sum of $16,679.85, and, as so modified, the judgment will stand affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

153 Cal. 77

In re GLENN'S ESTATE. (Sac. 1,567.)

(Supreme Court of California. Feb. 14, 1908.)

1. Courts—Superior Court—Probate Jurisdiction—Equity.

The superior court in the exercise of its probate jurisdiction proceeds upon principles of equity.

2. Estoppel—Equitable Estoppel—Conduct—Right to Partial Distribution.

Plaintiff's husband, as one of the heirs of an estate, agreed with the other heirs that the property should be kept together and farmed in order to pay off a debt. On the death of the husband, who willed his share of the estate to plaintiff, the heirs made another and similar agreement, which plaintiff signed individually and as executrix of the estate. Under these agreements the debt was greatly reduced, and plaintiff and her husband received a large amount of money. *Held* that, at a time when the land having become useless for farming purposes was being sold to pay off the rest of the debt, plaintiff was estopped from maintaining a suit for partial distribution of the estate, though by the terms of the statute she was entitled to it, where the effect of the distribution would be to greatly injure the other heirs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 204-210.]

In Bank. Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

Application by Alice A. Young for partial distribution of the estate of H. J. Glenn, deceased. From an order denying the application, she appeals. Affirmed.

Burrell G. White, for appellant. F. C. Lusk, for respondents.

ANGELLOTTI, J. This is an appeal from an order denying an application for partial distribution of appellant's share of the estate of deceased. The petitioner is the surviving wife of A. G. Glenn, one of the children of deceased, who was entitled to an undivided one-twelfth of the estate of his father. He died shortly after the death of his father, leaving a will, by which he gave his interest in his father's estate to appellant for her life, the same to go upon her death to the grandchildren of his deceased father. Appellant seeks to have distributed to her this life estate in an undivided one-twelfth part of the property of the estate remaining on hand.

Deceased died intestate February 17, 1883, leaving a large estate, consisting almost wholly of real property, and being very heavily indebted. It was concluded by the heirs that better results could be obtained by keeping the property in one body, without selling or distributing the same, until, by aid of the proceeds of the cultivation of the land, which was farming property, the indebtedness could be paid. At the request of the heirs, Mr. N. D. Rideout assumed the duties of administrator with this understanding, and a written agreement was entered into by him and all of the heirs, including appellant's husband, indemnifying him against any claim on their part arising from such management by him of the property of the estate. It being necessary that the heirs should have money with which to maintain themselves pending administration, in 1888 another agreement was executed by appellant, whose husband had in the meantime died, both individually and as executrix of her husband's will, and by the other heirs, indemnifying the administrator against any claim arising by reason of advances made to them or either of them from the property of the estate. Under these agreements, the property was farmed under the management of the administrator for many years, with the result that the indebtedness was very largely reduced. At the time of the filing of this petition for partial distribution, September 7, 1906, $495,217 had been paid to the heirs, of which last named sum $42,807 was paid to appellant's husband, and to her individually and as executrix of her husband's will, appellant receiving $1,700 as late as March, 1906. Farming having become unproductive, it was concluded to sell sufficient land to pay the remaining debts, and an order of sale was obtained. Some land was sold, but the administrator had not been able at the time of the hearing of this petition to sell enough to pay the debts of the estate. At the time of such hearing, the assets of the estate consisted of real estate appraised at $510,311, money due on real estate sold, $5,000, and grain valued at $7,000, and there was due creditors of deceased $54,640, due for administrator's commissions according to minimum estimate $50,000, and due for taxes $11,000—a total of $115,640. It sufficiently appeared that every reasonable effort was being made to sell enough land to pay the debts, and the indications were that sufficient could be sold to discharge the indebtedness within a year. The first demand on the part of appellant that advances to the heirs cease, and that the estate be closed, was made in August, 1905. The granting of the petition for partial distribution was opposed by the administrator and all of the heirs other than appellant.

It is apparent that the granting of the petition would have been exceedingly injurious to the heirs, and would have postponed the payment of the claims of the creditors of the estate. Contemplated sales of land absolutely necessary to the payment of debts and the closing of the estate would probably have been prevented, and certainly very much delayed, and unless a partition was had, which, in the ordinary course of things, would have involved large expense and delay, the inability of the estate to convey to purchasers an absolute title, including all interests, would naturally have caused the remaining undivided interests to be sold at great loss. The record amply justified the conclusion of the learned trial judge that it was not then for the best interests of the estate and those interested in it that this undivided interest should be distributed to appellant. Appellant, however, insists that this is an immaterial consideration upon an application for partial distribution, the statute providing that if at the hearing "it appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the petition." Her position is that the facts stated show as a matter of law that the estate was "but little indebted" (Estate of Crocker, 105 Cal. 372, 38 Pac. 954), and that the distribution asked might have been made without loss to the creditors, and that, consequently, the lower court was required by the terms of the statute to grant the application, however injuriously the other heirs might have been affected thereby. Assuming purely for purposes of argument that the facts showed the estate to be "but little indebted" within the meaning of the statute, and that no loss to creditors would have resulted from the granting of the application, we do not think that the result contended for by appellant follows. Ordinarily it is, of course, true that a legatee or devisee or an heir is entitled as a matter of right to receive his share of the estate at the time fixed by the statute, if the same can be given to him without loss to creditors, regardless of the fact that it might be better for all interested in the estate that the property should be held in administration for a longer period. It is his property, and he has the right to enjoy the same at the earliest possible moment consistent with the proper administration of the estate. That he shall be able to have such enjoyment is the object of our statutes relative to partial distribution. But we have no doubt that a party can estop himself from insisting upon the exercise of this right, where the effect thereof would be to injure the other heirs who had acted upon the faith of such party's undertaking and promises. It is well settled that the superior court, in the exercise of its probate jurisdiction, proceeds upon principles of equity (see In re Moore, 96 Cal. 528, 31 Pac. 584), and we see no reason why it may not deny an application for partial distribution where the circumstances of the case show that the claimant, under well-settled equitable principles, should not be heard to assert the right to immediate possession of the property. In the case before us the circumstances which would render the granting of appellant's application injurious to all the other heirs are the result of the agreements freely entered into by appellant and her husband, under which they have already received by way of advancement $42,807. If it had not been for these agreements, the estate would long ago have been closed, and appellant would have received her share thereof. By reason thereof, those interested in the estate find themselves in a position where it is necessary to sell a large portion of the realty in order to pay the debts and close the estate. Appellant chose that moment to insist upon the right of immediate delivery of her undivided share thereof, notwithstanding that the enforcement thereof will result in injury to all the other heirs. We think that the court below was warranted in holding that she could not insist upon this right to the injury of the other heirs, while those managing the estate were making every reasonable effort to close the administration, and there was a reasonable probability that if the estate was kept intact, sufficient property could be sold within a very short time to pay all the debts and expenses of administration, and thus enable final distribution to be made.

In view of what we have said, it is apparent that certain evidence objected to by appellant was relevant, and was properly admitted.

The order is affirmed.

We concur: SHAW, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.

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153 Cal. 38

WOODWORTH v. SUPERIOR COURT OF MARIN COUNTY. (S. F. 4,955.)

(Supreme Court of California. Feb. 10, 1908.)

PROHIBITION—WHEN LIES.

Since the state may, under some circumstances, maintain an action to prevent the issuance of a certificate of purchase of state land, the superior court has jurisdiction in such an action, and prohibition will not lie to restrain the action, though the complaint does not state facts sufficient to constitute a cause of action; that being a matter for the trial court to determine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, §§ 4–19.]

In Bank.

Application of Fred Woodworth for a writ of prohibition against the superior court of Marin county, Thomas J. Lennon, Judge. Application denied.

Fred Woodworth, in pro. per.

PER CURIAM. It cannot be held that the state may not, under some circumstances, maintain an action to prevent the issuance of a certificate of purchase of state land, which, as we read the pleadings, is practically the character of the action, the prosecution of which is here sought to be enjoined by prohibition. If this be so, we cannot say that the superior court has no jurisdiction of the action. The objection made by petitioner really is that the complaint does not state facts sufficient to constitute a cause of action. It may be that the complaint here does not state facts sufficient to constitute a cause of action, but that is a matter for the trial court to determine in the exercise of its jurisdiction, and prohibition will not lie.

Application denied.

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153 Cal. 40

CITY OF ESCONDIDO v. WOHLFORD. (L. A. 1,945.)

(Supreme Court of California. Feb. 10, 1908.)

1. MUNICIPAL CORPORATIONS—TAXES—ACTION TO COLLECT—EVIDENCE—ASSESSMENT BOOK—ADMISSIBILITY.

In an action by a city to recover taxes for 1904, an assessment book was not inadmissible on the ground that a statement at the head of each double page that it was the book for 1904–1905 made it uncertain that it was the roll for 1904, where the city's fiscal year begins January 1st, and where the assessor's affidavit and the clerk's certificate or affidavit in the book at the end of the list of property clearly show that the book was in fact the roll for 1904.

2. SAME.

Pol. Code, § 3732, provides for the authentication of the assessment rolls as to state and county taxes, but in its nature is inapplicable to city assessments in sixth-class cities. The municipal corporation act, applicable to such cities (St. 1883, p. 273, c. 49, § 871), prohibits the adoption of a system of assessment, etc., inconsistent with the act. An ordinance of the city of Escondido adopted the provisions of the Political Code as the law for assessing, etc., city taxes, except as the time, manner, mode, and persons are provided for in such act, and in another place enumerates sections of the Political Code not to be held applicable, not specifying such section 3732. Sections 872, 877, and 878 (pages 274, 275) of such act provide for the certification and authentication of the assessment roll in such cities. *Held*, that such section 3732 is not applicable to assessments made by the city of Escondido, the provision of the ordinance excluding the Political Code as to matters covered by the act being unaffected by the subsequent provision enumerating inapplicable sections of the Code; and hence, in an action by such city to recover city taxes, an assessment roll is not inadmissible, because not authenticated, as provided by such section.

In Bank. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by the city of Escondido against A. W. Wohlford. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

F. P. Willard, for appellant. William H. Francis, for respondent.

ANGELLOTTI, J. This is an action by the city of Escondido, a municipal corporation of the sixth class, to recover from defendant the sum of $11.55 city taxes for the year 1904, with penalties and costs. Judgment went for defendant, and plaintiff appeals from such judgment, and from an order denying its motion for a new trial.

By ordinance, the fiscal year for that city is made to commence on the 1st day of January. The complaint alleged the due making of an assessment list for the year 1904, containing the assessment sued on in this action, and this allegation was denied in the answer. Upon the trial plaintiff offered the assessment book in evidence for the purpose of showing a valid assessment and establishing prima facie its right to recover the tax thereon charged against defendant. Modoc Co. v. Churchill, 75 Cal. 172, 16 Pac. 771; San Gabriel Co. v. Witmer Co., 96 Cal. 636, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470. The trial court sustained an objection to the offered evidence. Plaintiff was thus precluded from showing a valid assessment. No such assessment being shown, the court directed judgment for defendant. The ruling of the court in sustaining the objection to the assessment book is the only matter presented for our consideration on this appeal.

The assessment book offered in evidence had printed upon each double page the words: "Assessment Book of the Property of the City of Escondido for the year 1904–1905." One of the grounds of objection was, in effect, that this was not the assessment of property alleged in the complaint, which was one for the year 1904. But the book in other respects sufficiently showed that it was the assessment list for the year 1904. As we have seen, under the laws relating to city assessments and taxes in the city of Escondido, there was no such year as "1904–1905," and there could be no assessment book for any such year. The affidavit of the city assessor, and the certificate or affidavit of the city clerk contained in said book at the end of the list of property, which were required by provisions of the municipal corporation act (sections 872 and 877 [St. 1883, pp. 274, 275, c. 49]), clearly show that the book was in fact the assessment roll of the city for the year 1904, and could be nothing else. Under these circumstances the printed statement at the head of each double page that it was the book for the year 1904–1905, which, in view of the law applicable, was meaningless, cannot be held to render it in the slightest degree uncertain that the book was the assessment roll for the year 1904.

The other ground of objection to the roll was that it was not authenticated by the affidavit provided for by section 3732 of the Political Code. That section, relating to the duties of the county auditor in the matter of state and county taxes, provides: "On or before the second Monday in October, he must deliver the corrected assessment book to the tax collector, with an affidavit attached thereto and by him subscribed, as follows: 'I, ———, auditor of the county of ———, do swear that I received the assessment book of the taxable property from the clerk of the board of supervisors, with his affidavit thereto affixed, and that I have corrected it and made it to conform to the requirements of the state board of equalization; that I have reckoned the respective sums due as taxes, and have added up the columns of valuation, taxes, and acreage, as required by law.'" It has been held that in the case of assessments for state and county taxes such an affidavit is essential to the enforcement of the tax. Miller v. County of Kern, 137 Cal. 521, 70 Pac. 549. We are of the opinion, however, that the section is not applicable here. The ordinance of the board of trustees of the city of Escondido providing a system for the assessment, levy, and collection of city taxes did not purport to adopt as a part of that system any section of the Political Code, the subject-matter of which was covered by the provisions of the municipal corporation act applicable to cities or towns of the sixth class. That act in terms provides that the system to be adopted must not be inconsistent with the provisions of such act. Section 871. The ordinance of the board in terms provided that said provisions of the Political Code are adopted as the law "for assessing, levying, and collecting city taxes, except as the time, manner, mode, and persons are provided for" in said act. The matter of certification and authentication of the assessment roll appears to be a matter that is fully covered by the provisions of said municipal corporation act. The assessor is thereby expressly required to verify the assessment list by his oath, and deliver the same to the city clerk. Section 877. The city clerk, discharging the duties corresponding to those of both the clerk of the board of supervisors and the county auditor in the matter of state and county taxes, is expressly required after equalization and correction of the list by the trustees to certify it, and, after the tax levy, to apportion the taxes thereon, and deliver it to the marshal for collection. Sections 872 and 878. There is no provision for any other certificate or affidavit by the clerk. These provisions cover the whole matter of the authentication of the roll, and, in view of the language of the ordinance, it is not to be presumed that the board intended to adopt as a part of their system a section of the Political Code as to further authentication, especially one which is so entirely inapplicable to the conditions existing in the matter of city assessments in cities of the sixth class.

The principal matter covered by the affidavit provided for in that section is the matter of the correction by the county auditor of the roll to make the assessments therein correspond to such changes as have been made by the state board of equalization, the declaration under oath of such officer that he has corrected the roll to make it correspond with such change. Such a declaration as to the city assessment roll would be meaningless. The state board of equalization has no power to order any change in such roll, and there are no corrections to be made therein except those ordered by the board of trustees sitting as a board of equalization, which changes are covered by the certificate of the clerk provided for by the municipal corporation act. To require the clerk to attach an affidavit stating that he had received the roll from himself, and had then corrected it, when he had no power to further correct it, and had made it conform to the requirements of the state board of equalization, a body having no power at all in the matter, would be most absurd. Yet this would be the consequence of the contention of defendant, for the section of the Code requires an affidavit in the words therein set forth. It is much more reasonable to construe the ordinance as not contemplating the adoption of any section of the Political Code relating to the authentication of the roll by an officer or officers, and as leaving that particular matter to be governed solely by the provisions of the municipal corporation act in that behalf. We regard the subsequent provision in the ordinance that certain enumerated sections of the Political Code "shall not be held applicable" as of very little force in determining the proper construction of the ordinance. The previous provision excepting all such matters as are covered by the municipal corporation act is clear and explicit, and its effect is not impaired by the language used in the subsequent provision.

No other ground of objection to the assessment roll is urged, and no reason appears to us why the roll should not have been admitted in evidence.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; McFARLAND, J.; HENSHAW, J.; SLOSS, J.; LORIGAN, J.

CITY OF ESCONDIDO v. BANK OF ESCONDIDO. (L. A. 1,946.)

(Supreme Court of California. Feb. 10, 1908.)

In Bank. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by the city of Escondido against the Bank of Escondido. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

F. P. Willard, for appellant. William H. Francis, for respondent.

PER CURIAM. This cause involves the same questions that are discussed and decided in City of Escondido v. Wohlford (L. A. No. 1,945) 94 Pac. 232. The parties have submitted this case upon the argument presented in that case. Upon the authority of that case, we hold that the court below erred in refusing to allow the assessment roll to be introduced in evidence.

The judgment and order denying a new trial are reversed.

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153 Cal. 44

WILLIAMS v. CITY OF SAN PEDRO et al. (L. A. 1,907.)

(Supreme Court of California. Feb. 11, 1908. Rehearing Denied March 12, 1908.)

1. PUBLIC LANDS—TIDE LANDS—LIMITATION ON SALE—STATUTE CONSTRUED.

Pol. Code, § 3488, excluding tide lands "within two miles of" certain cities and towns from the operation of laws authorizing the sale of state lands, applies to lands within such cities and towns as well as to those outside and within two miles of the municipal limits.

2. SAME—VALIDITY OF CERTIFICATE.

Under Pol. Code, § 3488, excluding tide lands within two miles of certain cities and towns from the operation of laws authorizing the sale of state lands, a certificate of purchase of state tide lands lying within such limits is void.

3. QUIETING TITLE—INVALID TITLE—RIGHTS OF DEFENDANTS.

Where, in an action to quiet title, plaintiff relies on a certificate of purchase of state tide lands, valid on its face, but void under Pol. Code, § 3488, excluding tide lands within two miles of certain cities and towns from the operation of laws authorizing the sale of state lands, defendants are not precluded from questioning the validity of the certificate because they do not bring themselves in privity with the paramount source of title, though they are not in possession, since, in actions to quiet title, plaintiff cannot prevail unless he shows title in himself, because if he has none he cannot complain that some one else, also without title, asserts an interest.

Shaw, J., dissenting in part.

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action to quiet title by George H. Williams against the city of San Pedro and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Geo. S. Hupp, Wm. T. Blakely, H. W. Duncan, and Frank Karr, for appellant. J. W. McKinley, Minor P. Goodrich, Flint & Barker, and Barker & Bowen, for respondents.

ANGELLOTTI, J. This is an action to quiet title to certain land in Los Angeles county. Plaintiff alleges that he is the owner and entitled to the possession of the same. The allegation of such ownership and right to possession was denied by each of defendants. Upon the trial, the only evidence of title in plaintiff offered consisted of an application by plaintiff to the surveyor general to purchase the land from the state as tide lands, a certificate of purchase therefor issued November 5, 1901, to plaintiff by the register of the state land office, and evidence that since the date of such certificate the land had been assessed to plaintiff, and he had paid the taxes thereon. The documents were in all respects regular on their face. The certificate stated that the land was "state tide land," which it admittedly was. It was in effect stipulated by the parties at the time of the offer of the documents in evidence that the land was at the time of application and certificate wholly within the city of San Pedro, an incorporated city of this state. This stipulation having been made, defendants objected to the admission of the documents in evidence, upon the ground that the land, being within an incorporated town, had been reserved from sale, and the certificate was therefore void. The objection was sustained, and the documents excluded. Plaintiff, without offering any other evidence of title, rested, and defendants submitted the case without evidence. The court found that plaintiff was not the owner or entitled to the possession of any part of the land, and directed judgment of dismissal. This is an appeal by plaintiff from such judgment.

In view of the stipulation as to the location of this tide land, the lower court did not err in excluding the application to purchase and the certificate of purchase issued thereunder.

It was not made to appear that the land fronted on any harbor, estuary, bay, or inlet used for purposes of navigation, and therefore it does not appear that the land was withheld from sale by virtue of section 3 of article 15 of the Constitution. At the time of such application to purchase and ever since, section 3488 of the Political Code provided in terms that all tide lands "within two miles of" any incorporated city or town other than San Francisco or Oakland are excluded from the operation of the provisions of law authorizing the sale of state lands. This provision withheld from the state officers all authority to grant or sell tide lands within the city of San Pedro. The contention of appellant that this limitation as to lands subject to sale applies only to lands situated outside of, and not exceeding two miles beyond, the limits of incorporated cities and towns, is not of sufficient force to merit discussion. Lands in the city of San Pedro are necessarily within two miles thereof, and there is nothing in the language used by the Legislature in former statutes, or in this particular statute with reference to tide lands in San Francisco or Oakland, which compels a contrary construction. The certificate of purchase was therefore, for a reason not apparent on its face, void, for want of authority in the state officials to convey the land described therein.

It is claimed that the defendants are not in a position authorizing them to question the validity of the certificate of purchase. This claim is based on the fact that the defendants did not bring themselves in privity with the paramount source of title, and it is claimed that the certificate of purchase, valid on its face, is, therefore, conclusive against them. In support of this contention, Doll v. Meador, 16 Cal. 324, is relied on. While the opinion in that case may be construed as giving some support to the claim that one cannot attack a patent (and a certificate of purchase is the same in this respect as a patent), unless he connects himself in some way with the original source of title, it is now thoroughly established that although a patent is apparently regular on its face, yet if, looking beyond the patent for a law upon which it is based, "it is found that there is no law which authorizes such a patent under any state of facts, or that the particular tract named in the patent has been absolutely reserved from disposal, then the patent will be worthless and assailable from any quarter." Gale v. Best, 78 Cal. 237, 20 Pac. 550, 12 Am. St. Rep. 44. As we read Doll v. Meador, supra, it recognizes this general rule, for it is said therein by the court, through Mr. Justice Field, that "if it" (the patent) "be issued in the absence of legislation directing a disposition of the property described, or, by an officer who is not invested with power to sign the same, or for an estate prohibited, its validity may also be controverted in any action, either directly or collaterally." In Edwards v. Rolley, 96 Cal. 408, 31 Pac. 267, 31 Am. St. Rep. 234, this court admitted that the claim here made found support in Doll v. Meador, supra, but said that on this point the case has not been followed. It then said, speaking through Judge Temple: "In St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875, the true rule is declared in an opinion written by Judge Field. He says: 'On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others.' The court further quoted and approved the language of the United States Supreme Court in Steel v. St. Louis Smelting Co., 106 U. S. 447,[1] 27 L. Ed. 226, that if the lands purported to be conveyed by the patent "never were the property of the United States, or if no legislation authorized their sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time and in any form of action." See, also, Carr v. Quigley, 57 Cal. 394; McLaughlin v. Heid, 63 Cal. 208; S. P. R. R. Co. v. Garcia, 64 Cal. 515, 2 Pac. 397; S. P. R. R. Co. v. McCusker, 67 Cal. 67, 7 Pac. 122; Cucamonga, etc., Co. v. Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359; Fredericks v. Zumwalt, 134 Cal. 44, 48, 66 Pac. 38; Stoddard v. Chambers, 43 U. S. (2 How.) 317, 11 L. Ed. 283; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844; Lake Superior, etc., Co. v. Cunningham, 155 U. S. 373, 15 Sup. Ct. 103, 39 L. Ed. 190. In Klauber v. Higgins, 117 Cal. 451, 49 Pac. 466, an action to quiet title, the land involved was tide land within two miles of the city of San Diego, and the plaintiffs claimed under patents purporting to convey the same under the general laws of the state providing for the sale of tide lands owned by the state, but reserving from sale tide lands within two miles of any town or village. It was held that the patent being shown to be for lands for the sale of which no provision had been made, the law expressly reserving them from sale, the patent was absolutely void, and inoperative to pass the title, and objection could be taken to it at any time and in any form of action by one who had no other claim than mere possession. The distinction is carefully made in the case just cited between the cases of the character under discussion, and those where the authority to issue the patent depends on the existence of particular facts in reference to the condition or character of the property, or the performance of certain antecedent acts, and officers have been appointed for the ascertainment of these matters in advance, who have passed upon them and given their judgment. In the latter class, it is well settled that the decision of the officers to whom the determination of the question is submitted by the law, though erroneous, cannot be collaterally attacked, even by one showing subsequent title from the same source. As put in Gale v. Best, supra: "If a large body of public lands be subjected to sale or other disposition under a law which has merely a general reservation of such parts of those lands as may be found to be of a particular character—such as swamp or mineral—then the Land Department has jurisdiction to determine the character of any part thereof, and a patent is conclusive evidence that such jurisdiction has been exercised. In such a case, the patent could be attacked only by a direct proceeding, and by a person who connects himself directly with the title of the government." In such cases, the rule applied in Doll v. Meador, supra, is properly applicable. But, as we have seen, this rule cannot be held applicable as to lands which have by sufficient description of location been expressly reserved by the state from sale.

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[1] 1 Sup. Ct. 389.

We regard it as absolutely immaterial in this connection that it does not appear that defendants were in possession of the land. Some of the cases cited state that one in possession is in a position to contest the right of another claiming under a void patent, from which it might be inferred that possession at least is essential to such a contest. It is elementary that a plaintiff in an action to quiet title cannot prevail unless he shows title in himself. If he has no title, he cannot complain that some one else, also without title, asserts an interest in the land. Pennie v. Hildreth, 81 Cal. 127, 22 Pac. 398; United Land Ass'n, etc., v. Pac. Imp. Co., 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988; City of San Diego v. Allison, 46 Cal. 162; City and County of San Francisco v. Ellis, 54 Cal. 72; Winter v. McMillan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; Heney v. Pesolli, 109 Cal. 58, 41 Pac. 819; McGrath v. Wallace, 116 Cal. 551, 48 Pac. 719; McKenzie v. Budd, 125 Cal. 602, 58 Pac. 199; Schroder v. Aden G. M. Co., 144 Cal. 630, 78 Pac. 20. A defendant in such an action may always effectually resist a decree against himself, by showing simply that the plaintiff is without title. If plaintiff here had simply shown himself to be in possession of the land involved, he would have made a prima facie case of ownership, and would have been entitled to judgment in the absence of proof of actual ownership by defendants. He did not do this, but relied solely on the certificate of purchase, as a conveyance by the state to him. This, valid on its face, would have been prima facie evidence of ownership it is true, but would have been no more, and defendants necessarily would have had the right to show the facts aliunde which rendered it worthless and inoperative as a conveyance, and thus rebut the prima facie case of ownership in plaintiff. It being established that a patent issued under such circumstances is absolutely void and collaterally assailable in any form of action, this result inevitably follows. Accompanied, as the offer of this evidence by plaintiff was, by the admission of plaintiff of the facts showing the invalidity of the proceedings of plaintiff for the purchase of the land and the certificate of purchase based thereon, all of which defendants would have been entitled to show if the admission had not been made, the trial court did not err in sustaining the objection of defendants to the evidence.

The judgment is affirmed.

I concur: SLOSS, J.

SHAW, J. (concurring). I concur in the judgment. I agree with my associates that, under section 3488 of the Political Code, the surveyor general's certificate of sale of tide lands situated within an incorporated city is void, and that the certificate in question did not disclose its invalidity on its face, and was therefore prima facie valid.

I do not agree to the proposition that the defendants, under the pleadings in this case, had shown a standing or interest sufficient to give them, or either of them a right to introduce evidence to defeat the plaintiff's prima facie title. The complaint did not aver that the plaintiff, or either of the defendants, was in possession. It counted upon title alone. The suit was brought under section 738 of the Code of Civil Procedure to determine the adverse claims alleged to have been asserted by each of the defendants. None of them, in their respective answers, pleaded any adverse claim, or alleged possession of the land. They merely denied the allegations of the complaint. The action is in the nature of an action in rem. In such actions, the rule is elementary and practically universal that no party will be permitted to interpose to defeat the prima facie title of another party to the thing, derived by him from a third person, unless such attacking party pleads, or shows in some authorized manner, that he has some right, title, or interest in the thing. A defendant who does not, himself, claim some right, title, interest, or possession has no status to question the validity of a conveyance of the property by a third person to the plaintiff. None of the cases cited in the opinion of Justice Angellotti, as I understand them, really controvert this principle, except, perhaps, United Land Ass'n v. Pac. Imp. Co., 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988. In all the others, except San Francisco v. Ellis, 54 Cal. 72, both parties pleaded either title, or possession, or the complaint alleged that the defendant was in possession. Hence, any remarks in these cases to the effect that the plaintiff must prove his allegations of title in himself, or fail in his suit, are either obiter dicta, or manifestly in affirmance of, and not contrary to, the rule I have stated. In United Land Ass'n v. Pac. Imp. Co., the defendants did set up some claim in the answer, but it seems to have been held to have been insufficient to show a valid claim, and it appears that defendants were in possession. The point was not seriously considered, and the statements there made can scarcely have been intended to declare a different rule. The case of San Francisco v. Ellis, supra, is really an affirmance of the rule stated. It was an action to cancel a deed from the state tide land commissioners to the defendant. The contents of the answer are not shown, but that is not important, since the complaint in such an action must have disclosed, at least, an apparent title in the defendant. The plaintiff failed to prove that it had either title or interest in the land, and this was held to be fatal to its right to cancel the deed to the defendant, regardless of the question of its validity.

The cases declaring the rule are numerous. The leading case in this state is Doll v. Meador, 16 Cal. 296. In discussing the right of one, not himself claiming right or title to the land, to attack the validity of title papers, valid on their face, purporting to convey the land from a third person to the plaintiff, the court there says (page 325): "The patent * * * cannot be attacked collaterally by parties who show no color of title in themselves. In such cases the parties without title cannot be heard at all." The discussion is very elaborate, and the question is thoroughly considered. The proposition has been repeatedly affirmed in subsequent decisions. People v. Stratton, 25 Cal. 251; O'Connor v. Frashear, 56 Cal. 501; Churchill v. Anderson, 56 Cal. 60; Rhodes v. Craig, 21 Cal. 422; Kile v. Tubbs, 23 Cal. 442; Terry v. Megerle, 24 Cal. 629, 85 Am. Dec. 84; Carder v. Baxter, 28 Cal. 100; Durfee v. Plaisted, 38 Cal. 83; Kentfield v. Hayes, 57 Cal. 410; Burling v. Tompkins, 77 Cal. 261, 19 Pac. 429; Dreyfus v. Badger, 108 Cal. 63, 41 Pac. 279; Standard Co. v. Habishaw, 132 Cal. 119, 64 Pac. 113; Phillips v. Carter, 135 Cal. 606, 67 Pac. 1031, 87 Am. St. Rep. 152; Harrington v. Goldsmith, 136 Cal. 169, 68 Pac. 594; McCabe v. Goodwin, 106 Cal. 490, 39 Pac. 941; Pioneer Co. v. Maddux, 109 Cal. 641, 42 Pac. 295, 50 Am. St. Rep. 67; Directors v. Abila, 106 Cal. 363, 39 Pac. 794; McFaul v. Pfankuch, 98 Cal. 403, 33 Pac. 397. See, also, Wall v. Magnes, 17 Colo. 476, 30 Pac. 56; Amter v. Conlon, 22 Colo. 150, 43 Pac. 1002. The extreme doctrine of Doll v. Meador, and some others of the above cases, that even one in possession had no standing to make such attack, unless he connected himself with the paramount source of title, has been properly modified in subsequent decisions, allowing such party to protect his possession by defeating the plaintiff's title, without proving title in himself. Klauber v. Higgins, 117 Cal. 451, 49 Pac. 466; Edwards v. Rolley, 96 Cal. 408, 31 Pac. 276, 31 Am. St. Rep. 234; Cucamonga Co. v. Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359. And this is the doctrine of the Supreme Court of the United States. Reynolds v. Iron S. M. Co., 116 U. S. 687, 6 Sup. Ct. 601, 29 L. Ed. 774.

But in the present case the plaintiff admitted that the land was in the city of San Pedro. This admission, which he was under no compulsion to make, was equivalent to a confession that he neither has, nor can have, any right, title, or interest in the premises, since he offered no other evidence than his application and the certificate issued thereon. No possessory rights are claimed, and none were adjudged. The judgment dismisses the action and gives defendants their costs. The dismissal was fully justified by the voluntary admission of the plaintiff. It does not appear that the defendants' costs are of any substantial amount. A judgment will not be reversed unless the appellant shows substantial prejudice to himself therefrom. The admission of the plaintiff, and the failure of the defendants to set up affirmatively any possession, right, or title, make it practically a moot case, for neither party, under existing laws, could obtain any right, title, or interest in the land. I perceive no substantial reason for interfering with the disposition of the case in the court below.

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152 Cal. 142

SWAN v. TALBOT. (Sac. 1,378.)

(Supreme Court of California. Oct. 3, 1907. On Rehearing, Nov. 2, 1907.)

1. JUDGES — DISQUALIFICATION — DETERMINATION.

The court must grant a motion to call in another judge where bias or other disqualification is shown, and must deny it where in his judgment the disqualifying cause is not shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, §§ 224–231.]

2. PLEADING—COMPLAINT — SUFFICIENCY AS AGAINST GENERAL DEMURRER.

A complaint in a suit in equity, which states a cause of action at law, is good as against a general demurrer.

3. CANCELLATION OF INSTRUMENTS—GROUNDS —JURISDICTION—EQUITY.

A suit for the cancellation of a bill of sale and for the restoration to plaintiff of the possession thereof, on the ground of his intoxication at the time of the execution of the bill of sale and the inadequacy of the consideration, is one in equity.

4. EQUITY—ADEQUACY OF LEGAL REMEDY.

Equity will entertain a suit where the remedy at law is not speedy, adequate, and efficacious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 151–153.]

5. SALES — VALIDITY — CANCELLATION — GROUNDS.

Equity will not assist one to avoid a contract of sale entered into when drunk merely because he would not have made the contract when sober, but will grant relief because of gross inequality in the values exchanged.

6. SAME.

Where one, while intoxicated, sold personalty of the value of about $12,000 for $200, equity will aid him by setting aside the sale and restoring him to his rights.

7. SAME—EVIDENCE—SUFFICIENCY.

In a suit to cancel a bill of sale on the ground of the intoxication of the seller therein, evidence examined, and *held* to support a finding of intoxication, rendering him incapable of executing the same.

8. CANCELLATION OF INSTRUMENTS—ACTION —RELIEF GRANTED.

Where equity obtains jurisdiction of a suit to cancel a bill of sale, and to restore the personalty to plaintiff, and finds that the sale should be rescinded, but that it is impracticable to decree a restoration of the property, the court may retain jurisdiction and render a personal money judgment against defendant in such sum as is equitable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, §§ 118–120.]

In Bank. Appeal from Superior Court, Glenn County; Oval Pirkey, Judge.

Action by George Swan against James R. Talbot. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Modified.

E. A. Bridgeford, Hiram W. Johnson, Ben. F. Geis, and Frank Moody, for appellant. Frank Freeman and Charles L. Donohoe, for respondent.

HENSHAW, J. Plaintiff sued for the cancellation and rescission of a bill of sale which he had executed to defendant, and under which defendant had taken possession of the personal property therein described. He prayed that he be restored to the possession of the property, and in case possession could not be had, be compensated for the value of the property withheld. The ground of action was that defendant had knowingly taken advantage of plaintiff while the latter was so intoxicated as to be incapable of transacting business, and, under these circumstances, secured his signature to the instrument. It was alleged that the property conveyed was of great value, and that the consideration of the bill of sale was grossly inadequate. The cause was tried before the court without a jury, and the court found the incompetency and incapacity of the plaintiff because of his drunkenness, found that the property which Swan conveyed to Talbot was of the value of $21,949.86, while the total amount due from Swan to Talbot, including $200 in coin paid to Swan at the time of the execution of the bill of sale, was but $10,604.32. The court found, moreover, that, owing to changes of ownership in the personal property, it was impracticable, while decreeing a cancellation of the bill of sale, to further order the restoration of the personal property, and therefore proceeded to give judgment for plaintiff in the sum of $11,345.54, being the difference between the amount of Swan's indebtedness to Talbot and the value of the property which Talbot obtained under the bill of sale. From this judgment and from the order denying defendant's motion for a new trial, he prosecutes this appeal.

Before trial defendant moved the court and Hon. Oval Pirkey, judge thereof, that another judge be called in to try the case, and pressed this motion with great vigor. With the same vigor he presses the matter upon this appeal, and a large part of the voluminous briefs is given over to extracts from the affidavits for and against the motion, and to a discussion of the alleged disqualification of the judge. The ground of the motion was the disqualification of the judge by reason of bias against the defendant and certain of his attorneys, together with charges of favoritism toward plaintiff's attorneys. The evidence upon both sides presented has been read and considered. It must suffice to say, without any extended review thereof, which would serve no useful purpose, that the matters charged as facts and susceptible of denial were denied fully and completely by the counter affidavits, and in some instances, at least, the falsity of the charges established. It cannot be said that it was error of the court to have refused the motion, and it is but just to add, in view of the trial court's ruling refusing so to do, that the position of the trial judge situated as was this one must always of necessity be most embarrassing and painful; for, upon the one hand, while it is his duty to grant the motion should bias or other disqualification be shown, yet, upon the other hand, it is equally his duty to deny the motion and to sit in the case himself if, in his judgment, the disqualifying cause alleged is not sufficiently established by the evidence. An added embarrassment under such circumstances arises from the fact that the judge himself is made the trier of the question touching his own bias or other disqualification; but the law has seen fit to impose this painful duty upon him, and he may not shirk its performance. Higgins v. City of San Diego, 126 Cal. 304, 58 Pac. 700, 59 Pac. 209; People v. Findley, 132 Cal. 305, 64 Pac. 472; Lamberson v. Superior Court, 91 Pac. 100.

Defendant's general demurrer to the complaint was properly overruled. That demurrer seems to be argued rather upon the proposition that the action does not state a cause in equity, than upon the theory that it does not state a cause of action at all; appellant in his argument saying that "it is possible that the complaint * * * may be held to state a cause of action in claim and delivery." Of course, if it states a cause of action addressed either to the legal or equitable side of the court, the pleading is good against a general demurrer. But, as the question of the real character of the action arises in other ways upon this appeal, as upon the court's refusal to grant a jury trial, it may here be said that the action is one addressed to the equitable consideration of the court. The instrument in question was not void upon its face, but called for extrinsic proof to show its invalidity. Under such circumstances it is well settled that an action in equity will lie. 3 Pomeroy's Eq. Jur. § 1399; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474. Nor does the mere fact that there is a remedy at law oust the court of its equitable jurisdiction. That remedy must also be speedy, adequate, and efficacious to the end in view, or otherwise equity will entertain the plea of the suitor. Watson v. Sutherland, 5 Wall. (U. S.) 74, 18 L. Ed. 580. The rule of equity in lending its assistance to a man who pleads drunkenness in avoidance of his contract is thus laid down by Judge Story (Eq. Jur. § 231S), and it has come to receive well nigh universal acceptance. He says: "Courts of equity, as a matter of public policy, do not incline on the one hand to lend assistance to a person who has obtained an agreement or deal from another in a state of intoxication; and, on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deal merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law unless there is some fraudulent contrivance or some imposition." Equity, therefore, will not assist a man to avoid a contract which he has entered into when drunk merely because when in his sober senses he may wish he had not entered into it. But, upon the other hand, it will not countenance fraudulent imposition. Gross inequality in the values exchanged—between the consideration moving to and that moving from the drunken party—is always received as evidence of imposition. Here the party pleads his total ignorance of the transaction by reason of his drunkenness, and, in effect, that he was induced to part with property of the value of about $12,000 for $200 in hand paid to him while in the midst of a drunken debauch. Here surely is presented one of the cases of exception to the rule that equity in general will leave the parties to such contracts to their ordinary legal rights and remedies. Phelan v. Gardner, 43 Cal. 306; Moore v. Moore, 56 Cal. 92. In Phelan v. Gardner, supra, it is declared that, in order to defeat a settlement made by him, the plaintiff may show that at the time he was incapable of contracting intelligently by reason of intoxication, and evidence of his condition as to being intoxicated several hours after the settlement may be given, as tending to throw light on his condition when the settlement was made. In Moore v. Moore, supra, the well-settled principle is laid down that whenever there is great weakness of mind in a person executing a contract, arising from any cause, and the consideration given for the property is grossly inadequate, imposition or undue influence will be inferred, and equity will, upon a proper and reasonable application, interfere and set the contract aside. From what has already been said, it is apparent, therefore, that the judge was justified in refusing defendant's demand for a trial by jury.

It is contended that the evidence is insufficient to support the finding of plaintiff's legal incapacity by reason of intoxication. By plaintiff it was shown that he was, and for years had been, a tenant of defendant, farming parts of defendant's lands on shares, and that he had accumulated personal property, farming utensils, stock, interest in growing crops and the like of great value. He was married, and with his wife lived upon one of defendant's ranches. He discovered that his wife was illicitly intimate with defendant, and, upon the discovery, went to the neighboring town of Willows and undertook to drink away his sorrow. His drinking led to a protracted debauch, lasting several days. Upon the day that the bill of sale was executed, and before its execution, he was so drunk, according to the testimony of several witnesses, that he fell on the streets and had to be helped upstairs, and three hours after the execution of the instrument he was so drunk that he collapsed and was put to bed. He recollected nothing of the transaction. There was thus certainly sufficient evidence in the record to support the finding of the court.

The action is in form a simple action for a rescission of the bill of sale and the restoration to plaintiff of the property of which defendant took possession under the instrument. As has been said, the court found for a rescission of the instrument, but found also that it was impracticable to decree a restoration and return of the property, and it proceeded thereupon to state and settle an account between the parties. Objection is made to this by the appellant upon the ground that the complaint nowhere asks for such relief. But the proceeding adopted by the court was wholly consonant with the principle that, where equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjustment of all differences between the parties arising from the cause of action presented. It is, indeed, the duty of a court of equity, when all the parties to the controversy are before it, to adjust the rights of all and leave nothing open for further litigation. Ord v. McKee, 5 Cal. 515; Kraft v. De Forest, 53 Cal. 657; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64. It is no objection to the relief which is thus decreed in an equitable action that the court should finally determine that the necessary and appropriate remedy should take the form of a personal monetary judgment. Van Rensselaer v. Van Rensselaer, 113 N. Y. 207, 21 N. E. 75. The court in this case was therefore justified in determining the value of the properties conveyed by Swan, the amount of Swan's indebtedness to Talbot, and in decreeing a personal judgment for the difference.

For these reasons the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.

On Rehearing.

PER CURIAM. In his petition for a rehearing appellant, with other matters, presses upon the attention of the court the fact that in the judgment given against him he is charged with the sum of $2,591.96, being the amount of a note for $2,000, with interest, executed by one Anderson to plaintiff and by plaintiff deposited as collateral security for his indebtedness to the bank, the payment of which indebtedness defendant had assumed. Petitioner, moreover, shows that there is a direct conflict in the evidence between Swan, the payee, and Anderson, the maker of the note; Swan testifying that it was a note given by Anderson in payment of moneys which plaintiff had from time to time loaned to him, Anderson testifying that it was a mere accommodation note given to Swan to assist him in borrowing money. There is no evidence touching the responsibility of the maker of the note, nor of its value. Under these circumstances, it was inequitable to charge Talbot with the amount of the note and accrued interest. The judgment against Talbot should therefore be modified by subtracting therefrom the amount of the Anderson note with accrued interest.

The judgment heretofore given by this court is set aside, and the following judgment given: It is ordered that the court below modify the judgment heretofore given by substracting from the judgment against Talbot the amount of the Anderson note, with accrued interest, and that, when so modified, the judgment shall stand affirmed. The order denying a new trial is affirmed. Appellant shall recover his costs on this appeal.

(153 Cal. 29)

In re DOOLITTLE'S ESTATE. (L. A. 2,065.)

(Supreme Court of California. Feb. 10, 1908.)

1. APPEAL—REVIEW—FINDINGS—CONCLUSIVENESS.

The rule that a verdict or finding will not be disturbed where there is a substantial conflict of evidence on the issue of fact involved applies to litigation over the validity of wills as well as to any other kind of litigation.

2. WILLS—MENTAL CAPACITY.

Though extremely feeble physically and in a dying condition, one may retain his mental faculties sufficiently to enable him to make a valid will. Such condition is entitled to consideration in determining his mental capacity, and is of marked significance when there is also evidence tending directly to show his feeble mental condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 92.]

3. SAME—EVIDENCE—SUFFICIENCY.

Evidence *held* to sustain a finding that when testator made his alleged will he had insufficient mental capacity to make a will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 137–161.]

4. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—SUFFICIENCY OF SHOWING.

A new trial on the ground of newly discovered evidence is properly refused where the affidavits offered are either of little importance or are merely cumulative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 218–220.]

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

In the matter of the estate of Lutellus Doolittle, deceased. William S. Doolittle and another contest the probate of decedent's alleged will offered for probate by L. D. Davenport. From a judgment denying the probate, proponent appeals. Affirmed.

Frank James, for appellant. Gavin W. Craig and Frank C. Vaughn, for respondents.

McFARLAND, J. This appeal arises out of a contest over the probate of the alleged will of Lutellus Doolittle, deceased. The proponent is L. D. Davenport, who is the main beneficiary in the will, and named therein as executor. The contestants are a brother and sister of the deceased. The case was tried without a jury, and the court found that at the time of the alleged making of the will the deceased was of unsound mind and incapable, from such unsoundness of mind, of making a will, and that the alleged will is not his will; and judgment was entered denying the probate. The proponent made a motion for a new trial, which was denied, and from the order denying the motion he appeals.

Appellant makes two points for a reversal, first, that the evidence was not sufficient to justify the finding that the deceased was not of sound mind; and, second, that a new trial should be granted on account of newly discovered evidence.

1. This court has a number of times set aside verdicts upsetting wills in cases where there was ample proof of the validity of the will in question, and what was claimed to be conflicting evidence was mere pretense, and without material and substantial value. But of course the rule that a verdict or finding will not be disturbed where there is a real and substantial conflict of evidence on the issue of fact involved applies to litigation over the validity of wills as well as any other kind of litigation; and, in our opinion, this rule as to conflicting evidence applies to the case at bar, and to the finding that the deceased was of unsound mind and incapable of making a will at the time of the alleged making of the will here in question. We will not notice in much detail the evidence on which the finding is based, but will notice only a few leading circumstances. The document in question was signed by the deceased, by making his mark, at the hospital of the National Soldiers' Home of Los Angeles county, about 10 o'clock a. m. of February 26, 1905. He had been in the hospital several days suffering from an attack of acute pneumonia, which caused his death. He was in an exceedingly weak and feeble condition physically. One of appellant's witnesses says: "I saw Mr. Doolittle make his mark. He tried to write his name, but could not do it. He was weak, and could not sit up straight in bed." The evidence shows that he was evidently about as weak and feeble physically as a man can well be and still live. He was dying at the time of the alleged making of the will. Dr. Parker, a subscribing witness, and a witness for appellant at the trial, speaking of the condition of the deceased at the time of the making of the will, said: "He was a dying man, of course." And he died within an hour thereafter. Of course a man may be extremely weak and feeble physically, and may be in a dying condition, and yet retain his mental faculties and will power to such an extent as to enable him to make a valid will; but such a feeble and dying condition is entitled to consideration in determining his mental capacity, and is of marked significance when there is also evidence tending directly to show his feeble mental condition.

There is evidence that he was, part of the time, at least, in a state of dumbness and deep stupor. He died in a cot in the hospital, surrounded by other cots in close proximity, occupied by other patients. About 7 o'clock in the morning, an hour or two before the making of the will, one of the attendants at the hospital brought the deceased his breakfast and spoke to him, but could not get any answer. "He appeared to be asleep and drowsy." He did not eat anything. Afterwords at about 10:30 o'clock he again asked the deceased if he wanted to eat anything, but could get no answer. Dr. Parker, appellant's witness, speaking of the time of the making of the will, says: "He was very sick, slightly drowsy, but when aroused and spoken to he answered clearly and rationally. * * * He could speak but with some difficulty." There was other evidence pointing in the same direction. Moreover the will was written by the appellant, and there was a sharp conflict of evidence as to whether the deceased was a moving party in having the will made, whether he dictated it to the appellant, or whether the latter first read the various paragraphs and then asked the deceased if it was what he wanted. When appellant came to the cot of the deceased to write the will, he asked one Griffith to be a subscribing witness, and to take notice "of what was going on there that morning." The witness said: "My bed was right there, and I sat down and listened to the whole business." When asked "if Mr. Doolittle gave the substance of the will to Davenport as he wrote it," he answered: "Well, no; I could not say that." Again he said: "I did not hear Mr. Doolittle say anything that morning that I remember of besides asking Mr. Davenport to read one part of the will over again. I didn't hear him give any directions at all as to whom he wished to dispose of his property." The witness Wallingford testified that he was present when the will was drawn. He testified that appellant "would read a little ways and ask him if that was satisfactory to him, and he would say: 'Yes; it is right.'" Q. "Did it happen like this—that Davenport would read a little and ask Doolittle if that was satisfactory to him, and Doolittle would say 'Yes'?" A. "Well, that was just the way it was." The appellant testified that on the morning when the will was made he went to the ward where the deceased was at the request of a Dr. Hasset, who had informed him that Doolittle wanted to settle up his affairs. He testified that when he went to the cot occupied by Doolittle, he said "Good morning," and Doolittle replied: "They say I can't get well. Do you think so, Mr. Davenport?" Davenport replied that he was afraid it was so. Doolittle, according to Davenport's testimony, then said that he wanted his affairs settled, saying nothing, however about a will, and Davenport told him it would be necessary for him to make a written will. But another witness, Barth, testified that upon that morning he saw Davenport coming into the ward; that he went to Doolittle's cot, and said: "Hello, Dooley, you remember me?" There was other evidence, some of which is hereinbefore referred to, tending to show that the appellant, and not Doolittle, was the moving party in having the will made. Indeed it is highly probable that if the deceased had not been "roused and spoken to," and the making of the will pressed upon him, it never would have been made. The fact is significant—outside of the question of undue influence, which is not raised here—for, if the purpose of making the will had originated with the deceased, and he had, of his own motion, carried that purpose into effect, those facts would have been important evidence to the point that notwithstanding his feeble and dying condition he still had the will power and the mental capacity to make the will. But if he was merely the passive, half-conscious assenter to the dictation of another person, that fact would be consistent with and corroborative of the want of testamentary capacity found by the court.

There are other facts and circumstances urged by respondents in support of the judgment which we will not discuss. The evidence and circumstances referred to are sufficient to support the finding excepted to; and there is no warrant for us to hold that, notwithstanding that evidence and the peculiar circumstances surrounding the alleged making of the will, the court should have found the other way.

2. As to the ground of newly discovered evidence, it is sufficient to say that, waiving the question of laches, the affidavits offered are either of little importance, or are merely cumulative.

The order appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

153 Cal. 39

In re WOODARD'S ESTATE. (L. A. 1,989.)

(Supreme Court of California. Feb. 10, 1908.)

TAXATION—COLLATERAL INHERITANCE TAX.

In determining the amount of collateral inheritance tax to be paid by those succeeding to the estate of a decedent, the law in force at the time of the death of the deceased governs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1676, 1709, 1714.]

In Bank. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

In the matter of the estate of Edson G. Woodard, deceased. From an order of the superior court settling the final account of the administrator with the will annexed of the estate of deceased, and from an order decreeing final distribution, George F. Schwartz, as county treasurer of the county of San Diego, appeals. Orders reversed.

Cassius Carter and Albert Schoonover, for appellant. W. J. Mossholder, for respondent.

PER CURIAM. This is an appeal by George F. Schwartz, as county treasurer of the county of San Diego, from two orders of the superior court—one settling the final account of the administrator with the will annexed of the estate of deceased, and the other decreeing final distribution. No brief on behalf of respondent has been filed. Under the will of deceased his brother was entitled to the whole estate, and the sole question presented by counsel for the appellant is to what act of the Legislature must we look to determine the amount of collateral inheritance tax to be paid by those succeeding to the estate? That question is answered by two decisions of this court. Estate of Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788; Trippet v. State, 149 Cal. 526, 86 Pac. 1084, 8 L. R. A. (N. S.) 1210. It is the act in force at the time of the death of the deceased that must govern. At the time of the death of this deceased the act in force was that of March 20, 1903 (St. 1903, p. 268, c. 228), under the provisions of which the tax upon property passing to a brother was 5 per cent. The lower court erroneously proceeded upon the theory that the act of 1905 (St. 1905, p. 341, c. 314), which fixed such tax at 1½ per cent., was applicable.

The orders appealed from are reversed, and the cause remanded.

153 Cal. 24

CADY v. CITY OF SAN BERNARDINO et al. (L. A. 1,943.)

(Supreme Court of California. Feb. 10, 1908.)

1. MUNICIPAL CORPORATIONS — CONTRACTS — PROPOSALS FOR BIDS—ADVERTISEMENT.

Under the charter of the city of San Bernardino, § 140, providing that no supplies, material, or other item of expenditure for an amount exceeding $300, except for personal services, shall be ordered or purchased by the mayor and common council, except after first advertising for sealed proposals, it was not necessary, in calling for proposals and bids for furnishing electric lights, that the council fix the absolute number of lights required, upon which number alone proposals were to be received.

2. SAME—BIDS—DEPOSIT OF SECURITY.

The charter of the city of San Bernardino, § 140, relating to awarding contracts to bidders, and requiring that proposals must be accompanied by a certified check in an amount not less than 10 per cent. of the sum bid, which check must be forfeited to the city on failure of the bidder to enter into the contract awarded, requires the security merely for the protection of the city, in the event that the successful bidder should refuse to enter into the contract, and, where the contract has been finally entered into, the purpose of the requirement is at an end, and the failure of the city to require the deposit is no ground for objection to the contract by a taxpayer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 671.]

Department 2. Appeal from Superior Court, San Bernardino County; N. P. Conrey, Judge.

Action by G. C. Cady against the city of San Bernardino and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Byron Waters, for appellant. Gregg & Surr and Ralph E. Swing (Seward A. Symons, of counsel), for respondents.

HENSHAW, J. This action was brought by plaintiff, as a taxpayer of the city of San Bernardino, to obtain a judgment against the defendants to the effect that a certain contract which had been entered into between them for the furnishing of illuminating light to the city of San Bernardino was void. A general demurrer to the complaint was sustained. Judgment followed for defendants, and plaintiff appeals.

The city of San Bernardino called for proposals and bids for the furnishing of electric lights to the city under section 140 of its charter. The section provides that no supplies, material, or other item of expenditure, for an amount exceeding $300, except for personal services, shall be ordered or purchased by the mayor and common council, except after first advertising for sealed proposals, and awarding the contract to the lowest and best bidder, "which proposal must be accompanied by a certified check in an amount not less than ten per cent. of the sum bid, which check must be forfeited to the city upon failure of the person, firm or corporation bidding to enter into the contract awarded"; and a sufficient bond payable to the city, with two or more sureties, or a surety company bond, shall be required to secure a faithful performance of each contract awarded.

The propositions advanced by appellant against the contract, and upon which he asserts it to be absolutely void, are based upon what he conceives to be violations of this provision of the charter. Herein he contends that the contract is void because the call for bids did not specify any particular number of lights, nor the candle power thereof, which the city would require. In this respect, the bid of the power company, which is set forth at length in the complaint, shows that the company agreed to furnish such a number of lamps and lights as the city might require, describing the lamps and their candle power, at the price of $4.49 for each lamp during each and every calendar month of the term. The call for the proposals declared that the bidder shall furnish a statement of detail of the kind of light he proposes to furnish, the candle power thereof and the price, for each light, per month, or otherwise. It is next contended that the certified check with which the defendant power company accompanied its bid was only for $50, and that, under the nature of the call for bids, no bidder could tell what amount should be named in the certified check accompanying the bid. And finally, it is urged that the provisions of the charter do not admit of the making of a contract containing the uncertain element as to the number of lamps or lights which the city might require; that, in other words, the call for bids should have prescribed the precise number of lights which the needs of the city exacted.

Upon all these points, as appellant declares, he relies on the familiar principle that the mode prescribed by the charter of the city is the only mode for the exercise of the power conferred, and that in the respects above enumerated there is a departure from that mode so flagrant as to render the contract void. Respondent makes answer that the charter provision in question has no applicability to a contract of a city for supplying it with gas, or other illuminating light, and that such has been held where the question was the furnishing of a municipality with water (Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 Pac. 189); that the same reasoning and rule under section 19, art. 11, of the Constitution, should apply to the furnishing of light. Denninger v. Recorder's Court, 145 Cal. 632, 79 Pac. 360; Harlem Gas Co. v. New York, 33 N. Y. 309. But, without pausing to decide this question, and for the purposes of this case, taking the position which most strongly favors the appellant, we are still of the opinion that the trial court's ruling, sustaining the demurrer, was sound. The first objection, that the council should have fixed the absolute number of lights required, upon which number alone proposals were to be received, is not sustained by reason or authority. It was the duty of the officers of the municipality tc provide the city with adequate light. As the city should increase or decrease in population, more or fewer lights would be required. It would be absurd to exact that the city should advertise for and specify the number of lights, when during the life of the contract its need might be for five times the number, or again, where from calamity, or other cause, its necessities might be reduced to one-fourth of the prescribed number. The simple, direct, and understandable method was that employed, to call for the supply of lights of designated character and candle power, burning for a designated time, at so much per week or month. This was the method adopted, and is the general method. State v. City of Philipsburg, 23 Mont. 16, 57 Pac. 405; Baxter Springs v. Baxter L. & P. Co., 64 Kan. 591, 68 Pac. 64; Vincennes v. Citizens' G. & L. Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 487; Town of Colorado City v. Townsend, 9 Colo. App. 249, 47 Pac. 663; Altgelt v. San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 386; Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

The second contention of appellant that the bid of the power company was not accompanied by a certified check to the amount of 10 per cent. of the bid is equally untenable. In the first place, it would be difficult under the circumstances of this bid for the company to have determined with exactness what would have amounted to 10 per cent., and a court would be reluctant in such a case where a bona fide bid was presented to overthrow it upon such narrow ground. But, of more consequence still, is this consideration: the requirement that a certified check for 10 per cent. of the amount shall accompany the bid is one wholly for the benefit of the city, to avoid possible loss in the event that the successful bidder should refuse to enter into the contract, thus, perhaps, entailing the necessity of readvertising. It is conceivable that a taxpayer might have a grievance which would be heard in court to prevent the consideration by the officials of such a bid not so accompanied by the 10 per cent. certified check, but that grievance is certainly at an end when the bidder, in good faith, and under an approved bond, has entered into the contract. Such is the condition here. The purpose of the requirement was at an end when the contract was entered into, and, as this proceeding is brought after that fact and to avoid the very contract, the appellant is without standing upon this proposition.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; McFARLAND, J.

153 Cal. 56

LOCKE v. LOCKE. (L. A. 2,134.)

(Supreme Court of California. Feb. 13, 1908.)

1. DIVORCE—GROUNDS—"WILLFUL NEGLECT."

Where, in a suit by a wife for divorce on the ground of willful neglect, enumerated in Civ. Code, § 92, as a cause of divorce, and defined in sections 105, 107, as the neglect of the husband for one year to provide for his wife the common necessaries of life, the court found that the wife by reason of ill health was obliged to give up her business, and that for more than a year she had been unable to support herself, and that friends had furnished board and lodging for her, and that the husband failed to make any provision for her, it was error to refuse her a divorce, though the husband had failed to support her, and she had supported herself; sections 124, 125, providing that a divorce must be denied because of unreasonable lapse of time in commencing the action, not being applicable.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7483.]

2. SAME.

It is not the policy of the law to encourage divorce.

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Carrie E. Locke against William C. Locke. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

Gardner & Fairall and Cyril H. Bretherton, amicus curiæ, for appellant. William E. Locke, for respondent.

McFARLAND, J. This is an action by the wife against the husband for a divorce upon the ground of willful neglect. The court made findings, and rendered judgment denying the divorce. From this judgment, plaintiff appeals.

It is averred in the complaint "that the defendant for more than one year last past has failed to provide the plaintiff the common necessaries of life because of his idleness, profligacy, and dissipation." The court found "that the defendant for more than one year last past has failed to provide the plaintiff the common necessaries of life, because of his idleness and dissipation; that he was an able-bodied man, able to earn good wages and to have the means and ability to furnish plaintiff the common necessaries of life, but has wholly failed to furnish her with the common necessaries of life." The court further finds that the plaintiff and defendant intermarried in the city of Denver in the state of Colorado on the 8th day of September, 1897. It further finds "that shortly after the marriage of plaintiff and defendant they went from Colorado to Texas, and during their stay in Texas plaintiff was compelled to and did support herself; that thereafter the defendant left the plaintiff in Texas without any means of support, going to Denver, where the plaintiff afterwards joined him; that the defendant failed to make any provision at all for the plaintiff, who, with money furnished by her relatives, started a hairdressing parlor, where, in connected rooms, plaintiff and defendant resided during about three years prior to the plaintiff coming to California. During all this time plaintiff was compelled to and did support herself by her own earnings, and the defendant contributed nothing toward her support, but, on the contrary, was furnished by her with money from her earnings, and pawned some of her personal effects and used the money." From these facts the court found as conclusions of law "that the plaintiff was supported by her own earnings for eight years prior to the commencement of this suit, and that said earnings were the community property of plaintiff and defendant"; and, further, that "there was an unreasonable lapse of time before the commencement of this action, even before the plaintiff came to California. The divorce must be denied." But the court further found "that plaintiff, by reason of ill health, brought on by overwork, gave up her business in Colorado and came to California in October, 1905; that during the time since leaving Colorado she has been unable to support herself, but has been assisted by friends, to the extent of being furnished board and lodging free by them." We are of the opinion that upon the findings the court should have given judgment for plaintiff, and erred in denying it. "Willful neglect" is enumerated in section 92 of the Civil Code as a cause of divorce, and is defined in section 105 as "the neglect of the husband to provide for his wife the common necessaries of life, he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy, or dissipation"; and by section 107 it must continue for one year. If it be law, as intimated by the court below (which question we do not here consider or determine), that a wife cannot obtain a divorce for willful neglect if she supports herself by her own work, because her earnings are community property, and, therefore, in legal contemplation, contributed by the husband, still that harsh rule would not defeat the action in the case at bar; because for more than a year before the commencement of the action plaintiff could not, and did not, support herself, and therefore, according to this theory, she had no cause of action until she ceased her self-support. There was, therefore, willful neglect for more than the full statutory period immediately before the commencement of the suit, entirely free of any consideration of former self-support of the wife; and this constituted, in itself, a perfect and independent cause of action, not affected by the previous conduct of the parties. We do not think that the provisions of sections 124 and 125, Civ. Code, relating to "unreasonable lapse of time before the commencement of the action," affect the case at bar. It would be attributing to the Legislature a very unjust and unreasonable purpose to hold the meaning of the Code to be that when a husband is guilty of willful neglect to provide for his wife she must immediately, or within any particular time, commence an action for divorce, and must not endeavor to support herself, and avoid what may be to her the very disagreeable event of a divorce, or she must forfeit forever the right to procure a divorce for willful neglect either past or future; and to compel that purpose to be attributed to the Legislature would require language to that effect much more direct and clear than that found in the Code. It is not the policy of the law to encourage divorces and to urge wives to bring suit to obtain them. We do not think that in the case at bar the plaintiff is estopped by laches from maintaining the present action merely because, under the facts developed in the record, she refrained from bringing other suits for previous willful neglects by defendant. See Thomson v. Thomson, 121 Cal. 11, 53 Pac. 403.

The judgment is reversed, and the cause remanded, with directions to the superior court, upon the findings as they stand, to render an interlocutory judgment of divorce in favor of plaintiff as prayed for in the complaint.

We concur: SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

SHAW, J. (concurring). I concur in the judgment. During the time the plaintiff supported herself she had no cause of action for divorce on the ground of nonsupport. Washburn v. Washburn, 9 Cal. 476; Rycraft v. Rycraft, 42 Cal. 445. The delay during that time to begin the action could not affect the case, for she then had no right of action. The cause of action she had was for nonsupport during the year ending in October, 1906. She began the action therefor on November 8, 1906.

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153 Cal. 53

UNITED RAILROADS OF SAN FRANCISCO v. COLGAN, Controller, et al.

(S. F. 4,368.)

(Supreme Court of California. Feb. 11, 1908.)

APPEAL—PERSONS ENTITLED—PARTIES AGGRIEVED—TAXATION.

A railroad was taxed by the county and city of San Francisco as an ordinary street railroad, and also taxed by the state as a railroad operated in more than one county. The city and county taxes were higher than the state taxes, and the state was entitled to a greater amount of tax by taking their share of the city and county tax than by taking their own tax. The railroad paid the higher tax into court, and interpleaded the parties, and from the judgment sustaining the higher tax the state appealed through its State Controller in the interest of the state only. *Held* that, inasmuch as the reversal of the judgment would deprive the state of a portion of the amount of the tax to which it was then entitled, neither the state nor the State Controller was a party aggrieved, entitling them to appeal.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Interpleader by the United Railroads of San Francisco against E. P. Colgan, Controller of the state, and others, and E. J. Smith, tax collector of the city and county of San Francisco, to determine the right to tax plaintiff. From a judgment in favor of the city and county, the state appeals. Appeal dismissed.

U. S. Webb, Atty. Gen., and George A. Sturtevant, Deputy Atty. Gen., for appellant. Percy V. Long, City Atty., William I. Brobeck, Asst. City Atty., William G. Burke, City Atty., and A. S. Newburgh, Asst. City Atty., for respondent.

ANGELLOTTI, J. The state board of equalization claimed the right to assess and assessed for the fiscal year 1903–04, the franchise, roadway, roadbed, rails, and rolling stock of plaintiff, a corporation having its principal place of business in the city and county of San Francisco, upon the theory that such railroad was a "railroad" operated in more than one county. Section 10, art. 13, Const. The assessors of the city and county of San Francisco and San Mateo county, the two counties in which plaintiff operates its railroad system, claimed the right to assess and assessed the portions thereof legally situate in their respective counties, upon the theory that the railroad was purely a "street railroad," and not a "railroad" within the meaning of that word as used in section 10, art. 13, Const. See S. F. & San Mateo, etc., v. Scott, 142 Cal. 222, 75 Pac. 575. The assessment valuation made by the state board of equalization, apportioned to the city and county of San Francisco was much lower than that of the city and county authorities, and the total assessment valuation made by such state board of all the property in both counties was much lower than the valuation by the San Francisco authorities of that portion claimed to be assessable by them. The State Controller claimed the right to collect all the taxes levied upon the state assessment, including the city and county taxes for the use of the city and county of San Francisco, while the tax collector claimed the right to collect all the taxes levied upon said city and county assessment, including the state tax for the use of the state. The taxes according to the city and county assessment valuation amounted to $364,572.99, and according to the state valuation to $327,000. Under these circumstances plaintiff brought this action to compel the State Controller and the city and county tax collector to settle their conflicting claims between themselves, paying into court the amount of taxes due upon the higher assessment. Plaintiff was thereupon relieved from further prosecution of the action, and ordered discharged from any and all liability on account of said taxes, and the defendants required to interplead in the action. The action was tried as between the State Controller and the city and county tax collector, and resulted in a judgment sustaining the validity of the city and county assessment, and the consequent right of the city and county tax collector to receive the whole amount, which amount was ordered paid to him. The State Controller has appealed from this judgment and from an order denying his motion for a new trial, and he, representing the state and with no interest in the appeal except as such representative, is the only appellant. The only question sought to be presented by the appeal of the State Controller is which of the two assessments, the state assessment or the city and county assessment, was valid.

Under the circumstances respondent tax collector urges that the question presented by the appeal is merely an abstract question, not affecting the substantial rights of the state, and that the appeal should be dismissed. It is apparent that the only way in which the state, represented here by appellant, can be affected by a reversal or a modification of the judgment, is to be deprived of a portion of the amount that will come to it under the judgment as it now stands. If the judgment stands, the city and county of San Francisco will be required to forthwith pay to the state the state portion of the taxes collected, which, the city and county assessment valuation being much higher than the state assessment valuation, will be several thousand dollars more than the state portion of the taxes that could be retained by the state upon collection of the taxes by the controller on the state assessment. Indeed, the transcript on appeal shows that, at the very inception of this proceeding, the portion of the amount paid into court that would go to the state as state taxes on the state assessment, $133,000, was ordered paid to the State Controller for the use of the state, and the portion of such amount that would go to the city and county of San Francisco on the state assessment, $194,000, was ordered paid to the city and county tax collector, leaving in fact only $37,572.79 in court subject to final judgment. Under the judgment, the state will receive the state portion of this amount. If it succeeds on this appeal, it will receive no part thereof. Under the peculiar circumstances, it appears here that neither the state nor its representative, the State Controller, is a party aggrieved by the judgment. No one else is complaining thereof. Practically the appeal is by a party whose sole substantial complaint is that the effect of the judgment is to give him more than he is entitled to. We are of the opinion that this court should not entertain the appeal under the circumstances disclosed by the record.

The appeal is dismissed.

We concur: SHAW, J.; McFARLAND, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.

BEATTY, C. J. (concurring). I concur in the order of dismissal and in the opinion of the court. The practical effect of the order is an affirmance of this particular judgment; but in view of the importance of the question involved, and the certainty that it must be met sooner or later, I should have preferred a direct affirmance of the judgment which is clearly sustained by our decision in San Francisco & San Mateo Ry. Co. v. Scott, 142 Cal. 222, 75 Pac. 575.

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153 Cal. 33

BANNING et al. v. KREITER et al.

(L. A. 1,877.)

(Supreme Court of California. Feb. 10, 1908. Rehearing Denied March 10, 1908.)

1. ESTOPPEL — REPRESENTATIONS — EXISTING RIGHTS.

While, generally, a representation to raise an estoppel, where the negotiations have ended in a contract, must relate to an existing fact, and not be a mere expression of opinion or a promise of future performance, a well-recognized exception to the rule exists where the statement relates to an intended abandonment of an existing right and is made to influence others, and they have been influenced by it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 221.]

2. SAME—CREATION OF EASEMENT.

Where purchases are made on representations by the seller that abutting property owned by him will be maintained either as a public street or private way for the benefit of the purchaser, it constitutes an expression of an intended abandonment of the seller's existing right which will support an estoppel, if the purchaser has relied on it.

3. TRIAL—EVIDENCE—FINDINGS.

In an action to recover a tract of land used by defendants as an alleyway, their right thereto being supported by a plea in estoppel arising from declarations of plaintiffs' authorized agents when selling the property, where there was strong evidence to support the claim of estoppel, the court erred in failing to find upon the plea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 908–911.]

In Bank. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Adelaide M. Banning and others against W. H. Kreiter and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Works, Lee & Works, for appellants. McNutt & Hannon, for respondents.

HENSHAW, J. This is an action to recover possession of a tract of land in the city of Los Angeles. The controversy arises over a strip 12½ feet in width, extending north from Requena street a distance of 94 feet. This strip had been used under a claim of right by defendants as an alleyway to their property, which abutted upon it. Defendants contended for an easement over the strip, and for a right so to use it as an alleyway. This right defendant Hanniman supports by a plea in estoppel, and this estoppel in turn arises from the declarations of the authorized agents of plaintiffs in selling the property. The court found for plaintiffs, but failed to find upon defendants' plea in estoppel, and this error is here urged upon appeal from the order denying the motion for a new trial. The omission of the court is prejudicial error, if there be any substantial evidence to support the plea, and for a determination of this a consideration of the facts becomes necessary.

In 1881, Mrs. Banning, through her husband, William Banning, employed a firm of real estate agents to sell certain city lots for her. Mrs. Banning took no personal part in the matter, gave no instructions to the real estate agents, but intrusted the whole matter to her husband. She testifies that whatever he did he did with authority. Mr. Banning is dead. Mrs. Banning testifies that, because of the fact that her daughters owned a lot lying to the rear of this 12½-foot strip, it was decided between herself and her husband to reserve this 12½-foot strip as a means of ingress and egress to the daughters' land, but that the reservation was made wholly for her own purposes. One of the purchasers, Hanniman, testifies that he went to the real estate firm of Rowan & Dobinson, who were the agents for the sale of these lots, to purchase lots 76 and 77, each with a 25-foot frontage; that he was told by the real estate agents that the estate (Mrs. Banning) had reserved one-half of lot 77 as an alleyway, and that by purchasing lot 76 and half of lot 77 he would have a frontage on this alleyway, better light for his building, etc., and that he would have the right to go in and out the alley. He then purchased the lot and the half lot, paying $150 extra, over and above the regular asking price, on account of the alleyway. Mrs. Banning has no recollection of receiving this extra price, and Mr. Dobinson of the real estate firm has no recollection of having exacted it, but nothing disputes the positive statement of Mr. Hanniman that it was exacted, and that he did so pay it.

The turning point of the matter, however, is to be found in the testimony of the selling agent and the interpretation which is to be given to that testimony. So far as it is pertinent to this matter, it is here quoted. He says that he drew the pencil line on the map marking off and reserving the disputed 12½ feet. The statement made to Mr. Hanniman with the map before them and the pencil mark showing the reservation was "to the effect that the estate had decided to reserve the west half of that lot, in order to give an entrance in the rear of the property owned by the minors, and that therefore he would have the benefit of that alley. * * * We had no conversation with Mrs. Banning at any time. All our business was done with Mr. Banning, whom we regarded as her agent. * * * Of course we, as agents, should not have dreamed of reserving any portion of the lots offered for sale, without the consent of the owner, or whom we regarded as the owner. And the reservation was made, with Mr. Banning's consent, of this twelve and a half feet for the purposes of an alley. * * * With reference to the reservation of this alley, the same representations were made (to other purchasers) exactly as in the case of Mr. Hanniman."

It is well settled that, while, generally, a representation to raise an estoppel, where the negotiations have ended in a contract, must relate to an existing fact, and not be a mere expression of opinion or a promise of future performance, a well-recognized exception to the rule is presented where the statement relates to an intended abandonment of an existing right, and is made to influence others, and they have been influenced by it (Union Mutual Life Ins. Co. v. Mowry, 96 U. S. 544, 24 L. Ed. 674); and so, where purchases are made upon representations by the seller that abutting property owned by him will be maintained either as a public street or private way for the benefit of the purchaser, here is the expression of an intended abandonment of a seller's existing right which will support an estoppel, if the purchaser has relied upon it. Prescott v. Edwards, 117 Cal. 303, 49 Pac. 178, 59 Am. St. Rep. 186.

Besides the facts above set forth, and besides the additional circumstance that during all of these years the appellants have used this passageway as an alley under what they conceived to be their right, there are further matters in evidence which, while not bearing directly upon the question of estoppel, have a significance as tending to show what was in the minds of the parties at the time of the contract. Thus, after the deed, it is in testimony that Mr. Banning congratulated one of the purchasers upon having made an advantageous bargain, since his lot fronted upon the alley. This, of course, is but a statement or representation made after the fact, but it is of value as showing what Mr. Banning's conception of the matter was at the time, which conception he undoubtedly conveyed to his agents. Moreover, the city has treated this cul de sac as a public way and has levied no assessments upon it. Mrs. Banning, who testifies to her ignorance of many of these matters, is chargeable with this knowledge, and with the knowledge came the duty, if she regarded it as her private property, to see that it bore its share of the burden of taxation.

Coming to its ultimate analysis, the controversy resolves itself to this: What is the meaning of the language employed by the agent in dealing with the purchaser? By plaintiffs it is contended that the language meant no more than what Mrs. Banning testified was her understanding of the matter, that she designed to reserve this strip for her own purposes, and for such a length of time as she saw fit as a mode of ingress and egress to the property of her daughters in the rear; that the purchasers of her lots could, and did, use this property under license during such time as she chose to allow the alleyway to remain open, and their right to use it was under a mere license, revocable at the owner's pleasure; that when Mr. Dobinson said, as above quoted, that the estate had decided to reserve the west half of the lot in order to give an entrance into the rear property owned by the minors, and that, therefore, the purchaser would have the benefit of the alley, his language meant no more than as above stated, namely, that Mrs. Banning was reserving for her own purposes a private way, and, so long as she chose to reserve it, the purchasers would have the benefit of it. Upon the other hand, what is the fair meaning of the language which the real estate agent testifies that he used, and what is the idea which would naturally be conveyed by it? It seems quite plain that it is not the construction for which respondent contends. If such had been its meaning one would expect that somewhere in the agent's testimony there would have been at least a suggestion that he regarded the 12½ feet as a temporary private way of the seller, to be closed at her pleasure. Yet no intimation of this kind is anywhere found in his testimony. The natural interpretation of his language conveys the idea that because Mrs. Banning's daughters owned property to the rear of this strip she had decided to reserve the strip as an alleyway; that the reason which prompted her to this reservation was the fact that her daughters owned property in the rear, but that the effect of the reservation would be to give the purchasers of adjoining lots a perpetual easement over this open strip. Thus it is apparent that there is evidence, substantial and strong, to support the plea of estoppel, and it was therefore error for the court to fail to find upon it. This court is, of course, without ability to make a finding on the matter, and it follows, therefore, that the order appealed from must be reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; McFARLAND, J.

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153 Cal. 59

PEOPLE v. FINLEY. (Cr. 1,367.)

(Supreme Court of California. Feb. 13, 1908.)

1. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—OFFENSES BY CONVICTS—DEATH PENALTY.

Pen. Code, § 246, provides that an assault likely to produce great bodily injury by persons serving a life sentence in the state prison shall be punishable with death. *Held*, that the statute is not unconstitutional as denying equal protection of the law guaranteed by Const. U. S. amend. 14, as such protection means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes, in the same place or under like circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 711.]

2. STATUTES—UNIFORMITY OF OPERATION—OFFENSES BY CONVICTS—DEATH PENALTY.

Pen. Code, § 246, providing that an assault likely to produce great bodily injury by a person serving a life sentence in a state's prison shall be punishable by death, does not contravene Const. Cal. art. 1, § 11, declaring that all laws of a general nature shall have a uniform operation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 72.]

3. CONVICTS—CRIMES—PROSECUTION—INSTRUCTIONS.

Where, under the evidence, accused is either guilty as charged in an indictment brought under Pen. Code, § 246, providing that an assault likely to produce great bodily injury by a convict in the state's prison shall be punishable with death, or is innocent, it is not error for the court to refuse to charge the jury that they might render any one of four verdicts, namely, guilty as charged in the indictment, guilty of assault with a deadly weapon, guilty of simple assault, and not guilty; the court having charged that, if the evidence did not satisfy the jury beyond a reasonable doubt that he was guilty of the offense charged, they must find him not guilty.

4. SAME—INDICTMENT.

In a prosecution under Pen. Code, § 246, providing that an assault likely to produce great bodily injury by a life convict in the state prison shall be punishable with death, the indictment is sufficient if it charges in the language of the Code that defendant was then and there a person confined in and undergoing a life sentence at the state prison, and it need not charge that accused was sentenced by a court of competent jurisdiction.

5. SAME—ADMISSIBILITY OF EVIDENCE.

In a prosecution under Pen. Code, § 246, providing that an assault likely to produce great bodily injury by a life convict in a state prison shall be punishable with death, the record of commitment of accused to the state prison is competent evidence.

In Bank. Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

J. W. Finley was convicted of assault while serving a life sentence in the state prison, and appeals. Affirmed.

Samuel T. Bush, for appellant. U. S. Webb, Atty. Gen., J. Charles Jared, Deputy Atty. Gen., and A. M. Seymour, Dist. Atty., for the People.

HENSHAW, J. The appellant while undergoing a life sentence in the state prison at Folsom was indicted under section 246 of the Penal Code, tried upon the indictment, found guilty, and the death penalty imposed. From the judgment, and from the order denying his motion for a new trial, he prosecutes this appeal.

The section of the Code defining his crime is in the following language: "Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death." The principal contentions of the appellant advanced in different forms resolve themselves into two propositions, both going to the constitutionality and validity of section 246 of the Penal Code. The first of these propositions is that it denies to the defendant the equal protection of the law guaranteed by the 14th amendment to the Constitution of the United States. The second is that it contravenes the provisions of article 1, § 11, of the Constitution of this state, declaring that all laws of a general nature should have a uniform operation. As to the genesis and origin of this comparatively new section of our Penal Code, it has long been a part of judicial knowledge, of legislative knowledge, and, indeed, of general knowledge, that convicts in penal institutions, undergoing sentences for life, constitute a most reckless and dangerous class. The conditions of their sentences destroy their hopes, and with the destruction of hope all bonds of restraint are broken and there follows a recklessness leading to brutal crimes. These crimes became the more frequent as the impotency of the law to mete out adequate punishment for them was discerned. They were crimes of violence committed, not alone against fellow inmates, but upon the custodians, officers, and guards of the institutions. The series of bloody and savage escapes and attempts to escape from the state prisons, which attempts were usually organized and headed by "life termers," form a part of the history of our state. Indeed, it is known that at times the prison officials have deemed it wise to clothe the "life termers" in a characteristic garb, as a red shirt, that they might be the better watched throughout the day, and the more readily picked out by the armed guards in cases of an emeute. Under this well-recognized condition of affairs it seemed expedient to the Legislature to meet the situation by the enactment of section 246 of the Penal Code.

It is upon the authority of the City of Pasadena v. Stimson, 91 Cal. 252, 27 Pac. 604, and the numerous cases of like import, declaring that class legislation must be based upon some natural, intrinsic, constitutional, reasonable distinction, or otherwise that it is in violation of section 11 of article 1 of the Constitution of this state, that the appellant argues against the validity of the Code provision. In this regard his contention is that there is no reasonable distinction to be drawn between the case of a convict undergoing a life sentence as such, and one undergoing a sentence for a period of years which in all human probability will exceed the term of natural life. But there are valid reasons which justify the distinction. The "life termers," as has been said, while within the prison walls, constitute a class by themselves, a class recognized as such by penologists the world over. Their situation is legally different. Their civic death is perpetual. As to a convict incarcerated for a term of years, his civic death ends with his imprisonment. The good conduct laws, whereby the term of imprisonment is shortened as to all other convicts, have no application to those undergoing a life sentence. Generally speaking, the crimes for which convicts suffer life sentences are graver in their nature and give evidence of more abandoned and malignant hearts, than do the crimes of those undergoing sentence for years. And, finally, if the Legislature sought to make the law applicable to convicts, other than "life termers," the difficulty which it would experience in fixing the term of imprisonment to which it should apply gives evidence itself that there is a reasonable, rational class distinction between the "life termer" and the convict under sentence for years. It is concluded, therefore, that the classification in question is not arbitrary, but is based upon valid reasons and distinctions.

Nor can it be said that the act in question is violative of the fourteenth amendment of the Constitution of the United States. This amendment means simply that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes, in the same place and under like circumstances. Bowman v. Lewis ("Missouri v. Lewis"), 101 U. S. 22, 25 L. Ed. 989. Paraphrasing the language of the Supreme Court of the United States in Moore v. Missouri, 159 U. S. 676, 16 Sup. Ct. 179, 40 L. Ed. 301, we cannot perceive that appellant was denied the equal protection of the laws, for every other person in like cases with him, and convicted as he has been, would be subjected to like punishment.

Defendant complains of the refusal of the court to give a requested instruction to the jury to the effect that they might render any one of four verdicts according to their conclusion from the evidence, viz., guilty as charged in the indictment, guilty of assault with a deadly weapon, guilty of simple assault, and not guilty. There was no error in this action of the court. In view of the evidence as shown by the record, the defendant was either guilty as charged in the indictment, or not guilty at all; and the jury was charged that, if the evidence did not satisfy them beyond a reasonable doubt that he was guilty of the offense charged, they must find him not guilty.

It is finally contended that the indictment is defective in failing to charge that the defendant was sentenced to life imprisonment in the state prison by a court of competent jurisdiction designating it. The indictment charged in the language of the Code that defendant was then and there a person confined in and undergoing a life sentence at the state prison. It was sufficiently specific to enable defendant to prepare his defense. It is plainly one of those crimes, which, as to the matter in question, it is sufficient to charge in the language of the statute. People v. O'Brien, 96 Cal. 174, 31 Pac. 45; People v. King, 125 Cal. 369, 58 Pac. 19. Upon the trial the record of the commitment of the defendant to the state prison was offered and admitted in evidence over the objection of the defendant. This record was not only competent evidence, but the method adopted was the proper method of its presentation to the court. Williams v. State, 130 Ala. 31, 30 South. 337.

For these reasons, the judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; BEATTY, J.; McFARLAND, J.

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7 Cal. App. 313

ENNIS-BROWN CO. v. LONG et al.

(Civ. 391.)

(Court of Appeal, Third District, California. Jan. 4, 1908.)

1. VENUE — CHANGE — CONVENIENCE OF WITNESSES—SUFFICIENCY OF SHOWING.

Under Code Civ. Proc. § 397, subd. 3, authorizing a trial court to change the place of trial when the convenience of witnesses and ends of justice will be promoted thereby, the exercise of a trial court's discretion will not be disturbed except for abuse, and no abuse is shown where in asking for a change for the convenience of witnesses defendants did not show what the witnesses would testify to, but merely showed that they were present when the agreement sued on was made; it not appearing that they would not testify against defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Venue, § 119.]

2. SAME.

Defendants' affidavit that the written contract sued on was indefinite as to the terms and the amount of the consideration stated a mere conclusion, and was insufficient to show that the contract would admit of oral proof by witnesses for whose convenience a change of place of trial was asked. The writing should have been set forth, so that the court could judge whether the terms were indefinite, and whether oral proof would be proper.

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Action by Ennis-Brown Company against E. O. Long and another, partners as E. O. Long & Co. From an order denying their motion to change the place of trial, defendants appeal. Affirmed.

L. T. Hatfield, for appellants. W. E. Kleinsorge, for respondent.

CHIPMAN, P. J. Motion to change the place of trial. The action is for damages for breach of an alleged written contract, whereby defendants agreed to sell and plaintiff agreed to purchase certain 900 sacks of beans to be delivered at Bradford Wharf No. 2 Contra Costa county. Defendant moved the court to change the place of trial to the superior court of Contra Costa county on the ground of the convenience of witnesses. The motion was denied, and defendants appeal from the order.

Defendant Long made affidavit that the alleged transaction, the subject of the action, took place in Contra Costa county, and that affiant was the only person on behalf of defendants who entered into any arrangement with plaintiff in relation to the alleged agreement; that one Coggshall, acting as plaintiffs' agent, on October 19, 1905, "visited the premises occupied by this affiant and his codefendants on Bradford Island and examined said beans * * * and offered to purchase the same for the price [stating terms] and that he would pay * * * [on October 22, 1905], the sum of $500; * * * that he would receive said beans and pay the balance of the purchase price of said beans at said Bradford No. 2, on or before October 25, 1905; and that, if he did not make such payment of $500 within the time mentioned and receive and pay for all of said beans as stated above, affiant and his co-tenants were to be released from all obligations to sell said beans to plaintiff." It is then stated that plaintiff failed to make said payments or any part thereof; "that there was present having personal knowledge of the terms and conditions of said proposed sale of said beans the following persons, each of whom heard the terms and conditions of said proposed sale, to wit (naming three persons residents of Contra Costa county)," that affiant resides at Stockton, "and that by reason of his business arrangements it is much more convenient for him to attend the trial of this action at the county seat of Contra Costa county than elsewhere"; that defendant Kirk is a resident of Los Angeles, and that it is "equally as convenient for said Kirk to attend the trial * * * at Contra Costa county as it is in the county seat of Sacramento county." A later affidavit stated that Kirk's residence is now San Francisco. It is also stated that one Hanselman, a resident of Contra Costa county, is a necessary witness for defendants in the case, but it is not shown what he would testify to. It is then stated: "That a memorandum of agreement to sell said beans was entered into in writing between plaintiff and affiant, but that said memorandum was indefinite as to the terms and the amount of consideration, and was subject to the agreement made part of the transaction touching the payments hereinabove set forth."

In a counter affidavit, E. S. Brown, president of plaintiff corporation, denies that said Long is the only one of defendants who entered into said agreement with plaintiff; admits the agency of Coggshall and that he made the purchase alleged, but denies that Coggshall agreed to make the payments as alleged in the affidavit of said Long; denies on information and belief the allegations in Long's affidavit as to the presence of certain named persons when said contract was made, and on information and belief denies the allegations as to their residence, and also as to its being more convenient for defendant Long to attend the trial at Contra Costa county than at Sacramento. "Denies that said memorandum of agreement to sell said beans was indefinite as to its terms, and the amount of consideration, and denies that the same was subject to the agreement made part of the transaction touching the payments as set forth in said affidavit of defendant E. O. Long." The affidavit then states the names of several witnesses who reside at Sacramento, and states what it is expected to be proved by them, including the making of said contract, the market value of said beans at the nearest place to said Bradford wharf at the time said beans were to be delivered, and the damage sustained by plaintiff by the failure of defendants to deliver said beans in accordance with the contract set forth in plaintiff's complaint. Defendant Long replied by affidavit, denying some of the statements of affiant Brown, and reiterating many of the facts stated in his first affidavit. Defendant Kirk also made affidavit to some of the facts stated by defendant Long in his affidavit to which he refers as to what the Contra Costa county witnesses will testify to. Defendants and their counsel filed a statement admitting defendants' failure to deliver the beans as agreed, and that the market value of the beans at Bradford wharf was the price agreed upon and that the beans could not have been procured for a less price at any time; "and this admission as to the value and failure to deliver is made to avoid the necessity of plaintiff producing any of the witnesses mentioned in the affidavit of E. S. Brown for the purpose of showing the value and character of the beans involved in this controversy." Other matters are set forth in the several affidavits, but the foregoing is sufficient for present purposes.

The motion is made under subdivision 3, § 397, Code Civ. Proc. Defendants seek to support their motion principally upon the ground that certain persons were present when Coggshall and defendant Long entered into the agreement, and that they reside in Contra Costa county, where it would be more convenient for them to attend upon the trial as witnesses than at Sacramento. The affidavit fails to state what these witnesses would testify to. The statement that they were personally present and had "personal knowledge of the terms and conditions of said proposed sale * * * and heard the terms and conditions" does not imply that they would testify to defendants' version of the contract. Non constat, but that they would testify against defendants. The only ground upon which defendants could successfully urge the convenience of these witnesses is that they are material and necessary to support defendants' contention, and, unless they so show in support of their motion, it would be properly denied. To show that they were material witnesses for defendants the trial judge should be informed of what they would testify to. Cook v. Pendergast, 61 Cal. 72, 77. In Grant v. Bannister, 145 Cal. 219, 78 Pac. 653, speaking of a similar motion, it was said: "If the court below had denied the motion, we would attach little importance to such affidavits, had defendant appealed." In that case the affidavit read: "That all the witnesses in the case who are necessary or material to the trial thereof, except the plaintiff, reside in said Tuolumne county." In Cook v. Pendergast the court said: "The affidavits should state what is expected to be proved by the witnesses, that the court may judge (in view of the issues) of their materiality." The rule is in every view reasonable, and entails no hardship upon the moving party. The discretion of the court, exercised under the subdivision cited, will not be reviewed except for its abuse. We cannot say that the court abused its discretion in view of the fact that defendants failed to inform the court what the witnesses named would testify to.

It was stated in Long's affidavit that the written contract "was indefinite as to the terms and the amount of consideration." This is but the conclusion of affiant. The written memorandum should have been set forth so that the court could judge whether or not its terms were indefinite, and whether, under established rules of law, the contract would admit of oral proof to show that it was "subject to the agreement made part of the transaction," as claimed by defendants. The stipulation or admission of defendants, assuming that it accomplished its object so far as it went, does not reach the principal question involved, namely, what were the terms of the alleged written contract, and how far, if at all, these terms were modified or explained by the alleged parol agreements. It appears from Brown's affidavit that Coggshall resides at Grand Island, Sacramento county. Upon appellants' showing he and Long were the only parties having knowledge of what took place when the contract was entered into, except the certain witnesses who, Long deposed, were present. But what these witnesses would testify to is not shown. Brown denied (not on information and belief) that the written memorandum "was subject to the agreement made part of the transaction touching the payments as set forth in said affidavit of defendant E. O. Long."

It seems to us that the trial court exercised a discretion with which we should not interfere.

The order is affirmed.

We concur: BURNETT, J.; HART, J.

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7 Cal. App. 261

IBBETSON et al. v. PEAIRSON. (Civ. 454.)

(Court of Appeal, Second District, California. Dec. 31, 1907.)

1. Landlord and Tenant—Rent—Lien on Crops.

In a lease of premises for five years, the rentals to be paid in money in quarterly installments, an agreement by the lessee to plant the land in certain annual crops, and not to sell any part of the crops without the lessors' written consent, did not give the lessors a lien on the crops for rent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 975-983.]

2. Receivers — Grounds of Receivership—Right or Interest in Property—Necessity.

Where a lease of land for five years, the rentals to be paid in money in quarterly installments, stipulated that the lessee should irrigate and plant the land in certain annual crops and cultivate the crops, but did not reserve a lien on the crops, on the lessee's failure to perform the conditions of the lease, a receiver will not be appointed to irrigate and cultivate the growing crops on the failure of the insolvent lessee to do so, since the lessors have no lien or present interest in the crops, but only a right to a money rental.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by R. E. Ibbetson and Maude R. Ibbetson against W. R. Peairson. From an order appointing a receiver for certain crops, defendant appeals. Reversed.

Variel & Hannon, for appellant. J. W. MacDonald and Victor Montgomery, for respondents.

ALLEN, P. J. Appeal by defendant from an order appointing a receiver. The complaint alleges: That on December 6, 1906, plaintiffs leased to defendant certain premises described for the period of five years from November 1, 1906, for a rental of $9,000, payable $450 May 1, 1907, $900 August 1, 1907, and the remainder in quarterly installments of $450 each. That, by the terms of the lease, defendant was to plant the whole of said premises in certain annual crops and to irrigate and cultivate the same; that, if he should fail to so plant or irrigate such crops, plaintiffs were entitled to give him five days' notice so to do. It was further provided that no part of the crops should be sold without plaintiffs' written consent. It is further averred that defendant made default in planting and irrigating certain portions of the premises, and in the payment of the first installment of rent; and, in addition, sold about $800 worth of growing crops without plaintiffs' consent. That plaintiffs have given the five days' notice specified because of the failure to plant and irrigate. That the growing crops now on a part of said premises require attention. That irrigation and cultivation is necessary. That defendant is insolvent, having no property other than the growing crops subject to execution, and the prayer is for judgment for the $450 rent, for damages for waste, for restitution, and for the appointment of a receiver. The lower court made an ex parte order, appointing a receiver to care for, harvest, and sell the crops, and to hold the proceeds until the further order of the court. From this order defendant appeals under subdivision 3, § 939, Code Civ. Proc.

The only cause of action stated in the complaint is one to recover the sum of $450 rent due. It is properly conceded by respondents that the action is not in ejectment. This is evident when we consider that the allegations necessary in such an action are wanting. No lien is reserved in the lease upon the crops, and the landlord has no lien for rent reserved. Hitchcock v. Hassett, 71 Cal. 333, 12 Pac. 228. No interest or property in the crop was reserved by the lease, but the rental was expressly stipulated to be in cash, and it follows that the products of the soil became the property of the lessee. The mere stipulation that the lessee will not sell property which belongs to him without the consent of the landlord gives the latter no lien thereon. No right of re-entry is reserved. No conditions are provided for forfeiture. The rent being in cash and plaintiffs having no lien or present interest in the crops, no injury could result to plaintiffs from the failure of the tenant to care for his own.

The court was without jurisdiction, under the allegations of the complaint, to appoint a receiver, and the order is reversed.

We concur: SHAW, J.; TAGGART, J.

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7 Cal. App. 248

SIMPSON v. MILLER. (Civ. 399.)

(Court of Appeal, Third District, California. Dec. 28, 1907. Rehearing Denied by Supreme Court Feb. 24, 1908.)

1. Bankruptcy—Assignment of Bankrupt's Estate—Assignment and Title of Trustee—Title Acquired by Trustee—Time of Vesting.

Under the direct provisions of Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], a trustee in bankruptcy is vested with title to the bankrupt's property, without conveyance by operation of law as of the date of adjudication of bankruptcy.

2. Same—Rights of Bankrupt—Actions by Bankrupt.

A bankrupt cannot maintain a suit in his own name in relation to his own nonexempt property, pending bankruptcy proceedings, after the appointment of a trustee.

3. Same—Assignment and Title—Rights of Trustee—Property Capable of Transfer.

Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], vests by operation of law in the trustee of a bankrupt's estate, upon his appointment, the title of the bankrupt to all the property which the latter might have transferred prior to the filing of the petition. Civ. Code, §§ 1044, 1045, provides that every species of property except a mere possibility not coupled with an interest may be transferred. Defendant's testator conveyed land to plaintiff by an unrecorded deed in escrow to take effect on the grantor's death. *Held*, that the title thereto immediately passed to plaintiff, and he had a transferable interest therein, which vested in his trustee in bankruptcy under the bankrupt law.

4. Same.

Though his grantor subsequently conveyed the land by a valid conveyance to an innocent purchaser, under Civ. Code, § 954, making a thing in action arising out of the violation of an obligation or right of property transferable by the owner, plaintiff had a transferable interest, which vested in his trustee in bankruptcy.

5. Same—After-Acquired Property.

Where the title to land was vested in plaintiff by an unrecorded deed prior to his bankruptcy, and his grantor thereafter sold the land to another, plaintiff's right to sue the grantor for the proceeds of such sale was not property acquired after bankruptcy, so as to entitle him to sue therefor in his own name.

6. Parties—Persons Entitled to Sue—Real Party in Interest.

Code Civ. Proc. § 367, requires actions to be brought by the real party in interest, in order to protect a defendant from loss by future suits; and hence plaintiff may not bring an action for property, the title of which had previously vested in his trustee in bankruptcy, where a judgment either for or against plaintiff would not bar a subsequent suit by such trustee for the same cause of action.

7. Pleading — Amended Pleading — Complaint—Time of Amendment.

In an action to recover property which had vested in plaintiff's trustee in bankruptcy prior to the suit, an amendment to the answer, made after both parties had rested, but before the cause was submitted, pleading plaintiff's bankruptcy in bar to the action, was properly allowed in the discretion of the court.

8. Same—Different Cause of Action.

Where plaintiff's original action was to recover the proceeds of land which defendant's testator conveyed to him by deed in escrow to take effect on testator's death, a motion, made after trial but before entry of judgment, to amend the complaint to allege that defendant's testator agreed to devise the property to plaintiff, introduced a new cause of action, and was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 686–709.]

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by J. J. Simpson against John C. Miller, executor of the estate of William Hartman, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

A. H. Carpenter, for appellant. E. E. Parlin (Aylett R. Cotton, of counsel), for respondent.

CHIPMAN, P. J. Action to recover the amount alleged to be due from the estate of William Hartman, deceased, on a claim presented to defendant executor and disallowed by him.

By the first cause of action set forth in the complaint it is alleged that on October 2, 1903, said Hartman received from Edward Hart and Laura Hart $1,280, as the purchase price of certain described land, which then belonged to plaintiff and which had been conveyed to him by said Hartman on July 21, 1896, by grant deed of that date, and which said sum said Hartman received in trust for plaintiff to be delivered on demand; that no part of the same was paid by said Hartman in his lifetime, and the whole thereof was held by him in his lifetime in trust for plaintiff, and has ever since his death been so held by his executor, the defendant herein; that Hartman died February 8, 1904, and defendant on February 29, 1904, became and is now the executor of his last will; that demand for the payment of said claim has been made upon said executor and payment thereof has been and still is refused. The claim as presented to the executor is set forth and is for the principal sum of $1,280 and $57.60 interest; the principal sum being "obtained from the sale of real property belonging to and conveyed to said J. J. Simpson (plaintiff) as per conveyance, a copy of which is hereto attached." As a second cause of action it is alleged that on July 21, 1894, plaintiff and Hartman entered into an agreement whereby plaintiff was to furnish materials and perform the work for the improvement of the premises referred to in the first cause of action, and that Hartman then and there agreed, in consideration of plaintiff having made said improvements, to convey said land to plaintiff and place the deed therefor in escrow, to be delivered to plaintiff upon the death of said Hartman; that plaintiff, pursuant to said agreement, entered into possession of the land and made said improvements, furnishing the material therefor, all at a cost of $1,280; that in performance of said agreement on his part said Hartman on July 21, 1896, conveyed said land to plaintiff by grant deed, "and that such deed was so executed and delivered in escrow and unrecorded at the time of the conveyance of said realty to the said Edward and Laura Hart as hereinafter set forth"; that on October 2, 1903, said Hartman conveyed the said land to said Harts, and received therefor the sum of $1,280; that said deed was received by the said Harts without any "knowledge or notice of plaintiff's said deed in escrow * * * and thereby said deed in escrow became null and void and valueless as a conveyance of the aforesaid property"; that thereby plaintiff became damaged in the sum of $1,600. Averments follow as to the death of Hartman, appointment of defendant as executor, and presentation of the claim hereinbefore mentioned. The prayer is for judgment for $1,280 and interest from October 2, 1905 (should be 1903). The answer contains specific denials of most of the averments of the complaint, and for a separate defense pleads that on May 23, 1903, upon the petition of plaintiff, he was duly declared and adjudged a bankrupt, and that on June 11, 1903, a trustee of his estate was duly appointed and duly qualified as such trustee; "that if said Simpson, at the time he was adjudged a bankrupt, as aforesaid, had any title to the land described in the complaint in this action, the said trustee * * * became vested by operation of law with such title, and said Simpson became thereby divested, and has ever since continued divested of such title; and that, therefore, said plaintiff cannot have or maintain this action against said defendant." The cause was tried by the court, a jury having been waived, and the court found that at the time said land was conveyed to said Edward and Laura Hart (October 2, 1903), it did not belong to plaintiff, and that the $1,280 received by Hartman from the Harts was not held in trust for plaintiff by Hartman during his lifetime, nor since his death by the executor of his estate, and no money is due or owing to plaintiff from defendant as said executor. The court finds the facts as to the conveyance by Hartman to plaintiff and the deposit in escrow of the deed "to hold said deed until the death of said Hartman and then to deliver it to the said plaintiff." The facts as to the conveyance to the Harts by Hartman are found to be as alleged in the complaint. The court then finds the facts of plaintiff's bankruptcy as alleged in the answer, and "that, therefore, said plaintiff cannot maintain this action against said defendant." Defendant had judgment accordingly that plaintiff take nothing by the action. The appeal is from this judgment.

If, by reason of his bankruptcy, plaintiff cannot maintain the action, it becomes unnecessary to consider any other of the various questions that arose in the course of the trial. The only claim made by plaintiff is based upon his alleged title to the land, and the only claim presented to defendant for payment was for money received by Hartman for the sale of land alleged to belong to plaintiff by virtue of Hartman's deed to him in 1896. By section 70 of the act establishing a uniform system of bankruptcy throughout the United States (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, vol. 3, p. 3451]), it is provided: "The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged bankrupt * * * to all property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." The investiture of title in the trustee takes place, without a deed of conveyance, by operation of law, as of the date the petitioner was adjudicated to be a bankrupt. In re Engle (D. C.) 105 Fed. 893. A bankrupt cannot maintain a suit in his own name in relation to his property, not exempt, pending bankruptcy proceedings after the appointment of a trustee. Loveland on Bankruptcy (3d Ed.) p. 435, citing Pickens v. Dent, 106 Fed. 653, 45 C. C. A. 522, affirmed sub nom. Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128.

The remaining question would seem to be: Was the interest of plaintiff in the land property which could be transferred? If the Hartman deed, as claimed by plaintiff, was placed in escrow beyond the grantor's power to recall it, and with instructions to hold it until his death and thereupon to deliver it to the grantee named in the deed, the grantor to have no other or further interest in the land than to enjoy the use of it until his death, the title vested immediately in the grantee and the depositary became a trustee of the grantee. Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867. The effect of the deed was to vest the title in the grantee and convert the grantor's estate into a life tenancy, and make himself the tenant of the grantee. It was said in Cook v. Brown, 34 N. H. 460: "These conclusions result unavoidably from the certainty of the event upon which the second delivery is made to depend, and from the impossibility under the circumstances that the grantor will ever be able to recall or repossess himself of the deed." Every species of property, except a mere possibility, not coupled with any interest may be transferred. Civ. Code, §§ 1044, 1045; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024; Rice v. Whitmore, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479. Plaintiff had a transferable interest in the property, assuming that he established his contention that the deed from Hartman effected the purpose claimed for it. Plaintiff was adjudged a bankrupt in May, 1903, and Hartman sold the property to the Harts the following October. If, as claimed by plaintiff, when Hartman sold the property to an innocent purchaser, the "deed in escrow became void and valueless as a conveyance of the said property," plaintiff's right of action, whatever it was, became property which was transferable (Civ. Code, § 954); and hence title thereto passed to the trustee in bankruptcy.

Plaintiff contends that because he was adjudged a bankrupt on May 23, 1903, and Hartman sold the property October 2, 1903, plaintiff's right to the proceeds of the sale is property acquired after the adjudication and belonged to him. The sufficient answer to this claim is that the proceeds of this sale came from the land to which plaintiff's title, upon his own theory, vested in him long prior to May 23, 1903, and was in him when he was adjudicated a bankrupt; and, when Hartman sold the property in October, 1903, the title had already, by virtue of the decree of adjudication and by operation of law, vested in the trustee.

It is urged that the action was properly commenced by plaintiff, and should not abate because of his bankruptcy—citing Giselman v. Starr, 106 Cal. 651, 657, 40 Pac. 8. We do not think that a judgment in the case, if satisfied by defendant, "would protect him from future annoyance or loss," as was stated in the case cited to be one of the tests of plaintiff's right to maintain the action under section 367 of the Code of Civil Procedure. This section requires the action to be prosecuted by the real party in interest. When the plea was interposed, it could not be known what the judgment of the court would be on the merits. If plaintiff had recovered judgment, and it had been satisfied by defendant, it would have been no protection to defendant against the claim of the trustee in whom title to the land, and the claim arising out of such title, had already vested. Nor would the judgment that plaintiff take nothing by the action estop the trustee from bringing his action to enforce his vested interest in the property or claim. In the Giselman Case the facts warranted the court in holding that both of these tests were fully met and that by the judgment, whatever it might be, the defendant would be saved "from further harassment or vexation at the hands of the claimants to the same demand." In Woodsum v. Cole, 69 Cal. 142, 10 Pac. 331, the action was upon a promissory note. The plaintiff had possession of the note by indorsement. The court said: "To entitle a party to maintain an action upon a promissory note, he must be the legal owner, and have the right of possession of the instrument; and such ownership must be sufficient to protect the defendant upon a recovery against him from a subsequent action. It was competent, therefore, for the defendant to show, if he could, that the plaintiff paid no money for the note, and was not the legal owner of it"—citing Hays v. Hathorn, 74 N. Y. 486; Towne v. Wason, 128 Mass. 517. There is nothing in Cortelyou v. Jones, 132 Cal. 131, 64 Pac. 119, in any wise changing the rule, where the assignment passed the legal title to the assignees, though they held the notes and mortgage in trust. Mr. Bliss says: "Under the new system the rule is adopted which prevails in equity, and which requires, with certain exceptions, that actions be prosecuted in the name of the real party in interest." The exceptions relate to persons suing in a representative capacity. In a note to the text the author says: "This raises the question: 'Who is the real party in interest?' The 'real party in interest' is the party who is to be benefited or injured by the judgment in the case. It will be observed that the rule provides the action must be prosecuted in the name of the real party in interest, and, of course, if the defense can show that the plaintiff or plaintiffs are not the real parties in interest the action must fail"—citing numerous cases. Bliss on Code Pleading, § 45. Speaking of the statutory provision, already noted, Mr. Pomeroy says: "The defense that the plaintiff is not such real party in interest is, in general, a bar to the suit. This," he says, "is certainly so when the plaintiff is the assignee of anything in action not negotiable, and the issue raised by an answer setting up such defense would be simply whether the plaintiff was, upon the proof, the real party in interest." Pom. Code Rem. (3d Ed.) § 66, p. 91. The Giselman Case, supra, and Philbrook v. Superior Court, 111 Cal. 31, 43 Pac. 402, and Iowa & Cal. Land Co. v. Hoag, 132 Cal. 627, 64 Pac. 1073, are cases where the court was able to say that the judgment against the nominal party plaintiff would protect the defendant from an action upon the same demand by another, as well as also to give to the defendant the opportunity to assert all defenses and counterclaims available to him.

Plaintiff claims error in allowing defendant to plead plaintiff's bankruptcy by way of amendment to the answer. This amendment was offered after both parties had rested, but before the cause was submitted. There had been some evidence admitted relating to the bankruptcy to show that plaintiff had not included the property in question or any interest in it in his schedule, but the adjudication had not been pleaded in bar of the action. The amendment was to accomplish this object, and we think it was within the discretion of the court to allow it. It appears from the bill of exceptions "that after the trial of the above-entitled case, and before entry of judgment therein, the plaintiff duly made, served, and filed" a notice of motion to amend the complaint. The proposed amendment introduced the following new issue: That, in consideration of the improvements made by plaintiff upon the said land, "the said Hartman then and there agreed to devise and bequeath the above described realty to plaintiff, and fix it so that the plaintiff should have the same upon the death of the said William Hartman." This amendment was utterly inconsistent with the cause of action counted upon and with the claim presented against the estate. It was not error to refuse the amendment.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

7 Cal. App. 267

GRANT v. SUNSET TELEPHONE & TELEGRAPH CO. (Civ. 416.)

(Court of Appeal, Third District, California. Jan. 2, 1908.)

1. Appeal—Review—Questions of Fact.

In an action for personal injuries resulting from the alleged negligence of defendant in maintaining dangerous premises, on the question whether defendant violated any duty it owed to plaintiff, the appellate court will consider the case in the light of the inferences most favorable to plaintiff's contention, for which there is substantial support in the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3907–3911.]

2. Negligence—Dangerous Premises.

It is negligence to maintain a guy wire from a telephone post to the ground some 25 feet therefrom, and within the line of travel between a street and railroad station grounds, without anything to attract attention of one approaching the station in the dark.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 41–54.]

3. Same—Contributory Negligence.

Where plaintiff was injured in the nighttime by contact with a telephone guy wire maintained in the line of travel between a street and a railroad station, he was not guilty of contributory negligence merely because the wire had been thus maintained for 18 months before the injury; he having no knowledge of its existence, and there being nothing to attract his attention thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 83–92.]

Appeal from Superior Court, Yolo County; J. F. Ellison, Judge.

Action by John T. Grant against the Sunset Telephone & Telegraph Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Pillsbury, Madison & Sutro and Arthur C. Huston, for appellant. Hudson Grant and E. A. Bridgford, for respondent.

BURNETT, J. The action was instituted to recover damages for personal injuries. The plaintiff prevailed; and, from the judgment and order denying the motion for a new trial, defendant appealed.

It appears from the complaint that defendant constructed and maintained in the city of Woodland a certain guy wire or cable, at or near the point where Lincoln avenue intersects the western boundary of the depot grounds of the Southern Pacific Company; that along the western boundary of said depot grounds is a spur or switch track, and Lincoln avenue crosses this at right angles, extending easterly across said grounds; that said grounds are open and uninclosed; that prior to the accident defendant erected a telephone pole at or near the south side of said Lincoln avenue at the point of its intersection with the western boundary of the said depot grounds, upon which pole it strung its wires, and, for the purpose of "staying" the aforesaid pole, erected a second pole about 83 feet distant in a northeasterly direction, both of said poles being within the exterior limits of said Lincoln avenue; that the said guy wire, being about three-eighths of an inch in diameter, extended from a point near the top of the first mentioned pole to the top of the second, and thence in a general northeasterly direction to the ground at a point about 25 feet from the foot of the said second pole, and on the grounds of the said Southern Pacific Company, where said guy wire was attached to some object unknown to plaintiff entirely under the surface of the earth; that at the time of the erection of said poles and guy wire, and for more than five years prior thereto and at the time of the accident, there was "an open, well-traveled roadway leading in a northeasterly direction from the said intersection of Lincoln avenue with the spur or switch track aforesaid, across the said depot grounds to the depot buildings of said Southern Pacific Company; that said guy wire was not attached to any post or other visible obstruction at the point where it entered the ground, which point was within the limits of said traveled roadway." As the plaintiff, on his way to the depot to meet his wife coming in on the train, was driving a horse attached to a two-wheeled cart along said roadway, and not knowing of the erection or location of said guy wire, and being unable to see the same, he collided therewith, and was thereby thrown with great force to the ground, and seriously injured. It is assumed by both parties throughout the argument that the measure of defendant's duty and liability in the premises is the same as would be that of the Southern Pacific Company if the latter had directly erected and maintained said poles and guy wires instead of authorizing defendant to do so, and we shall consider the case upon this assumption.

But it is insisted by appellant that defendant cannot be held responsible for the injury for the following reasons: "(1) There was no contractual relation between plaintiff and defendant. (2) The defendant owed the plaintiff no duty whatever. (3) The defendant did not violate any duty it owed plaintiff. (4) The plaintiff was guilty of contributory negligence." It is obvious, however, that the first proposition is inconsequential, as there is no contention of any contractual relation between the parties, and the second ground is involved in the third. The position of appellant, therefore, upon which main reliance is placed, may be considered as affirmed in the said third and fourth propositions. In the consideration of the question whether defendant violated any duty it owed to plaintiff—in other words, whether it was properly chargeable with negligence as contemplated by the law and the decisions of the courts—appellant seems to have ignored the rule of practice, well established, that we must consider the case in the light of the inferences most favorable to plaintiff's contention for which there is any substantial support in the evidence. Appellant makes a very common mistake in assuming that its theory of the facts must be accepted as the basis for the judgment of this court, notwithstanding there is a decided conflict in the evidence as to some important questions, and it is clear that our conclusion must be vitally affected by the consideration whether we accept as true the testimony supporting plaintiff's theory or that in favor of the theory advanced by defendant.

For the purpose of this decision, the following must be accepted as facts established by the evidence: The whole space between the spur track and a certain tree mentioned in the evidence is covered by a clearly defined and regularly traveled roadway. That within this space is located the said guy wire with which plaintiff collided. That this roadway has been used openly and continuously by a large number of people, in fact by every one who had occasion to use it, for 15 or 20 years. It was the common route of travel for persons going from the southern part of the city of Woodland to the depot. Plaintiff had used it for 20 years, and it was his habit to go that way to the depot. On the evening of the accident after dark he was driving as usual, intending to go to the depot to meet his wife, when the wheel of the cart was caught by the guy wire and plaintiff was thrown out. Plaintiff was watching where he was going. He was driving with his usual care, and he was a very careful driver. He had never seen the guy wire, and he did not know it was there. He supposed the road was in the same condition as that in which it had been for many years, except that he saw the pole to which the wire was attached, but he could not see the wire itself, and he was driving on the particular part of the road near the tree to which he had been accustomed for many years on account of it being higher ground than that further west. Under these circumstances must it be said as a matter of law that defendant violated no duty it owed to plaintiff, or, in other words, was not, in legal contemplation, guilty of negligence? Appellant makes a distinction—which is recognized by the authorities—between the case of one invited over a way where an accident occurs and that of a mere licensee. In the former case a higher degree of care is required and a stricter rule of responsibility is applied in favor of the one injured than in the latter instance. Again, in many of the decisions great importance is attached to the question whether the party injured is or is not in pursuit of some business with the party of whose negligence complaint is made. In the case at bar plaintiff is entitled to whatever favor may be shown to a party so engaged on account of his business at the depot and defendant's relation to the said Southern Pacific Company. Considering the manner in which said roadway had been used for so many years without objection, and without ever having been obstructed until the said guy wire was placed as aforesaid, the more reasonable view is that plaintiff was there not as a mere licensee, but in consonance with an implied invitation of the Southern Pacific Railroad Company. But, whether one position or the other be correct, in the light of the evidence most favorable to plaintiff, it cannot be held, we think, that there is no support for the conclusion that under the circumstances defendant was negligent in placing and maintaining the guy wire within the line of travel without anything to attract the attention or observation of one approaching in the dark, and when such an accident as in the case at bar was likely to occur.

It is no answer to say that defendant owed no duty to plaintiff. The general principle is applicable that one must use his property so as not to injure another. He must at least practice ordinary care in the use of his property, and not be reckless or indifferent to human life or safety. It is clear that the case would be entirely different if the guy wire had been placed within an inclosure or outside of the line of travel. The ordinarily prudent and cautious person of average intelligence seemingly would anticipate such an accident, and moved by just solicitude for the welfare of others which the law enjoins would have located the wire differently, or, as was afterward done, have placed a piece of timber near the wire so as to attract attention, and lead to the discovery of the obstruction. The case would be no different in principle if defendant had stretched a barbed wire or dug a ditch across a part of the traveled way, although the danger of accident might have been somewhat increased. It is true that the wire had been maintained for some 18 months before plaintiff was injured, and consequently during that time there had been no travel over this particular part of the road, but this is of no importance as far as plaintiff is concerned, if he had no knowledge of the change nor of any circumstance to put him upon inquiry. Giving full credit, as we must, to the testimony of plaintiff, the case is just the same as though the accident had occurred the day after the wire had been located. Again, we think it is equally clear that the court was justified in finding that there was no contributory negligence on the part of plaintiff. He acted as any ordinarily prudent man would be expected to act under the circumstances, seeing what he saw and knowing what he knew. He observed the pole and avoided it. The presence of the pole, however, would carry no intimation that a guy wire was attached to it. The general knowledge and observation of the average man would not lead him, from the fact of proximity to a telephone pole, to suspect the imminence of danger of contact with a wire anchored to the ground. It would certainly be unreasonable to expect him to make diligent investigation to ascertain whether there was any invisible obstruction which he had no reason to believe existed.

Among a large number of cases we cite a few to illustrate the view taken of similar questions by different courts of last resort. In Sweeny v. Old Colony, etc., R. R. Co., 92 Mass. 368, 87 Am. Dec. 644, the Supreme Court of Massachusetts said: "The general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement, or inducement, either express or implied, by which they have been led to enter thereon. * * * The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, but from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used." In Carskaddon v. Mills et al., 5 Ind. App. 22, 31 N. E. 559, it is held by the Appellate Court of Indiana, as stated in the syllabus: "Where, after allowing the public to drive across his lot from one street to another for several years, the owner stretched a barbed wire across the track without other notice that the license to use the road was terminated, he is liable for an injury from the wire to a horse driven over such road after dark." In Morrow v. Sweeney, 10 Ind. App. 634, 38 N. E. 189, the same court said: "When the owner induces another to come upon his lands, he thereby assumes the obligation of making them reasonably safe, and of protecting such person so induced to enter thereon from unseen dangers; but the law will not infer that the injured party was induced to enter, except the facts are sufficient to show an express or implied invitation. Mere acquiescence or failure to object is not sufficient to sustain such an inference. It is alleged in the complaint, however, that from the time the appellant commenced to improve his property and erected the fence complained of a well-defined road which was almost continuously traveled by the public extended across his lot. Whether he knew from actual observation that the public were in the habit of so driving is immaterial; for, if there was a well-defined way across the lot indicating that the public were in the habit of driving across there, he was bound to take notice of it. True, if the public had not used the way for a sufficient length of time, or under such circumstances, as to create a highway by user, appellant had the right to forbid the further use and to fence his property, but he must not do so in a manner calculated to injure those who attempt to continue to drive across without any knowledge of the revocation of the existing privilege or that a barrier had been erected. Had the fence erected by appellant been of such a character that persons driving across the lot must have seen it, he could not be made to answer for any injury resulting therefrom; but to stretch across a way used by the public a barbed wire, which in itself cannot be seen after dark, without anything to warn the traveler of its existence, is equivalent almost to a desire to do injury." In Izlar v. Manchester & A. R. Co., 57 S. C. 332, 35 S. E. 583, it is held by the Supreme Court of South Carolina that: "Where plaintiff started in the night to defendant's passenger station to meet his wife and daughter, and was injured by falling over an embankment left near the way leading to the passenger station by the defendant when grading the grounds, the company was liable for the injury, since it was its duty to keep the grounds leading to the station in a reasonably safe condition." To the same effect is the decision of the Supreme Court of Michigan in the case of McKone v. Mich. Cent. R. Co., 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596. In Phillips et al. v. Library Co. of Burlington, 55 N. J. Law, 307, 27 Atl. 478, it is declared by the Court of Errors and Appeals of New Jersey that "a person entering premises of right or by invitation, expressed or implied, and using a path which for many years had been used with the acquiescence of the owner, is not precluded from recovering damages for an injury caused by a danger placed by the owner across the path solely on the ground that the owner had provided another way that was safe and might have been used by the plaintiff. In such a case it is a question of fact whether the path taken by the plaintiff has by its accustomed use, with the knowledge of the defendant, become a way which by its use and appearance indicated a way that persons so using the premises were invited to use." In Beck v. Carter et al., 68 N. Y. 284, 23 Am. Rep. 175, it is said that: "Where the owner of land expressly or by implication invites others to come upon his land, if he permits anything in the nature of a snare to exist thereon, which results in injury to one availing himself of the invitation, and who at the time is exercising ordinary care, such owner is answerable for the consequences." In Lundeen v. Livingston Electric Light Co., 17 Mont. 32, 41 Pac. 995, it is held by the Supreme Court of Montana that "a guy wire running from a telegraph pole across a street to a post four or five feet above the ground and two feet from the sidewalk is an obstruction to the free and ordinary use of said street," and defendant was held liable for the injuries caused to plaintiff by being thrown to the ground in consequence of her horse running away and coming into contact with the wire." In Graves v. Thomas, 95 Ind. 361, 48 Am. Rep. 727, it is held that, "when the public have by permission traveled on foot for years over an open lot, it is the duty of the owner, upon making an excavation in the pathway, with a view to erecting a building, to put some guard or warning for public protection, and a failure to do so gives a right of action to one who, without fault, is injured thereby." In Brown v. Stevens et al., 136 Mich. 311, 99 N. W. 13, it is held by the Supreme Court of Michigan that "a customer told that he would find what he wanted in the back part of the store, and who in walking back fell into an open trapdoor in the middle of the floor space provided for the use of customers and around which persons were standing, not having been warned, was not guilty of contributory negligence, though he might have seen the opening had he looked; he having a right to rely upon the safety of the floor." In Texas & P. Telephone Co. v. Prince, 36 Tex. Civ. App. 327, 82 S. W. 327, the Texas Court of Civil Appeals says: "There is nothing whatever to indicate negligence on appellee's part, although he testified that he might have seen the wire had he been looking. But there is nothing in the evidence indicating that appellee should reasonably have contemplated an obstruction of the character met with. It certainly cannot be affirmed that a party is guilty of negligence because of a mere failure to closely scrutinize the sidewalks of a city." In Brush Electric Lighting Co. v. Kelley, 126 Ind. 220, 25 N. E. 812, 10 L. R. A. 250, the Supreme Court of Indiana held that "the failure of a traveler to notice in the daytime an electric light wire on the sidewalk, over which he stumbled and fell, is not contributory negligence as a matter of law." In Brusso v. City of Buffalo, 90 N. Y. 679, it is declared that "a person desiring to cross on foot a city street, either in the night or daytime, is not confined to a crossing, but has a right to assume that all parts of the street are reasonably safe, and he may cross at any point that suits his convenience without being liable to the imputation of negligence."

Appellant cites a large number of cases which, it is claimed, are opposed to the views herein expressed, but an examination of them shows that they are easily distinguishable in their facts from the case at bar. We refer specifically only to those decided by our own Supreme Court. In Peters v. Bowman, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. Rep. 106, it is held, as stated in the syllabus, that "the owner of a vacant lot upon which a pond of water has accumulated by reason of an embankment erected by the city in the grading of a street, preventing the flow of surface water from the lot, owes no duty to trespassers to keep the water from accumulating upon the premises, nor to keep the lot guarded against trespasses by children, and is not liable for the death of a child from drowning in the pond while trespassing in the lot." This is in harmony with the generally recognized doctrine that with certain exceptions, to which the Peters Case does not belong, the owner of property owes no duty to trespassers except to abstain from wanton injury. There was no evidence of negligence of defendant in the case of George v. Los Angeles Railway Co., 126 Cal. 359, 58 Pac. 819, 46 L. R. A. 829, 77 Am. St. Rep. 184, and the plaintiff was clearly guilty of contributory negligence. It could not be said that defendant was culpable in leaving on the track certain "trailing cars" with the brakes properly set, and the facts furnish no analogy to the case before us. Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379, also involved the case of a trespasser, and, besides, it was properly held that the act of a third party was the proximate cause of the injury. In Douglas v. Southern Pacific Company (Cal.) 90 Pac. 538, the employé took the dangerous way knowing that it was dangerous when a safe way had been provided. Hence it was justly held that he was guilty of contributory negligence as a matter of law. He voluntarily assumed the risk; whereas, a vital point in the case at bar is that plaintiff believed and had reason to believe that the way was safe and it was rendered unsafe by reason of an invisible obstruction placed there by defendant. It is said in the Douglas Case, supra: "To undertake to pass through the planing mill when it was in full movement—its planers, saws, and other machinery in operation, trucks, push carts, tables, benches, lumber, and materials occupying practically the entire mill, with no distinct passageway through it, and such ways as there were so blocked that one would have to pick a devious or uncertain route over or around permanent and temporary obstructions—was so obviously attended with risk and danger as not to be open to discussion on that point." The case would be in point here if plaintiff had known that the way he was traveling was dangerous on account of the guy wire.

Some other points are made by appellant, which do not demand, as we view them, extended notice.

The demurrer to the amended complaint was properly overruled. No prejudicial error was committed by the court in its rulings upon questions of evidence. The findings cover all the material issues, and whether an action might have been maintained or not against the Southern Pacific Company or against it and the defendant jointly we are satisfied that there is sufficient evidence to uphold the judgment against appellant. Barrett v. Third Ave. Ry. Co., 45 N. Y. 631.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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7 Cal. App. 465

CARSTENBROOK et al. v. WEDDERIEN et al. (Civ. 396.)

(Court of Appeal, Third District, California. Jan. 2, 1908. On the Merits, Jan. 23, 1908. On Rehearing, Feb. 22, 1908.)

1. Subrogation — Nature of Right — Adequate Remedy at Law.

Equitable subrogation implies that there is no adequate remedy at law.

2. Same—Payment of Mortgage—Rights of Mortgagee—Execution in Original Suit.

Civ. Code, § 2969, provides that, before mortgaged property can be taken on attachment, the mortgagee must be paid or tendered the amount of the mortgage debt and interest, or the amount must be deposited with the county clerk or treasurer, payable to the mortgagee. Section 2970 provides that, when the property thus taken is sold under process, the officer must apply the proceeds, first, to the payment of the sum paid the mortgagee with interest; second, the balance in like manner as the proceeds of sales under execution are applied in other cases. *Held*, that an attaching creditor having paid a mortgage on the property, and the mortgagee having satisfied the mortgage of record, cannot have the satisfaction set aside and be subrogated to the rights of the mortgagee, but must proceed in the original suit to sell the property under execution.

On Petition for Rehearing.

3. Appeal—Questions for Review—Limitation by Record—Grounds for Rehearing.

Matters not set forth in the record cannot be considered on appeal, and are not grounds for a rehearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2867–2877.]

Appeal from Superior Court, Yuba County; E. P. McDaniel, Judge.

Action by H. J. Carstenbrook and J. D. Carstenbrook against Mary J. Wedderien and W. A. Wedderien. Judgment for defendants. Plaintiffs appealed to the appellate court, whence the case was transferred to the Supreme Court, and by that court retransferred to the appellate court. Reversed.

See 91 Pac. 117.

W. H. Carlin and Waldo S. Johnson, for appellants. M. F. Brittan and J. E. Ebert, for respondents.

BURNETT, J. The action was brought to set aside the release and satisfaction of a certain chattel mortgage and to have said mortgage, given by said defendants to one Wallace Dinsmore, determined and declared to be in full force and effect, and to have plaintiffs adjudged to be the owners and holders of said mortgage and the note secured thereby and entitled to the full payment of all the sums so secured, and also to have said mortgage foreclosed.

The relief sought by the complaint, involving as it does "equitable subrogation" and foreclosure, is a matter peculiarly of equitable cognizance, and the appeal should not have been taken to this court.

The cause is transferred to the Supreme Court.

We concur: CHIPMAN, P. J.; HART, J.

On the Merits.

BURNETT, J. On the 8th day of August, 1904, plaintiffs brought suit against defendants for the sum of $591 and interest. Thereupon, a writ of attachment was issued and placed in the hands of the sheriff of the county of Yuba for service. He was directed to attach certain personal property belonging to defendants upon which there was a chattel mortgage in favor of one Wallace Dinsmore to secure the payment of a promissory note for $1,500. The sheriff, acting in view of section 2969 of the Civil Code, declined to levy the writ of attachment on said property, unless the plaintiffs should pay or tender to the said mortgagee or deposit with the county clerk or treasurer of said county payable to the order of said mortgagee the amount due on said mortgage. The plaintiffs thereupon deposited with the said county clerk in accordance with said demand the sum of $1,509.35. Thereafter, on August 11, 1904, the clerk paid said sum to the said mortgagee, who entered upon the record in the county recorder's office the usual acknowledgment of satisfaction and discharge of said mortgage. Upon the payment of said money by the plaintiffs to the clerk, the sheriff levied the said writ of attachment upon said property. The action was afterwards tried, and judgment rendered in favor of plaintiffs for the sum of $659.86 and costs. An appeal was taken to this court and the judgment was affirmed. 4 Cal. App. 619, 91 Pac. 117. No execution was issued upon this judgment, but plaintiffs, claiming equitable subrogation, brought suit to set aside the satisfaction and release of said mortgage and to have said mortgage determined to be in full force and effect, and that plaintiffs be adjudged the lawful owners and holders thereof, and entitled to the payment of the full amount secured thereby and for the foreclosure of said mortgage and the sale of said property. After trial judgment was rendered for plaintiffs in the sum of $1,846.76 and $200 attorneys' fees and costs, and for the other relief prayed for in the complaint. From this judgment and the order denying their motion for a new trial defendants have appealed.

Appellants admit that plaintiffs are entitled to be reimbursed for the amount paid on account of said mortgage, but they contend that the only recourse is through the attachment suit. It is declared in their brief: "They have obtained their judgment in that action and should proceed to have execution issued out, levied upon the property in question, and then have it sold in accordance with section 2970 of the Civil Code, and the proceeds applied to the payment of said mortgage debt, with interest and the balance upon their judgment. These sections of the Civil Code deal with the subject exclusively and under well-established rules of interpretation should be held to lay down the rule that must be followed." We think appellants are clearly right in their contention. The subject is a matter of statutory regulation, and we must look to the provisions of the statute for the course to be pursued. "Equitable subrogation" implies that there is no adequate remedy at law, but here the remedy is not only adequate, but it is plain, simple, and speedy. Indeed, it is difficult to understand why plaintiffs should have resorted to the foreclosure suit unless the purpose was to secure an attorney's fee and to make conditions as burdensome as possible for defendants. The statute certainly does not contemplate that in such a case the property shall be sold twice, once under foreclosure of the mortgage and again under execution to satisfy the judgment in the other action. Section 2969 of the Civil Code provides upon what conditions personal property which is mortgaged can be taken either under attachment or execution, as follows: "Before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer payable to the mortgagee." Assuming that this has been done, we find the provision for the reimbursement of the attaching creditor in the next section (2970) as follows: "When the property thus taken is sold under process, the officer must apply the proceeds of the sale as follows: (1) To the payment of the sum paid to the mortgagee, with interest from the date of said payment; and (2) the balance, if any, in like manner as the proceeds of sales under execution are applied in other cases." It would be a dangerous doctrine to hold that, where the statute provides one remedy, another may be adopted that is not so provided. Respondents' construction would compel the interpolation into said section 2970 of some direction providing for the contingency of subrogation and the foreclosure of the mortgage by the attaching creditor. It is obvious that said section is intended to furnish the exclusive method for the reimbursement of said creditor as the preceding section prescribes the condition by compliance with which he may, under process, take possession of the property. The procedure taken in the case at bar imposes an unjust burden upon the defendants, and we are satisfied that it is not contemplated by the said act of the Legislature. It is no answer to say that the defendants are not prejudiced for the reason that they would have to bear the expense of foreclosure in case the mortgagee had brought suit on his mortgage. This view ignores the obvious intent of the Legislature to avoid this expense in the event of attachment. Besides, it is manifest that the probable result of a sale would be quite different in the case of foreclosure where the property is free from any other lien from that presented here where the property is in the possession of the sheriff under other process and subject to execution to satisfy another judgment.

The authorities cited by respondents to justify the course pursued in the court below simply illustrate the application of the well-known principle of equitable subrogation, but they are not in point here where the statute has pointed out the legal remedy. The scope of Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40, is disclosed by the syllabus as follows: "A stockholder of a corporation who pays his own and another stockholder's proportionate share of the debts of the corporation, under a legitimate and fair effort to protect his own interest in the corporate property, is entitled to contribution from the other stockholders to the extent of such stockholders' proportion of the debt paid and to be subrogated to the rights and remedies of the creditor as a necessary means to enforce such contribution." In Shaffer v. McCloskey, 101 Cal. 576, 36 Pac. 196, two tenants in common had executed a mortgage to secure the purchase price of the land, and one of them, being unable to pay his share of the mortgage, had conveyed his interest in the land to his co-tenant, in consideration that the latter would pay the full amount due, and the mortgage was afterwards satisfied of record upon such payment, without knowledge of the grantee that his grantor had previously made a deed of trust of his half of the land. It was justly held that the person paying the mortgage could maintain an action to revive it to protect his interest against the deed of trust. The Supreme Court, through Mr. Justice McFarland, properly said: "Respondent clearly intended that his payment of the mortgage should inure to his own benefit, and not to the benefit of appellants; and there is no equitable ground upon which appellants can object to it so inuring. They were not led astray by the payment of the prior mortgage, and are left in the exact position which they expected to occupy when the trust deed was taken." Randall v. Duff, 107 Cal. 33, 40 Pac. 20, is a clear case of equitable subrogation where the purchaser, under an ineffectual foreclosure of mortgages having paid off the mortgages, is held entitled to the rights and remedies of the mortgagees. The court, speaking through Mr. Justice Temple, said: "Subrogation is allowed by courts of equity to secure justice. Ordinarily it takes place when one has paid a debt which some one else ought to pay. In such cases sometimes the person so paying succeeds to the securities which the original creditor held for his debt. This is allowed when justice requires it, and the securities which a person so obtains are held by him merely to insure reimbursement. He will not be permitted to make a speculation out of it. * * * Obviously a court of equity will not allow a resort to such securities beyond what is necessary to effectuate the purpose." In Brown v. Rouse, 125 Cal. 645, 58 Pac. 267, the doctrine of equitable subrogation is again discussed by the court through Commissioner Chipman, and the conclusion reached that it was not a proper case for its application because the one claiming the benefit of it was a volunteer, and, furthermore, it is said: "There was no mistake of fact, for he had knowledge of the authority under which Rouse was acting. His mistake was one of law. No question of fraud, accident, or mistake of fact arises." The other authorities cited by respondents are in line with the foregoing, and we see no necessity for reviewing them in detail.

Or course, if it appeared that the proceedings in the attachment suit were invalid or so defective that the property could not be legally sold under an execution upon the judgment, a different case would be presented, and it would probably be brought within the principle of Randall v. Duff, supra. But, as already seen, the judgment in said cause has been affirmed. We must assume that the proceedings were all regular, and that the property is of sufficient value to satisfy plaintiffs' claim if they pursue the remedy pointed out by the statute. But, at any rate, they had knowledge of the requirements of the statute. They proceeded to attach according to its conditions, and they must abide by the consequences.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

BURNETT, J. Respondents in their petition for rehearing state that they "assign as their grounds for a rehearing herein certain matters which existed with relation to said cause at the time of the hearing and which were not plainly set forth in the record." As a matter of fact they were not set forth in the record at all, and, of course, cannot be considered by us.

It is claimed that this action was not instituted until the property subject to the chattel mortgage had been released from attachment in pursuance of a bond; and that said undertaking was in the sum of $700, while the amount of the judgment in the original action was $867.40, and that the said property is not now subject to execution in that action, and therefore respondents' only remedy to secure reimbursement for the payment of the amount due on the mortgage is to be subrogated to the rights of the mortgagee. No reason is stated why the amount of the undertaking is so small, nor why the property was not returned to the sheriff or its full value paid to plaintiffs as contemplated by section 553 of the Code of Civil Procedure. However, it inferentially appears in the petition that the original judgment was paid, plaintiffs probably satisfying it upon the theory that subrogation would lie for the $1,508. These additional matters of equitable cognizance stated and implied in the said petition are of persuasive force, but they are outside of the record and would not justify us in granting a rehearing; but, as the cause was ordered back for a new trial, we can see no reason why plaintiffs should not be permitted to amend their complaint, setting up the additional facts which in their opinion render the remedy provided by the statute inadequate or inoperative. In case this is done, and the judgment should be for respondents, we invite the consideration of the learned trial judge to the question whether the amount recovered should not be limited to the amount actually paid out by plaintiffs with the legal rate of interest.

The rehearing is denied.

We concur: CHIPMAN, P. J.; HART, J.

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7 Cal. App. 264

SAN DIEGO REALTY CO. v. McGINN et al. (Civ. 443.)

(Court of Appeal, Second District, California. Jan. 2, 1908.)

1. MORTGAGES — FORECLOSURE — PARTIES — GRANTEES FROM MORTGAGOR.

Where a deed by a mortgagor of the mortgaged premises was recorded before the maturity of the mortgage note, the grantee in the deed was entitled to be made a party to proceedings to foreclose the mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1272–1287.]

2. SAME—LIMITATIONS—PARTIES ENTITLED TO PLEAD.

Where a deed by a mortgagor of the mortgaged premises was recorded before the maturity of the mortgage note, the grantee in the note was entitled to plead limitations as a defense to the foreclosure.

3. JUDGMENT—DEFAULT—SETTING ASIDE—AFFIDAVITS OF DEFENSE—SUFFICIENCY.

Where a defendant in foreclosure proceedings served notice upon plaintiff, accompanied with an affidavit to be used on the hearing of the motion that she would move to set aside a default judgment rendered against her in the foreclosure proceedings and for leave to answer upon the merits, on the hearing of which motion she produced the affidavit which accompanied the motion and a verified answer containing matter constituting a defense, the answer was of itself an affidavit of merits.

4. Limitation of Actions—Statutes—Construction—Rules of Property.

Statutes of limitations have become rules of property, and are favored in law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 13–15.]

5. Judgment — Default — Setting Aside — Grounds—Failure to Serve.

Under Code Civ. Proc. § 473, authorizing a party not personally served with summons in an action to answer on the merits to the original action at any time within one year after the rendition of the judgment therein, a default decree in mortgage foreclosure proceedings rendered against a party not personally served, without whose presence a decree could not be entered, would be set aside, upon timely motion made upon a showing that such party had a defense which would bar a recovery, if filed within the time allowed for due service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 253, 292.]

6. Same — Motions to Set Aside — Notice — Service—Sufficiency.

Though notice of motion to set aside a default decree in mortgage foreclosure proceedings and for leave to answer upon the merits, which was served upon the party in whose favor the decree was rendered, did not contain an affidavit of merits, and though the answer filed upon the granting of the leave to answer served as such affidavit, the proceedings to set aside the decree were not defective, since it was not necessary that service should be made before presentation of the pleadings used on the hearing.

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by the San Diego Realty Company against John H. McGinn and others. From an order setting aside a default judgment in favor of plaintiff, plaintiff appeals. Affirmed.

Collier, Smith & Hoff, for appellant. Mills & Hizar, for respondents.

ALLEN, P. J. Appeal from order setting aside the default of respondent Heisler and permitting the filing of an answer to the merits of the action, from which order plaintiff appeals.

The action was brought to foreclose a mortgage executed by defendant McGinn on June 27, 1894, to secure certain promissory notes and interest coupons attached. The complaint, which was filed July 5, 1905, averred that all of the defendants other than the mortgagor, including respondent, claimed some interest in the premises as purchaser, etc., but that the same were subordinate to the said mortgage. Further, that all of said defendants are nonresidents, and none of them have been within the state of California since the execution and recordation of such mortgage. An affidavit to obtain an order for publication of summons was filed, in which it was averred that respondent was a resident of Cook county, Ill., and that her post-office address is Chicago, in said county. An order for publication was made, and the summons duly published. An affidavit showing that a copy of the complaint and summons was mailed to the respondent at Chicago, Ill., was also filed. Thereupon, on November 9, 1905, the clerk entered the default of defendants, and on the same day a decree of foreclosure was entered. Thereafter, on August 9, 1906, respondent served upon plaintiff a notice that, upon an affidavit, a copy of which was served therewith, she would move the court on a day named to set aside such judgment and all subsequent proceedings, and for leave to answer upon the merits, and that said motion would be heard upon an affidavit, the files of the case, and a verified answer of defendant, to be exhibited on the hearing of said motion. Respondent at the hearing of said motion, in support thereof, offered an affidavit, attached to notice, which showed that she was at the date thereof, and had been at all times since January, 1894, a resident of California, and that she had not during said time been absent from the state more than three months. The verified answer produced upon the hearing alleged her residence as in the affidavit stated, and, further, that the mortgagor conveyed to her the premises described in December, 1894, and such deed was duly entered of record in San Diego county in February, 1895; that she had continuously since that date been in possession of the said premises, and now owned and was in possession of the same. She further averred that plaintiff's action was, at its commencement, barred by sections 337, 339, and 343, of the Code of Civil Procedure. The court upon the hearing of said motion granted the same upon condition of the payment of $20 as her costs therein, which sum was paid by respondent, and such answer filed.

The deed under which respondent claimed title being recorded before maturity of the note determines her right to be a party, and her right to plead the statute in defense. Filipini v. Trobock, 134 Cal. 446, 66 Pac. 587. The answer containing matter constituting a defense was of itself an affidavit of merits. Merchants' Co. v. Los Angeles, etc., Co., 128 Cal. 632, 61 Pac. 227. "Statutes of limitation have become rules of property, * * * and are favored in law." Nichols v. Randall, 136 Cal. 432, 69 Pac. 26. It being made to appear to the court that a necessary party, and one without whose presence a decree of foreclosure could not be entered, had not been personally served with process, and that her application to be heard in her defense was timely, and that she had such a defense as would bar recovery if filed within time allowed after due service, the court very properly, under the authority of section 473 of the Code of Civil Procedure, made the order of which complaint is made. It is insisted, however, by appellant, that a rule of court was violated at the hearing. This is not made to appear. The record discloses that on August 9th notice of the motion, to which was attached the affidavit of respondent to be used on the hearing, was served upon plaintiff. The rule of court invoked does not require service before presentation of the pleadings which are to be used on the hearing, even should such pleadings serve as an affidavit of merits.

We find no error in the record, and the order is affirmed.

We concur: SHAW, J.; TAGGART, J.

SAN DIEGO REALTY CO. v. BERGMAN et al. (Civ. 444.)

(Court of Appeal, Second District, California. Jan. 2, 1908.)

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by the San Diego Realty Company against Nils Bergman and others. From an order setting aside a default judgment in favor of plaintiff, plaintiff appeals. Affirmed.

Collier, Smith & Hoff, for appellant. Mills & Hizar, for respondents.

ALLEN, P. J. The matters involved upon this appeal are substantially the same as those in San Diego Realty Company v. McGinn et al. (Civ. No. 443) 94 Pac. 374, this day filed; and upon the authority of that case, and for the reasons therein assigned, the order appealed from is affirmed.

We concur: SHAW, J.; TAGGART, J.

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7 Cal. App. 375

McDONALD v. CALIFORNIA TIMBER CO. et al. (Civ. 390.)

(Court of Appeal, First District, California. Jan. 9, 1908.)

1. MASTER AND SERVANT—INJURY TO SERVANT BY FELLOW SERVANT—MASTER'S LIABILITY.

Under the express terms of Civ. Code § 1970, an employer is not liable for injury to an employé caused by the negligence of a fellow servant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 354–374.]

2. SAME—SAFE APPLIANCES—MASTER'S DUTY.

An employer is not required to furnish absolutely safe appliances, but must furnish his employés with reasonably safe ones to perform the work for which they are designed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171–174.]

3. SAME—NEGLIGENCE—PRESUMPTION.

The mere fact that a clevis, to which was attached a cable which anchored a logging donkey engine, broke while the engine's position was being changed by the application of its own power, causing injury to an employé, raises no presumption that the employer was negligent in furnishing the clevis.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 881, 898, 955.]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Personal injury action by John R. McDonald against the California Timber Company and George Dent. There was nonsuit as to defendant Dent, and from a judgment for plaintiff and from a motion denying a new trial, defendant company appeals. Reversed.

See 90 Pac. 548.

Chas. B. Younger, Jr., for appellant. Chas. M. Cassin and Benj. K. Knight, for respondent.

KERRIGAN, J. This action was brought to recover damages for personal injuries sustained by plaintiff while in the employ of the defendant the California Timber Company. At the conclusion of plaintiff's case a motion for nonsuit was granted as to defendant Dent. The California Timber Company made no motion for nonsuit, and introduced no testimony, whereupon the case was submitted on the evidence introduced by plaintiff. The verdict and judgment were for plaintiff, and from the judgment and the order denying its motion for a new trial, the California Timber Company (hereinafter called the defendant) has taken this appeal.

The plaintiff bases his cause of action upon the alleged careless and negligent use of a wire cable by defendant and of a defective clevis. Defendant's answer, in addition to denying these and other allegations of the complaint, sets forth as defenses that the alleged injuries were the result of the ordinary risks of the business, of the negligence of a fellow employé, and of the contributory negligence of the plaintiff.

At the date of the accident—April 24, 1903—plaintiff as an engineer was operating a logging donkey engine for the defendant. He and others were at that time engaged in turning the engine at right angles to its former position. The engine was anchored by a cable line attached to a clevis on the platform of the engine, and was being turned by the application of its own power on a cable known as the main line. The evidence shows that, in logging, the pulling line or "main line" is attached to the first of a series or chain of logs, and they are pulled toward or from the engine as desired, the engine being held stationary by the anchor line or lines. At the time of plaintiff's injury the engine was anchored to a tree or stump. The main line ran from the engine to a block attached by a short cable or "strap" to a stump, a little to the right or left of the engine, and returned to the engine where the power was applied, thus turning the engine in the desired direction. The anchor line, as just stated, was attached to a clevis on the donkey engine. The breaking of this clevis was what caused the injuries to plaintiff. Divested of unnecessary detail, the evidence is as follows: The plaintiff testified: "I have worked in the woods in connection with lumbering twelve years. I have operated stationary engines twelve or thirteen years off and on. I have run engines similar to the one on which I was injured. All the engines on which I have been employed were worked with a wire cable. They all had clevises around the spider and a cable to steady the machine, as this one had. I had been operating this engine about fourteen or sixteen days. My duties as engineer were to stop and go ahead, and to take care of my engine. In stopping and going ahead I was governed by the signal of the head man, Emil Nuber, who was the 'donkey boss.' At the time of the accident the donkey engine was being turned around from the position in which it was standing to another position at right angles. I did not know the thickness either of the clevis or the anchor line. I do not know who attached the main line and the anchor line. I had nothing to do with it. It was the duty of the donkey boss to make those attachments. He gave orders for them to be fixed. It was no part of my duty. The engine was about 12 horsepower without the gearing. By use of the gearing I should judge it was from 75 to 80 horsepower. At the time of the accident I had up about 120 pounds of steam. Between 125 and 130 pounds was the limit. At that time the engine was pulling at its full capacity. I had full steam on." Here, one of the jurors asked the question: "Would not 60 pounds of steam have been enough to turn it [the engine] around if the anchor had been cut loose?" to which the witness answered, "Yes, sir, 60 pounds would have turned it around." The plaintiff continued: "A little further on I saw things were tightening up. I looked away from me. I thought the grab or strap on the tree to which the main line was fast would give out—would break. I saw them break more than once. I was looking towards Nuber so as to get any signal. I was apprehensive that something would break when I applied the 120 pounds of steam. I paid no attention to the anchor line; I was looking in the opposite direction." On cross-examination he further testified: "Q. Suppose there had been no cable from the clevis to the tree, would things have tightened up? A. That is what kept it back."

Frank Omnes, one of the witnesses for plaintiff, testified that he was a blacksmith; that the break in the clevis was clean and at a point just a little to one side of the center thereof; that the clevis was of iron, seven-eighths of an inch thick; that the cable used on the spool (the main line) was a ¾-inch cable, and the anchor line was a ⅜-inch cable; that he believed the clevis was one that came with the donkey. Thomas Dean, another witness for plaintiff, said: "The clevis broke because of a foul hold on the donkey—a cramp. They got a quartering hold on it." Other evidence was introduced in corroboration of some of the testimony just stated.

It would seem that the plaintiff, in applying 120 or 125 pounds of steam, when 60 pounds would have been sufficient to turn the engine, and when, too, he was aware, as he said, that "things were tightening up" and that "something would break," was himself guilty of negligence. If, however, the injury was not the fault of the plaintiff, but was caused by the negligence of the person who fastened the anchor line in the clevis with a "foul hold," or of Nuber, the foreman, or of some other person who was engaged in the same general employment with the plaintiff, then the accident was the result of the negligence of a fellow servant, and for such negligence the employer is not responsible. See section 1970, Civ. Code; Congreve v. S. P. R. Co., 88 Cal. 360, 26 Pac. 175; Livingston v. Kodiah P. Co., 103 Cal. 258, 37 Pac. 149. But this comment is merely in passing, for respondent contends that "even though it be conceded that the fellow servants of the plaintiff were guilty of negligence, or the most culpable carelessness in moving the donkey or in getting a 'foul hold,' yet if the clevis had been of suitable size and strength the accident would not have occurred, and the defendant cannot escape its liability on account of any negligence of fellow servants of plaintiff."

An employer is not required to furnish appliances which are absolutely safe. He is, however, under obligation to furnish his employé with reasonably safe appliances to perform the work for which they are designed, and to keep them in repair. Higgins v. Williams, 114 Cal. 185, 45 Pac. 1041. There was no evidence introduced which shows or tends to show that the clevis provided was not of suitable size and strength. The mere happening of the accident raised no presumption that the defendant was at fault in providing the clevis. Brymer v. S. P. Co., 90 Cal. 496, 27 Pac. 371; Madden v. Occidental, etc., S. S. Co., 86 Cal. 445, 25 Pac. 5; Sappenfield v. Main St., etc., R., 91 Cal. 48, 27 Pac. 590.

The judgment and order are reversed.

We concur: COOPER, P. J.; HALL, J.

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7 Cal. App. 308

PHILLIPS v. COX et al. (Civ. 406.)

(Court of Appeal, Third District, California. Jan. 4, 1908. Rehearing Denied by Supreme Court March 2, 1908.)

1. Taxation—Tax Titles—Recitals—Delinquency.

Pol. Code, §§ 3776, 3785, provide that the certificate of sale of property sold at a tax sale, and the deed thereof, shall recite that the property was sold for delinquent taxes. The certificate of sale under which defendant claimed recited that the taxes due were not paid, and at the time of sale remained wholly unpaid, and that at the time of sale all the property assessed and delinquent as aforesaid was sold to the state; and the deed recited that all the said property assessed and delinquent was by the sale vested in the state. *Held*, that the recitals in the deed and certificate of sale substantially complied with the statute.

2. SAME—TITLE AND RIGHTS OF PURCHASER—DEEDS AS EVIDENCE—IRREGULARITIES IN PROCEEDINGS.

The statutory provision making a tax collector's deed in a tax sale conclusive evidence of the regularity of all proceedings from the assessment to the execution of the deed applies only to nonessential matters, which the Legislature might have caused to be omitted, and is constitutional as to such matters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1557.]

3. SAME—SALE OF LAND BY STATE FOR NONPAYMENT OF TAX—OFFICERS AUTHORIZED TO SELL.

The constitutional provision providing that all grants, etc., shall be in the name of the people of the state, and signed by the Governor, etc., does not apply to the statute empowering tax collectors to grant to purchasers at public auction land bought by the state at sales for delinquent taxes.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Perry C. Phillips against E. T. Cox and another. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

Charles G. Lamberson and E. T. Cosper, for appellant. E. O. Larkin and W. W. Houston, for respondent Cox. Hannan & Miller, for respondent Zimmerman.

BURNETT, J. This is an action to quiet title. Defendants relied upon a tax deed dated June 25, 1904, based upon a tax sale of June 24, 1899. The land was sold for delinquent state and county taxes for the year 1898. Defendants had judgment, from which, and the order denying his motion for a new trial, plaintiff has appealed.

In his opening brief appellant assigns many grounds upon which it is contended the judgment should be reversed; but in his reply to respondents' citation of authorities he virtually admits that all the points made except two have been decided against him by the Supreme Court in the case of Baird v. Monroe (Cal.) 89 Pac. 352, and Bank of Lemoore v. Fulgham (Cal.) 90 Pac. 936, determined after the said opening brief was filed.

The two points from which he declines to recede and upon which he insists in the closing brief are: (1) That neither the certificate of sale nor the deed stated that the property was sold for "delinquent taxes"; and (2) the statutory provisions which seem to justify the trial court's action, to wit, the act of the Legislature making the tax collector's deed "conclusive evidence of the regularity of all other proceedings from the assessment by the assessor, inclusive, up to the execution of the deed" and the legislative attempt "to provide a system by which the tax collectors of the counties of the state could grant to purchasers at public auction the real estate or property belonging to the state without regard to its condition or character as being suitable for cultivation or not," are unconstitutional and void.

As to the first point, sections 3776 and 3785 of the Political Code provide that the certificates of sale and the deed shall contain a statement that the property "was sold for delinquent taxes." We think there was a substantial compliance with this requirement of the law. The certificate recites the levy, assessment, and equalization of the taxes, the amount of the tax on the property; "that said taxes were not and have not been paid, and at the time of sale hereinafter mentioned still remain wholly due and unpaid"; * * * that on the day and hour fixed for the sale "all the property assessed and delinquent as aforesaid (describing it) was by operation of law and by my declaration as such tax collector sold to the state of California as purchaser, in pursuance of law in such case made and provided, for the amount of said taxes of every kind charged against said property and penalties, costs, and charges, * * * and I do further certify that the said real estate last aforesaid was sold for taxes and subject to redemption pursuant to the statute in such cases made and provided." And in the deed among other things it is recited that "all the property assessed and delinquent as aforesaid * * * was by operation of law and the declaration of said tax collector sold to the state of California, as purchaser, in pursuance of law in such cases made and provided, to pay said taxes of every kind charged against said property; * * * that the said real estate last aforesaid was sold for taxes and subject to redemption pursuant to the statute in such case made and provided," etc. From the foregoing we think no one would have any difficulty in determining from either the said certificate or the deed that the property "was sold for delinquent taxes."

The second proposition is no longer an open question. It has been set at rest by the cases already cited and Chase v. Trout, 146 Cal. 350, 80 Pac. 81, and County Bank v. Jack, 148 Cal. 442, 83 Pac. 705, 113 Am. St. Rep. 285. In the bank of Lemoore Case, supra, referring to a certain memorandum which the assessor, by section 3680 of the Political Code, is required to make, the Supreme Court, through Mr. Justice Henshaw, said: "This memorandum was not made. The parties paying the subsequent taxes did not receive this notice that the property had been sold. It is urged that this was a notice which the law required to be given to the owner of the property, and that a failure to give this notice amounted to a deprivation by him of his property without due process of law, since the law had provided this means of notice. But section 3787 of the Political Code makes the deed from the state conclusive evidence upon the matter. Of course it is true that the Legislature has not the power to make such a certificate or deed conclusive as to any of the essentials of the listing, valuation, apportionment, or notice (Cooley on Taxation, pp. 355–356; 1 Blackwell on Tax Titles, § 640), but it can make the certificate or deed conclusive as to matters or things which in the first instance the Legislature might not have required to be done, and which are in their nature, therefore, nonessentials." In the case at bar no essential matters were omitted. Again, in the same opinion, it is said: "It is perfectly apparent from a reading of the constitutional provisions touching the public lands of the state that lands, title to which might thus be acquired by the state for delinquent taxes, were never within its contemplation"—and it is held that the state has full power to make the tax collector its agent and attorney in fact for the passing of the legal title.

We see no necessity for any further discussion, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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7 Cal. App. 287

HARLAN v. SCHULZE. (Civ. 405.)

(Court of Appeal, Third District, California. Jan. 3, 1908.)

1. HOMESTEAD — ENFORCEMENT OF RIGHTS — EVIDENCE—SUFFICIENCY.

In a suit to quiet title, where plaintiff claimed title under a declaration of homestead by his grantor, evidence examined, and *held* sufficient to warrant the finding by the trial court that at the time the homestead was declared persons visited the house occasionally for the purpose of prostitution.

2. SAME—NATURE AND ACQUISITION—PERSONS ENTITLED — MARRIED WOMEN—RESIDENCE—ABSENCE OF HUSBAND — TEMPORARY ABSENCE.

Under the homestead laws requiring a declaration of homestead to state that the declarant resides on the premises, the temporary absence of declarant's husband, necessitated by his business, if he did not take up a permanent residence elsewhere, would not prevent the wife from declaring for the benefit of herself and husband.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 34–43.]

3. SAME—CHARACTER OF DECLARANT.

The right to declare a homestead under the homestead laws does not depend upon the moral character of declarant, and the statute does not exclude the criminal or vicious from enjoying its protection, and the fact that at the time plaintiff's grantor declared a homestead persons visited her house occasionally for the purpose of prostitution, and she was reputed to be a prostitute, did not render her declaration void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 50–56.]

4. SAME—PURPOSE OF OCCUPANCY AND USE OF PROPERTY—BUSINESS HOMESTEAD—EVIDENCE—SUFFICIENCY.

In an action to quiet title, the evidence examined, and *held* insufficient to show that the property was used by plaintiff's grantor at the time of making her declaration of homestead primarily as a house for carrying on the business of prostitution, so as to prevent its being declared a homestead.

5. SAME — NATURE OF RIGHT—CONSTRUCTION OF HOMESTEAD LAWS.

The homestead laws are remedial, and should be liberally construed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 7.]

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Action by Paul C. Harlan against Oscar C. Schulze. From a judgment for defendant, plaintiff appeals. Reversed.

Paul C. Harlan, in pro. per. Geo. A. Lamont, for respondent.

CHIPMAN, P. J. Action to quiet title. The land in controversy is a certain lot situated in the town of Dixon, Solano county. The complaint is in the ordinary form of an action to quiet title. Defendant denies the averments of the complaint, and avers that at the time the action was commenced he was the owner in fee of the premises. It is further averred that on November 3, 1904, one Josephine Quick was the owner of the land, and on that day conveyed the same to Albert Manning, who on November 9, 1904, conveyed the same to defendant. The answer then sets forth that plaintiff claims title through a deed dated December 2, 1905, from said Josephine Quick and William Quick, her husband; avers that Josephine Quick, on October 5, 1901, filed "a pretended declaration of homestead, which declaration is claimed by plaintiff to be a valid homestead declaration"; that plaintiff took said deed with notice of said deed to said Manning; that at the time said pretended homestead was filed "the house upon said premises was not suitable for the dwelling of a family, and was not a dwelling, but was a place of business, to wit, a house of prostitution. The court made the following findings of fact: That at the commencement of the suit plaintiff was not the owner of the premises; that at that time defendant was the owner in fee thereof; that said Josephine Quick was the owner in fee simple of the land on November 3, 1905, and on that day conveyed the same to said Manning, who sold and conveyed the same to defendant on November 9, 1905; that plaintiff claims title under deed, dated December 2, 1905, "made by William Quick and Josephine Quick, husband and wife"; that at the time of its execution plaintiff had actual notice of the previous grants by Josephine Quick to Manning and by Manning to defendant; that on October 4, 1901, said Josephine "executed and acknowledged in proper form, and on October 5, 1901, recorded, * * * a declaration of homestead on said real property"; that at that time "she was a married woman, and was the wife of William Quick, the only member of the family, and was residing upon the said real property, but her family did not then reside upon said real property, and that the following recital in said declaration of homestead was untrue, to wit, 'I do now, at the time of making this declaration, actually reside with my family on the land and premises hereinafter described'; and that all other recitals contained in said declaration of homestead were true." The court further found that at the time of of the execution of the homestead, October 4, 1901, "in physical character, the dwelling house situated on said real property was capable of being used as a human habitation and residence, and was actually so used by said Josephine Quick on said October 4, 1901, but was incapable of being a home, by reason of being a house of prostitution, and that by reason of the carrying on of said unlawful business of prostitution in said dwelling house the before described declaration of homestead executed on October 4, 1901, was of no force or effect, and was invalid and void." For like reason the court found that the house on the premises "was not suitable for the dwelling of a family, and was not such dwelling," but "was a house of prostitution." As conclusions of law the court found that said premises could not, on October 5, 1901, be selected as a homestead, and the declaration of homestead was void, and that plaintiff is entitled to no relief. Judgment was thereupon entered for defendant, from which plaintiff appeals on bill of exceptions.

All the findings of fact adverse to plaintiff are challenged for insufficiency of facts to support them. The undisputed evidence was that at the time the homestead was declared the fee-simple title to the lot was in Josephine Quick; that she and her husband first rented the property, and were living on it when her husband bought it and the deed was made to Mrs. Quick; that she was then the wife of William Quick, and that they both resided at that time on the premises; that the husband worked away from his home at times for different persons in the neighborhood, but made the premises his home and had no other; that the family consisted of Quick and his wife. A copy of the homestead declaration is in the record, and conforms in all respects to the requirements of the statute, and on its face is valid. The declaration, among other things, stated: "I declare that I have not heretofore made a declaration of homestead; and I declare that my husband has not heretofore made a declaration of homestead; and I, therefore, make this declaration for the joint benefit of myself and husband." Mrs. Quick testified: "There were three buildings upon this property—a house, a woodshed, and a closet. In the house there were four rooms. Mrs. Crandall, my servant, made a bedroom out of the front room. Next to that was a sitting room, then my bedroom, and then a kitchen. Those were all the rooms in the house. They were used by each one of us as part of our home at that time. I resided there. That was the only home I had. My husband resided there at that time. He worked on the electric light line. Sometimes he went away from Dixon to his work, at other times he worked around near Dixon. All the rooms were convenient for use by Mr. Quick and myself as a home." The property cost originally $125, and was estimated in the homestead declaration to be worth $300. Defendant testified that he paid Manning $200 for it. The evidence that the house was used as a house of prostitution was mostly hearsay and circumstantial, and was based upon the character of the people going to and coming from the place and the character of women occasionally seen there. There was no evidence that women resided in the house and were engaged with Mrs. Quick in carrying on the business of prostitution, or that any persons resided there other than as testified by Mrs. Quick. One of the witnesses testified: "I do not know whether it was a place of business or merely the rendezvous of people." Another witness testified: "I don't know of my own knowledge that the business of prostitution was going on in there, but from others. I concluded so from the fact that certain men from around town were going there." Defendant testified: "Mrs. Quick was living in that house across the street from me. It seemed to be her home so far as I knew. It was capable of being used as a residence, and was at that time the home of this woman." Much of the testimony related to the character of the house some time after the homestead was declared.

Appellant makes the point that his objection to the testimony introduced to prove prostitution by common reputation should have been sustained, and that section 315 of the Penal Code, as amended in 1905, which permits the keeping of a house of ill fame to be proved by common repute, is not retroactive, and did not warrant the introduction of such proof of acts occurring long prior to the amendment; that the section did not make reputation competent proof of the use of a house for the purposes of prostitution; that, while the "ill fame" (or evil notoriety) of a house may be shown by hearsay, the use of the house for prostitution must be established as a fact—citing State v. Haberle, 72 Iowa, 138, 33 N. W. 461. We think, however, there was evidence sufficient to justify the inference that at the time the homestead was declared persons visited the house for purposes of prostitution, although there was no witness of the act itself being committed. We prefer to deal with the specific ground upon which the court based its decision that the homestead was invalid, rather than consider the alleged errors in admitting testimony. Indeed this is the only ground urged by respondent in support of the findings and judgment.

"The homestead consists of the dwelling house in which the claimant resides, and the land on which the same is situated, selected as in this title provided." Civ. Code, § 1237. The declaration must contain, when made by the wife: "* * * That her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit. (2) A statement that the person making it is residing on the premises, and claims them as a homestead." There is no pretense that the husband had a residence elsewhere, and both he and his wife testified that at the time the homestead was declared neither of them had any other residence, but that this property was their only residence, and as to the wife the court found that she resided on the premises. The statute requires only that the "claimant" shall show residence. The temporary absence of the husband, his employment away from his home, in the absence of any showing that he had taken up a residence elsewhere, would not prevent the wife from securing the benefits of the homestead act for herself and husband. See Gambette v. Brock, 41 Cal. 78; Skinner v. Hall, 69 Cal. 195, 10 Pac. 406. Once created, the homestead "can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged." Civ. Code, § 1243; Simonson v. Burr, 121 Cal. 582, 54 Pac. 87; Freiermuth v. Steigleman, 130 Cal. 392, 62 Pac. 615, 80 Am. St. Rep. 138, and cases there cited. We do not understand respondent to controvert these propositions. It is said in his brief: "The home that homestead laws were made to protect is the home of decency and respectability, where a man and his wife may live without reproach, and their children raised without shame." It is furthermore claimed that the premises were "primarily a place of business, and could not be selected as a homestead"—citing Laughlin v. Wright, 63 Cal. 113; McDowell v. His Creditors, 103 Cal. 264, 35 Pac. 1031, 42 Am. St. Rep. 114; Beronio v. Ventura County L. Co., 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118.

The ideal home which respondent describes is greatly to be desired, but does the law make it a prerequisite to claiming the benefit of a homestead? So far as is disclosed by the homestead act no personal qualifications touching the moral character of the claimant are prescribed. Nor does the statute undertake to exclude the vicious, the criminal, or the immoral from the protection given by it, or to deprive them from the shelter intended thus to be thrown around the family, however unworthy. The right to declare a homestead on one's home is in no wise dependent upon right living. If we may inquire into one species of immorality, why not into all? And where can a just line of discrimination be drawn? There may be irreconcilable differences between husband and wife. They may be committing acts of cruelty towards each other at times unbearable. The marriage vow may be recklessly violated by one or the other. The children may be surrounded by an atmosphere destructive of moral health or growth, and daily witnesses of revolting conduct by their parents, and yet we see nothing in the law that would prohibit such a family from protecting itself by a valid homestead. The homestead is as much for the benefit of the husband (and children where there are any) as for the wife, and there is not the slightest evidence in this case that the husband was a party or had knowledge of the conduct of his wife and the uses she made of their home in his absence. Judge Baldwin said in Lies v. De Diablar, 12 Cal. 328: "The adultery or abandonment by the wife did not divest the property of the character of homestead. * * * We do not see that the statute has made the crime of adultery, or abandonment, or desertion by the wife of the husband, or of the family, a cause of defeating or impairing her right."

Prince v. Hake, 75 Wis. 638, 44 N. W. 825, was an action to restrain the sheriff from selling on execution certain lots which constituted the homestead of plaintiff's intestate, Mahoney, when the judgment was recovered. The answer alleged, "by way of avoidance of Mahoney's homestead right, that at the time of docketing such judgment the only building upon the lots in question used as a residence was, and ever since has been, a bawdy house—an open and notorious house of prostitution—used and kept as such by Mahoney, and well known to be such by him and his family; also that during all that time Mahoney sold liquors upon said lots without any license, and contrary to law." The court on appeal directed that the demurrer to the answer be sustained. Speaking of the effect of the homestead, the court said: "This exempted the property from sale on execution for his debt, no matter to what other uses he put it, or that he used it for criminal purposes, or committed crime upon it. The statute exempts from seizure and sale, on execution, a certain quantity of land owned and occupied by any resident of the state as a homestead. The exemption is unqualified. No exception is made against an occupant who conducts an unlawful business, or commits crime upon such premises, and the courts have no authority to interpolate such an exception therein. The law provides the punishment which may be inflicted upon a person convicted of the crimes with which Mahoney is charged, but the forfeiture of his homestead right is no part of such punishment. * * * In the present case the right to the exemption does not depend upon the business in which Mahoney was engaged, but upon his ownership and occupancy of the premises as his home. Surely the vilest of criminals out of prison may have a home."

In discussing the subject Mr. Freeman says: "If, however, we concede that the dishonest are not worthy the benefits of the exemption laws, it still seems that we should not, as judges, enforce our peculiar ideas until they had met the supreme approval of the Legislature. Judges ought not to pronounce sentence where the law has provided no penalty. Besides it must be remembered that one of the chief objects of these laws is to protect and to provide for the debtor's family, and that this object would be partially subverted by making the benefit of the law depend upon the character of the debtor." It was said in Vandall v. Teague, 142 Cal. 471, 76 Pac. 35: "While the husband and wife are living the homestead can be destroyed only by the joint act of both husband and wife;" and, speaking of the operation of a general statute (of which the homestead statute is an example), the court said: "It must be applied generally and in all cases where exception to its operation is not specifically made." We are unable to see that any different rule should prevail in the construction of the statute authorizing the creation of the homestead and in construing that other part of the same statute which relates to its abandonment or its sale on execution. If residing in a house of prostitution is a crime, as suggested by respondent in view of section 315 of the Penal Code, we must not overlook section 677 of the same Code, which declares: "No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law; and all forfeitures to the people of this state, in the nature of a deodand, or where any person shall flee from justice, are abolished."

The remaining question is, were the premises used primarily as a place in which to carry on the business of prostitution within the rule laid down in the cases cited by respondent? It becomes necessary to examine these cases. In Laughlin v. Wright, 63 Cal. 113, the court said: "The use of the property is an important element to be considered. From the record in this case it appears that the premises in question were used by the Wrights (the owners) primarily and principally as a hotel for the accommodation of the public. It was so used at the time of the filing of the declaration, and until August, 1874, when, because of the embarrassed condition of their business, they left the hotel and put it in other hands. The Wrights, it is true, lived in the hotel until August, 1874, but their residence there was incidental to the business of 'running the hotel.'" In McDowell v. His Creditors, 103 Cal. 264, 35 Pac. 1031, 42 Am. St. Rep. 114, McDowell was an insolvent, and petitioned the court to set apart the real property in question as a homestead. The facts were that he erected the building on the premises "for the special purpose of boarding and lodging railroad men and the public generally. As first constructed the building consisted of a bar room, office, dining room, and eight sleeping rooms, but during the year it was enlarged somewhat. A large sign was placed upon it designating it as the 'El Monte Hotel,' and by that name it was advertised in the newspapers and by cards. From the time of its completion * * * appellant used the building primarily as a hotel." The court said: "The evidence clearly tended to show that the building was constructed to be used, and from the time of its construction it was used, primarily and principally, as a hotel for the accommodation of the public. And it was being so used by appellant at the time he filed his declaration of homestead. This being so, the case is plainly within the rule declared in Laughlin v. Wright, 63 Cal. 113." In Beronio v. Ventura County Lumber Co., 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118, it appeared that Beronio "was the owner of the land involved in the action, and built thereon a two-story brick building for the purpose of conducting therein a general merchandise store and hotel. He was at that time unmarried, and with his servant conducted said business and hotel until March 29, 1886, when he married, and thereafter with his wife continued to conduct the business, occupying a portion of the building with his family for that purpose. * * * February 3, 1887, he executed and acknowledged a declaration of homestead upon said lot, sufficient in form, and the same was filed with the county recorder." Upon the authority of Laughlin v. Wright and McDowell v. His Creditors, it was held that the declaration did not have the effect to impress the property with the characteristics of a homestead. In the recent case of Estate of Levy, 141 Cal. 646, 75 Pac. 301, 99 Am. St. Rep. 92, Mr. Justice Angellotti discusses the subject, and reviews the cases in a manner to leave nothing further to be desired. The doctrine of Heathman v. Holmes, 94 Cal. 291, 29 Pac. 404, is fully approved. The court, in the latter case, speaking through Mr. Justice McFarland, said: "In the case at bar it is not contended by respondents that the appellants did not continue to reside in the building and make it their home, or that they had any other residence or home. * * * But it is contended that because for part of that time they leased part of the building, although residing themselves in the part not leased, therefore they lost the right of homestead. We cannot concur in this view. To do so would be to hold that appellants lost their residence without changing it, and left their home without going away. * * * It would be strange indeed if the occupants of a house could not use part of it for family revenue, no matter how favorable the opportunity might be to do so, without forfeiting the home itself." In Estate of Levy the court, referring to cases cited, said: "These cases are all authority for the proposition that, if the building is the actual bona fide residence of a party, he may legally select it and the land on which it is situated as a homestead, even though, incidentally, a part thereof, no matter how large, may be used by him for other purposes than the family residence. * * * In no case has it been decided that where a portion of a building is dedicated to residence purposes, and is actually occupied by the claimant as the home of himself and his family, and such occupation is not merely incidental to the carrying on of some business in other parts of the building, the building and the land on which it is situated cannot be legally selected as a homestead."

The undisputed testimony was that Mrs. Quick lived upon the homestead premises, and that it was the only house or residence she and her husband then had. The defendant testified that this was her home, and the court found that she resided there. There is not a particle of evidence that the primary object of the family in purchasing and occupying the place was to establish and carry on the business of prostitution; that the residence was incidental to the business. On the contrary, whatever of this kind of business was carried on in the house was incident to the residence of the family. Unless we can say that this incidental use destroyed the right to claim a homestead because of its immorality, we cannot say that the homestead was void. That the personal character of the claimant, or her personal conduct, however immoral, in conducting her home, can be inquired into, and alone made the test of her right to a homestead, we do not believe. If she can declare a homestead, though she earns a living in part and incidentally by the art of millinery, or renting rooms, or other legitimate occupation, there is no law that would deprive her of this right because she violated the seventh commandment. The cases all hold that the statute is remedial, and should be given a liberal construction.

Defendant's title rests upon the deed of Mrs. Quick, who, as we have seen, could not alone make a valid conveyance. Plaintiff's title, the homestead being valid, rests upon the deed executed by both husband and wife, and conveyed the fee. The findings to the contrary are not supported by the evidence. The judgment is therefore reversed.

We concur: HART, J.; BURNETT, J.

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7 Cal. App. 317

DONNELLY v. TREGASKIS. (Civ. 420.)

(Court of Appeal, Third District, California. Jan. 4, 1908.)

1. EXCEPTIONS, BILL OF — SETTLEMENT — AMENDMENT—DISCRETION OF COURT.

Code Civ. Proc. § 473, provides that the court may relieve a party from an order taken against him through his mistake, inadvertence, surprise, or excusable neglect, provided that application therefor be within a reasonable time, but in no case exceeding six months after such order is taken. Judgment was entered in an action September 24, 1906. A copy of the bill of exceptions was served October 20, 1906. No amendments were proposed nor order extending time to propose amendments obtained. December 17, 1906, appellant served notice that he would move for a new trial December 23, 1906, on the bill of exceptions that day presented to the court. Respondent obtained an order setting aside the order settling the bill of exceptions, and allowing ten days in which to propose amendments, alleging as an excuse for his delay the death of the stenographer reporting the trial and the disappearance of his notes, and an agreement between counsel as to searching for the notes, and that the bill of exceptions so settled did not set forth a full, true, or correct statement of the proceedings. *Held*, that it was not an abuse of discretion to grant the order setting aside the order settling the bill of exceptions, and allowing respondent time to propose amendments.

2. APPEAL — RECORD—APPEAL FROM ORDER—SETTLING BILL OF EXCEPTIONS.

The record on appeal from an order authorized by Code Civ. Proc. § 473, setting aside an order settling a bill of exceptions, should be such that the appellate court could determine whether there had been excusable neglect, such as would warrant setting aside the order.

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Action by James Donnelly against Elizabeth J. Tregaskis. Judgment for defendant, and plaintiff appeals from an order vacating and setting aside an order settling a bill of exceptions, and allowing defendant 10 days in which to propose amendments. Order affirmed.

Paul C. Harlan, for appellant. Frank R. Devlin, for respondent.

HART, J. This is an appeal from an order of the superior court vacating and setting aside an order settling a bill of exceptions, and allowing the defendant 10 days in which to propose amendments thereto. The plaintiff excepted to said order, and the record upon said exception consists of the affidavits of the respective counsel for the parties. From the record we learn that a suit between the parties for some sort of equitable relief—the particular relief sought does not appear—was tried on the 1st day of August, 1906, and judgment awarded to the defendant by the court and the same entered of record on the 24th day of September, 1906.

The only question submitted for determination is: Did the court below abuse its discretion in making the order setting aside the previously made order settling the bill of exceptions? The respondent had failed to prepare, propose, and serve upon the attorney for the appellant any amendments to the bill within the 10 days allowed him by law to do so, and had not obtained from the court an order extending the time for that purpose. The proceeding involving the motion to set aside the order with which we are here concerned was inaugurated upon the authority of section 473 of the Code of Civil Procedure. That part of the said section through which respondent seeks relief provides that the court may, "upon such terms as may be just, relieve a party or his legal representative from a judgment, or order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; provided that application therefor be within a reasonable time, but in no case exceeding six months after such judgment, order or proceeding was taken." A copy of the bill of exceptions was served on counsel for respondent by counsel for appellant on the 20th day of October, 1906, no amendments were proposed and served on appellant by the respondent, and an order extending the time within which to propose and serve amendments to the bill was not obtained nor attempted to be obtained from the court or by stipulation from counsel. It is alleged in appellant's affidavit that on December 17, 1906, "affiant duly served upon said Devlin, at his office, a written notice that he (affiant) would move the said superior court for a new trial in said action, on December 23, 1906, upon (among other things) the bill of exceptions that day (December 17, 1906), presented to the judge of the superior court." This statement is not directly denied by counsel for respondent, but is controverted only by inference from the following averment in his affidavit: "That the first knowledge affiant had that said Harlan was to urge a speedy settlement of said bill of exceptions was on the 26th day of December, 1906, when affiant learned for the first time that said bill of exceptions had been settled, allowed, and approved on the 17th day of December, 1906."

Counsel for respondent offers as an excuse for his neglect in proposing and serving amendments to the bill the following reasons set forth in his affidavit: "That at the trial of said cause T. H. Hyatt, who was then and there the duly appointed and acting official reporter of said superior court, reported the proceedings and testimony in said cause in shorthand, and, after the rendition and entry of said judgment, as aforesaid, to wit, on or about the ——— day of August, 1906, said reporter was directed by attorney for said plaintiff to transcribe his shorthand notes into longhand, and the said attorney for said defendant on or about the same date directed said T. H. Hyatt to transcribe for defendant a copy of said notes; that thereafter, to wit, about the 1st day of October, 1906, the said T. H. Hyatt met with a violent and mysterious death in the county of Alameda, state of California; that it was rumored that at the time of the death of said Hyatt he had the transcript of the testimony of said case in his possession, but that said transcript and notes were missing when the remains of said T. H. Hyatt were found; that subsequently, to wit, on or about the ——— day of November, 1906, the said Paul C. Harlan discussed with the said Frank R. Devlin the matter of the loss of said reporter's notes, and in such conversation both of said attorneys suggested what might be done toward ascertaining the whereabouts of said notes and transcript; that, in said conversation, affiant suggested to said Harlan that inquiry be made of the coroner's office and sheriff's office of said Alameda county to ascertain if said notes and transcript were subsequently found, and, at the conclusion of said conversation, it was affiant's opinion and belief, based upon said discussion, that it was the said Harlan's intention to make such inquiry; that the said transcript of testimony was very necessary to both parties herein for the proper preparation of the bill of exceptions and amendments thereto herein, and it was the opinion and belief of affiant that he would later hear from said Harlan before the said honorable superior court would be requested to settle said bill of exceptions; that the said affiant informed said Harlan that he proposed offering amendments to said bill of exceptions, and also informed the honorable judge of said superior court of his intention to offer said amendments; that the said Harlan never mentioned or discussed the said bill of exceptions with affiant since the said conversation with reference to the loss of said notes and transcript and the efforts to be made to locate them." The affidavit of respondent's counsel also states: "That the said bill of exceptions, as now settled, allowed, and approved, does not set forth a full or true or correct statement of the proceedings and evidence in said cause, and defendant could not safely proceed to the hearing of the motion for a new trial herein, or, on appeal, if appeal became necessary, upon such bill of exceptions, and it is the purpose, intention, and desire of defendant to offer amendments to said bill of exceptions if the order heretofore made settling said bill of exceptions is set aside, and it is necessary to conserve the interests of defendant that amendments be offered to said bill of exceptions, and that substantial justice cannot be done between the parties herein under the bill of exceptions as now settled, allowed, and approved."

In his affidavit counsel for appellant declares that in the conversation referred to in respondent's affidavit he informed counsel for respondent that the transcript of the testimony and proceedings made by said court reporter Hyatt would, if found, amount to only about 38 of a possible 50 pages; that the conversation between himself and respondent's counsel relative to said reporter's notes occurred after a copy of the bill of exceptions had been served on counsel for respondent; that he did not, either before or after said conversation, "undertake or promise or agree with said Devlin to search or inquire for the notes and transcript of the testimony and proceedings in said action for the benefit of said Devlin or any other person"; that "affiant did not say, at any time, directly or indirectly, to said Devlin, that he [affiant] would give any notice or information to said Devlin concerning the settlement of said bill of exceptions." It is admitted that in said conversation counsel for respondent "did say something to the effect that he intended to propose amendments to said bill of exceptions." The inclination of reviewing courts generally is in the direction of sustaining an order of a trial court made under section 473 of the Code of Civil Procedure, where it is made to appear that the relief asked, if granted, will result in the furtherance of justice, if the facts upon which the order is made do not compel an opposite conclusion. With the whole record of the case before it, in addition to the showing made by the affidavit of respondent's counsel, the trial court was in a position to thoroughly know and appreciate the situation and the circumstances of the alleged default of respondent in not presenting his amendments to the bill within the time allowed by law, and his neglect to secure either by stipulation with his adversary or from the court an extension beyond the statutory time within which to serve and propose amendments. In cases like this much must be left to the discretion of the trial court. As is said in Vinson v. Los Angeles Pac. R. R. Co., 147 Cal. 483, 82 Pac. 514: "Whether or not the circumstances of a particular case are such that the mistake or inadvertence should be excused is a question the determination of which must of necessity be left largely to the court to which application is made, and it is well settled that this court will not interfere with the exercise of the discretion, except in a case where a clear abuse of discretion, is apparent. Particularly is this so where the discretion is exercised in favor of the granting of the relief sought, as such action tends to bring about a conclusion on the merits, which is always to be desired." Citing O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105, and note. It may be admitted that the affidavit of counsel for the respondent averring facts excusing his neglect does not of itself make a very strong showing. It does, however, state that the bill as settled "does not set forth a full or true or correct statement of the proceedings and evidence in said cause"; and, if this averment be true (and no one could better know whether it was or not than the judge who tried the case), then considerable latitude should be allowed to the discretion of the court below to take such necessary authorized steps as would make the contents of the bill conform to the record, so that the cause, upon the motion for a new trial or upon appeal, if it reaches that stage, could be finally disposed of on its merits.

In O'Brien v. Leach, supra, the court says: "The court below in deciding the motion should have considered, and undoubtedly did consider, all the facts in the case as shown by the record, including the cause of action set forth in the complaint, the proceedings in applying for judgment, and the amount of the judgment rendered in favor of plaintiff." It is also said in that opinion, "We are disposed to look with favor on the action of the lower court in setting aside the judgment, and to give to the defendant the most favorable possible construction of the evidence," speaking of the record before it involving an appeal from the order setting aside and vacating a default judgment upon the ground of the "mistake, inadvertence, and excusable neglect of the defendant's attorney." The court in the case at bar evidently from the affidavit of respondent and the whole record of the case, with which, having tried it, it was fully familiar, concluded that the bill did not present a "full or true or correct" statement of the proceedings and evidence, and with such conclusion we do not feel at liberty to interfere.

It will no doubt be apparent to the profession that we have sustained the order of the court below more upon the assumption that the judge made a full investigation of the record of the case, and upon such investigation found that the bill as offered and settled does not represent the proceedings and evidence as they appear in the record and necessary to be shown in the bill in order that the cause may finally be determined upon its merits, than upon the showing made by counsel for respondent. With this showing we do not hesitate to say that we are not greatly impressed, for it is very clear that nonaction on the part of the respondent for a period of 47 days after a copy of the bill had been served on him in the matter of proposing amendments does not constitute evidence of that diligence with which an attorney should attend to matters necessarily arising under the law in causes litigated in the courts. But, as suggested, we have assumed that there must have been considerations growing out of the record of the whole case, not appearing in the record before us, which influenced the judge, as a matter of justice not only to the victorious party to the suit, but to himself, to vacate the order settling the bill.

This leads us to suggest that in appeals from orders such as the one before us it would be a commendable practice, in order to give section 473 of the Code of Civil Procedure the force and uniform enforcement intended by the Legislature, for the judge to present his reasons for making such order, pointing out briefly wherein the bill does not speak the truth or the full truth, particularly where the affidavits and other proceedings upon which relief is asked and which constitute the record on the motion do not from their own intrinsic strength compel favorable action. Rules regulating the procedure in the trial of cases and prescribing the mode of taking appeals are established for no other purpose than to facilitate, so far as practicable, the final disposition of litigation, and should, of course, be uniformly enforced, or at least so enforced as to promote diligence rather than encourage laxity and negligence. Therefore the record in such appeals should be such as to enable an appellate court to determine for itself, without the necessity of assuming too much, whether in a given case there has been excusable neglect by a party or his attorney for a failure to act within the requirements of the statute. But we feel, as before declared, that under the circumstances shown here, and upon the assumption that the order of the court is to be interpreted as a finding that the bill does not contain a full and true statement of the evidence and other proceedings, the action of the court ought to be upheld in the interest of justice, particularly when we bear in mind the undisputed fact that the reporter's notes for the reason stated were not available, and that probably, therefore, the bill was prepared from memory.

For the reasons declared in the foregoing the order is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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7 Cal. App. 278

HEDSTROM et al. v. UNION TRUST CO. et al. (Civ. 441.)

(Court of Appeal, Second District, California. Jan. 3, 1908. Rehearing Denied by Supreme Court March 2, 1908.)

1. PLEADING — AMENDMENT — CONFORMITY TO PROOFS—TIME FOR MAKING.

The amendment of a complaint, pursuant to Code Civ. Proc. § 470, to conform the allegations to the proofs, is timely, when filed after the court has heard the evidence and argument and given the cause due consideration, but before filing the findings or judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 620–625, 653–675.]

2. TRIAL—REOPENING CASE—FURTHER PROOF AFTER AMENDMENT.

If defendant is denied the opportunity to present material evidence on any issue by an amendment of the complaint, pursuant to Code Civ. Proc. § 470, to conform same to the proofs, he should apply to have the case reopened that he may introduce such evidence.

3. SAME—REOPENING CASE—APPLICATION.

The application to reopen the case for further evidence after an amendment of the complaint to conform same to the proofs must show that defendant was misled or prevented from introducing evidence to rebut that on which the amendment was based, and that if the case is reopened he will be able to present testimony tending to rebut such evidence.

4. ADJOINING LANDOWNERS—EXCAVATION.

The fact that the owner of a building undertook to construct a foundation wall under it to comply with the requirements of a city ordinance did not release the adjoining landowner, who undertook to construct a wall by the side of it extending from six to nine feet deeper, from the duty to so construct his wall as to retain the premises on which the building stood.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adjoining Landowners, §§ 21–44.]

5. SAME—NEGLIGENCE.

A contractor who removed braces supporting adjoining premises during excavation, or had knowledge of their removal, is liable for injury to such adjoining premises resulting from such removal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adjoining Landowners, §§ 49–59.]

6. MASTER AND SERVANT—INDEPENDENT CONTRACTORS—INJURY TO THIRD PERSON—LIABILITY OF MASTER.

Where injury results to adjoining land while a contractor is performing the work of excavation and constructing a wall according to the specifications furnished him by the owner, the owner is liable for the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1241–1243, 1263–1265.]

7. APPEAL—REVIEW—CONFLICTING EVIDENCE.

The finding of the court on conflicting evidence that the fall of a wall into an excavation in an adjoining lot was not due to leaky drain or waste pipes will not be disturbed on review.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983–3989.]

8. EVIDENCE—BEST AND SECONDARY.

It is proper to allow an attorney who drew a lease to testify as to its contents after due proof of its loss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 580–594, 663.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Wilbur F. Hedstrom and another against the Union Trust Company and others. From a judgment for plaintiffs, defendants Union Trust Company and C. Leonardt appeal. Affirmed.

John W. Kemp, Kemp & Collier, and Lloyd W. Moultrie, for appellants. Bernard Potter and Frank James, for respondent Hedstrom. Frank G. Finlayson, for respondents Ramish & Marsh.

TAGGART, J. This is an action to recover damages for injury to plaintiffs' property and business caused by one side of the building occupied by them falling into an excavation in the adjoining land belonging to one of the defendants. Judgment was for plaintiffs and against the defendants Union Trust Company and C. Leonardt. Several appeals are presented by these defendants from the judgment, from an order denying their respective motions for a new trial, and from an order denying their several motions to strike from the files the second amended complaint filed by the plaintiffs. A judgment of nonsuit was granted as to the defendants Ramish & Marsh, from which no appeal was taken.

Plaintiffs conducted a manicuring and hair dressing parlor and store in a 1-story brick building belonging to I. W. Hellman, situated on a lot fronting on Fourth street in the city of Los Angeles. The defendant Union Trust Company, which was the owner of the lot adjoining to the west, contemplating the erection of a 10-story brick building on its lot, notified Hellman of its intention to make an excavation for a cellar and foundation for said building upon its premises, and in due time proceeded to make such excavation to a depth varying from 17 to 20 feet along the boundary line between said lots. By an ordinance in force at the time in said city the standard depth of foundations for brick buildings was fixed at 11 feet, and Hellman employed the defendant C. Leonardt to construct a supporting wall to that depth for the side of the building occupied by plaintiffs. The defendant Union Trust Company employed Leonardt to extend and continue said supporting wall to the full depth of the excavation made by it for its cellar and foundation. When finished this supporting wall was shored up and sustained by certain braces and shores placed against it by Leonardt under his contract with Hellman and by an agreement with the trust company. This was the only retaining wall provided to prevent the soil of the Hellman lot or the building thereon from falling into the excavation.

The plans and specifications for the Union Trust Company building called for three cement foundation piers and footings therefor, which footings were to project 4½ inches beyond the east line of said building, and were each to be 12 inches in height and 12 feet long. Defendant Leonardt was employed by the trust company, as a contractor, to construct these footings and piers. While his employés were engaged in such construction the shores and braces supporting the Hellman wall were removed, and some of these employés were engaged in picking bricks out of the wall and making niches for the purpose of inserting the footings of the cement piers for the Union Trust Company building, when the wall and side of the Hellman building fell into the excavation and thereby caused the injury to plaintiffs' business and stock of goods, for which damages are asked.

The findings upon which the judgment rests are that the allegations of the second amended complaint are true, and that the wall did not fall on account of the carelessness or negligence of Hellman or the plaintiffs. There are also two special findings to the effect that the wall did not fall by reason of defective plumbing or leaky water, drain, or waste pipes on the Hellman premises. The conclusions of law of the trial court are that the acts of said defendants Leonardt and Union Trust Company were the proximate causes of the falling of said wall, and that said acts were trespasses upon the Hellman premises, and were carelessly and negligently done and performed.

The second amended complaint was filed by leave of the court after the evidence had closed, the cause submitted for decision, and the opinion of the court been delivered, but before the filing of findings or judgment. Both defendants against whom the judgment was rendered thereafter filed and served demurrers to said complaint, and moved to strike it out on the grounds that it was filed without notice to defendants, was not served on them, was without authority of law, and that it changed the material issues in said cause, and that defendants had no opportunity to be heard on the issues so made. These demurrers were overruled and motions denied, and thereafter the defendant Leonardt filed an answer to said second amended complaint.

In support of the appeals from the order denying the motions to strike out appellants contend that the complaint upon which the action was tried counted upon negligence alone, while the complaint upon which the findings rest alleges a trespass as well as negligence. The record does not sustain this contention. The second amended complaint merely alleges with more certainty and detail the matters contained in the first amended complaint. Neither alleges a trespass in terms. The first alleges the removal by the defendants of the shores and braces, of the dirt from about, and the bricks in the wall. The second states the size of the niche made in the wall by the removal of the brick, the purpose for, and the manner in which the bricks were removed, and that it was done pursuant to the plans and specifications for the Union Trust Company building. The allegations of either would support a finding of trespass against both defendants, and the same evidence might be introduced to sustain either complaint.

The amendment was made in order that the allegations and proof might conform. Where the variance between pleading and proof is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment. Code Civ. Proc. § 470. A variance is material only when it has misled the adverse party to his prejudice in maintaining his action or defense on its merits (section 469), and becomes a failure of proof when the allegations are not proved in their general scope and meaning. Section 471. Under section 470 pleadings may be amended without terms, under 469 upon terms, while under 471 the variance is fatal.

In cases coming under section 470 amendments to the pleading should not only be allowed but required, and it is proper to do this at any stage of the action. It is timely when the court has heard all the evidence and argument and given the cause due consideration. Upon discovering a variance it should order the pleading amended before making its findings or judgment. Hancock v. Board, 140 Cal. 554, 562, 74 Pac. 44. If the adverse party is denied the opportunity to present material evidence upon any issue by reason of such amendment, he should apply to the court to have the case reopened that he may introduce such evidence and have the benefit of it. Jackson v. Jackson, 94 Cal. 462, 29 Pac. 957. Upon such an application he must show that he was misled by or prevented from introducing evidence to rebut that upon which the amendment was based, and that if the case be reopened he will be able to present testimony tending to overcome such evidence. Firebaugh v. Burbank, 121 Cal. 193, 53 Pac. 560. Amendments of this character are not made for the purpose of framing issues for the trial, but to supply technical defects, or upon the supposition that issues which have been tried are within the allegations of the pleadings when such is not the case. McDougald v. Argonaut, 117 Cal. 95, 48 Pac. 1021. It is apparent, then, that the second amended complaint was not such an amended pleading as defendants were entitled to demur to, or answer as a matter of right, as the issues therein presented were deemed to have already been tried.

This view of the second amended complaint sustains the findings and judgment so far as they are based upon it, and supports the ruling of the trial court in denying the defendant Union Trust Company's motion for a nonsuit.

Appellants contend that, when Hellman assumed the building of the 11-foot foundation wall in accordance with the city ordinance introduced in evidence, he thereby relieved the Union Trust Company of its obligation to use the care and take the precautions to sustain the land of Hellman that are required by section 832 of the Civil Code; that Hellman constructed a wall which was insufficient as a retaining wall, and the negligence which caused the injury to plaintiffs was that of the landlord and not the negligence of defendants. Had nothing else been done to sustain the Hellman property, and the Union Trust Company been misled as to the sufficiency of the Hellman wall as a protection, and relied upon it entirely as all the precaution necessary to be taken, some question might arise as to the estoppel of Hellman and his tenants to claim damages from the trust company. But this was not the case. The trust company apparently accepting the Hellman wall as a sufficient foundation under the ordinance, extended it 6 to 9 feet deeper, and relied upon it as a retaining wall. If it were too flimsy for a retaining wall at 11 feet in depth, it certainly did not become less so by the extension which was admittedly the act of appellants.

Respondents claim that the 11-foot wall was not built for a retaining wall, but as a foundation to comply with the building regulations of the city requiring an 11-foot foundation under all brick buildings. Architect Morgan testified that it was sufficient either for foundation or as a retaining wall to that depth. When the Union Trust Company made it a part of the wall erected by it as a precautionary measure, under section 832, to sustain Mr. Hellman's land, it adopted the Hellman wall, not only as sufficient for the purpose for which it was built, to wit, to support the building, but also when taken with the wall constructed by the trust company as a sufficient retaining wall for all purposes. That Hellman took measures to support his building with a proper foundation did not release the trust company from the duty imposed upon it to support Hellman's land.

The city ordinance was admissible in this connection to show a compliance with the building regulations of the city by Mr. Hellman. It need not be considered as a rule of damages, and we do not deem it necessary to pass upon the power of the city council to pass a law on that subject.

There was evidence to support the finding that both of the appellants were guilty of a negligent trespass. The immediate causes of the collapse of the wall were the removal of the shores and braces placed against the wall by the order of Mr. Hellman's architect, and the picking out and removal of the bricks from it by Leonardt's employés. The architect testified that it was intended that the braces should remain against the wall as a precaution so long as they were working and digging by the side of it, putting in the footings for the piers of the Union Trust Company's building. The braces were removed three or four days prior to the accident; but when the wall fell an employé of Leonardt was hammering the bricks from the foot of the Hellman wall with a pick to a depth of six inches, according to one witness. Twenty-four or 48 hours prior to the accident Leonardt was notified that the braces had been removed, and was requested to replace them. They were not against the wall at the time the collapse came. The evidence clearly shows the liability of the defendant Leonardt.

That of the defendant Union Trust Company, as said by the trial court in denying its motion for a nonsuit, depends upon whether or not Leonardt, as an independent contractor, was carrying out his contract with it when he was removing the bricks from Hellman's wall and thereby committing a trespass. The witness Smith, upon whose testimony the court relied in making this ruling, testified that the footings of the cement piers were put in in accordance with the plans and specifications of the Union Trust Company's building, and that the pier which was completed at the time of the accident projected 4½ inches beyond the building line of the trust company. At that time he stated he did not know whether it was on the Hellman line or not. Later when recalled by the defendants he testified that the footings of the Hellman wall extended four inches over the trust company's line, and that he was putting the trust company's footings 4½ inches into the Hellman wall. The court stated in ruling that its ruling on the motion for a nonsuit was based upon the fact that the footings extended 4½ inches on the Hellman property. This statement of fact by the court was unchallenged, and we think the inference supported by the evidence of architect Parkinson and others. There is evidence to sustain the finding that the 4½-inch niches cut in the Hellman wall to accommodate the footings of the Union Trust Company's piers were cut at the instance of the defendant Union Trust Company, and that they constituted a trespass upon the property of Hellman to that extent. The picking of these bricks from the wall at a time when there were no braces to support the wall warranted a finding of negligence and disregard of proper precaution after notice given. The record would support a finding that the proximate cause of the accident was the picking and removal of these bricks alone.

There was a conflict in the testimony as to whether there was any faucet or water pipes at the south end of the Hellman building and the wetness of the earth near the excavation may have been the result of the breaking of either drain, sewer, or water pipes, or all of them, at the time of the accident. There is evidence to support the finding that the falling of the wall was not due to leaky pipes, drains, or waste pipes on the Hellman property, and therefore the finding will not be disturbed by this court.

It was not error to admit the testimony of the witness Graves as to the contents of the lease from Hellman to plaintiffs. One of the plaintiffs testified that they were in possession of the premises under a written lease, but that the lease had been lost, and he gave the details of his efforts to find it. Mr. Graves was the attorney who drew the lease, and he was competent to testify to its contents.

While the city ordinance prescribing the depth of foundations for brick buildings and declaring a rule of damages was considered admissible for the first purpose only, we do not think its admission could in any manner have prejudiced the case of defendants, as the findings, so far as they affect the Union Trust Company, are framed upon the theory of a trespass committed by it.

The question addressed to the witness Smith whether or not the taking out of the bricks from the foot of the Hellman wall "would in any manner weaken the wall" was hardly open to the objection which was sustained that "it is calling for expert testimony." We think, however, the court was correct in rejecting the testimony, but it should have been upon the ground that it called for opinion evidence which was not expert. There could have been but one answer to the question, and common observation would have supplied that. The objection to the other question propounded to the same witness was properly sustained.

No prejudicial error appearing in the record, the judgment and orders appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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7 Cal. App. 324

MELVIN v. E. B. & A. L. STONE CO. et al.

(Civ. 441.)

(Court of Appeal, First District, California. Jan. 9, 1908.)

1. PLEADING—SUPPLEMENTAL PLEADING—NATURE AND OFFICE—SUPPLEMENTAL COMPLAINT.

The office of a supplemental complaint is to plead facts material to plaintiff's cause of action accruing after the filing of the original complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 832.]

2. SAME—NECESSITY—SUBJECT-MATTER AND GROUNDS.

While a new cause of action may not be alleged in a supplemental complaint, different or additional relief, which is consistent with the original cause of action stated, may be asked for therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 836–841.]

3. SAME—NEW CAUSE OF ACTION—SUPPLEMENTAL COMPLAINT.

In a suit to enjoin defendants from blasting, etc., where the original complaint alleged that defendants threatened to do certain blasting and excavating which would destroy the lateral support to plaintiff's dwelling house, a supplemental complaint to recover for injuries to plaintiff's house and its contents, caused by the blasting, which the original complaint sought to restrain, did not allege a new cause of action, and was properly allowed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 836–841.]

4. APPEAL—REVIEW—SCOPE AND EXTENT—NATURE OF DECISION APPEALED FROM—ON APPEAL FROM DECISION ON MOTION FOR NEW TRIAL.

In an action to enjoin defendants from blasting, the correctness of a judgment of the trial court in enjoining defendants from doing certain acts, and the sufficiency of the complaint, may not be considered on appeal from an order denying a new trial, but only on an appeal from the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3476–3486.]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Georgina H. Melvin against the E. B. & A. L. Stone Company and others. From an order denying defendants' motion for a new trial, defendants appeal. Order affirmed.

Reed, Nusbaumer & Black and B. H. Griffins, for appellants. G. R. Lukens, for respondent.

HALL, J. This is an appeal from an order denying defendants' motion for a new trial. The first and probably most important point urged for a reversal of the order grows out of the action of the court in allowing plaintiff, over the objection of defendants, to file a supplemental complaint.

The action was brought to obtain an injunction preventing defendants, among other things, from blasting, excavating, or removing earth or rock on and from a certain block in the city of Oakland, designated as block 70, in which is situate the lot and dwelling house of plaintiff, so as to deprive the lot of plaintiff of the lateral and adjacent support of the adjoining land, and from operating engines at or near said block 70, with oil or other fuel, emitting offensive odors and injurious substances, and for damages alleged to have been caused to plaintiff's dwelling house and the furnishings thereof by the smoke, soot, and dirt emitted from said engines.

The original complaint does not allege that any damage had been caused to plaintiff's property by the blasting, excavating or removal of earth, but did allege, in substance, that defendants threaten and intend to continue blasting, excavating, and removing earth from the described land, and, if permitted so to do, will impair and entirely destroy the lateral and subjacent support of the land of plaintiff. The supplemental complaint alleges that by certain blasting done by defendants subsequent to the filing of the complaint the dwelling house of plaintiff was injured and damaged, and the walls and ceilings of the rooms thereof broken and cracked, and the furniture and ornaments of said house broken and destroyed, to plaintiff's damage in the sum of $1,000, for which she asked judgment.

The office of a supplemental complaint is to plead facts material to plaintiff's cause of action accruing after the filing of the complaint. Code Civ. Proc. § 464. It is not proper to set forth a new and independent cause of action, but only such matters as may be consistent with and in aid of the case made by the original complaint. "It is no objection to a supplemental complaint that different or additional relief is asked for. Indeed, the object of the supplemental complaint is to obtain additional or different relief without resort to a new trial." Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119; Baker v. Bartol, 6 Cal. 483. In Miller v. Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292, it is said: "If the original bill is sufficient for one kind of relief, and facts afterward occur which entitle the complainant to other and more extensive relief, he may have such relief by setting out the new matter in a supplemental bill." See, also, Candler v. Pettit, 1 Paige (N. Y.) 168, 19 Am. Dec. 399.

In the case at bar the original complaint charged in substance that defendants threatened to do certain blasting that would impair and destroy the lateral and subjacent support to the lot of land of plaintiff, upon which was a dwelling house occupied by her and her family. Subsequently to the filing of the complaint defendants did the threatened blasting, with the result, not of injuring the support of the lot of plaintiff, as she had feared, but damaging and injuring the house and its contents. Under these circumstances we are unable to see why it was not proper to permit the pleading of this new matter. It was not an independent cause of action, but rather matter consistent with and in aid of the original cause of action, and calling for different and additional relief.

Appellants also attack the sufficiency of the evidence to sustain certain findings of the court, but we find sufficient evidence in the record to sustain all the findings complained of. The court found that the house and its furnishings had been damaged and injured by the soot, smoke, and dirt emitted from the engines operated by defendants, and also by the blasting pleaded in the supplemental complaint, in the total sum of $307.50. In discussing the evidence to sustain this finding appellants confine themselves to the evidence tending to prove the allegations of damage under the original complaint; but the supplemental matter was properly pleaded; and when we consider the evidence introduced to sustain the damages alleged in the supplemental complaint, as well as that tending to support the damages alleged in the original complaint, we find ample to sustain the finding made by the court on this subject. So, too, the finding to the effect that the defendants intend to use and operate a steam shovel and other machinery, emitting greasy dirt, soot, and smoke, near to the residence of plaintiff, is supported by the evidence, especially in view of the answer of appellants, which seems to insist on their right to use the same.

The other matters discussed in appellants' brief concern the sufficiency of the complaint and the correctness of the judgment so far as it enjoins defendants from doing certain specified acts, and cannot properly be considered on an appeal from an order denying a motion for a new trial, but only on an appeal from the judgment. Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Evans v. Paige, 102 Cal. 132, 36 Pac. 406; Brison v. Brison, 90 Cal. 323, 27 Pac. 186.

The order is therefore affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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7 Cal. App. 327

MELVIN v. E. B. & A. L. STONE CO. et al.

(Civ. 384.)

(Court of Appeal, First District, California. Jan. 9, 1908.)

1. Nuisances — Private Nuisances — Acts Causing Nuisances.

Under Code Civ. Proc. § 731, providing that an action may be brought for a nuisance by any person whose property is injuriously affected, or whose personal enjoyment thereof is lessened by the nuisance and the nuisance may be enjoined, as well as damages recovered, where defendants operated a steam shovel and steam engines near plaintiff's dwelling house, using fuel oil emitting large quantities of greasy soot, dirt, and smoke, so as to interfere with plaintiff's comfortable enjoyment of her property, she may maintain an action in her private capacity to enjoin the nuisance, and recover damages for injuries caused the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 20–25.]

2. Same — Abatement and Injunction — Grounds for Injunction — Adequacy of Relief.

Since the continued operation of the engines would further damage the house and furnishings and interfere with plaintiff's enjoyment thereof, damages, only, would not compensate plaintiff for the injuries, and an injunction was properly allowed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 55–59.]

3. Same—Relief Awarded—Mode and Extent of Abatement.

The facts justified a judgment enjoining defendants from operating engines near plaintiff's dwelling house, "using fuel oil emitting offensive odors, or greasy, dirty soot or smoke" upon plaintiff's property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 93, 94.]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Georgina H. Melvin against the E. B. & A. L. Stone Company and others. From a judgment awarding plaintiff damages, and enjoining defendants from doing certain acts, defendants appeal. Affirmed.

Reed, Nusbaumer & Black and B. H. Griffins, for appellants. G. R. Lukens, for respondent.

HALL, J. This is an appeal from a judgment awarding plaintiff damages in the sum of $307.50, and enjoining defendants from operating engines or machinery within certain described limits near to the dwelling house of plaintiff, using fuel oil emitting offensive odors or greasy dirt, soot, or smoke upon the property of plaintiff. It is the same case as No. 441, in which we have this day affirmed the order denying defendants' motion for a new trial, but comes before us on a separate appeal upon the judgment roll alone. 94 Pac. 389. Appellants urge that the complaint does not state facts sufficient to constitute a cause of action in that the nuisance complained of is a public nuisance, and is not shown by the allegations of the complaint to be specially injurious to plaintiff. The complaint, among other things, substantially alleges that defendants are and have been operating a steam shovel and steam engines near to the dwelling of plaintiff, using oil fuel emitting large quantities of greasy soot, dirt, and smoke, so as to interfere with the comfortable enjoyment by plaintiff of her said property, and that said soot and smoke have damaged and injured the house and furniture of plaintiff in the sum of $500, and that unless defendants be enjoined from so operating said engines and machinery further damage and injury will be done the said house and furniture of plaintiff.

The facts pleaded in this case bring it within the principle laid down in Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82, and followed by this court in Meek v. De Latour, 2 Cal. App. 261, 83 Pac. 300. It was held in Fisher v. Zumwalt, supra, that a nuisance, the effect of which extends to the dwelling houses of neighbors to such an extent as to render their occupancy materially uncomfortable, is a private nuisance as to each person thus injured, for which he may have his private action. In such action the nuisance may be enjoined or abated, as well as damages recovered. Code Civ. Proc. § 731.

Neither do we think that the injunction should have been refused, upon the ground that plaintiff could have been compensated by damages. The court found that plaintiff's property had been injured and damaged, and also that large quantities of greasy soot, dirt, and smoke were frequently emitted from the engines operated by defendants, which by its offensive odor interfered with the comfortable enjoyment by plaintiff of her residence and dwelling house, and that by the use of said engines there would be emitted large quantities of greasy smoke, dirt, and soot, which would occasion further damage and injury to the house and furnishings of plaintiff.

In Wahle v. Reinbach, 76 Ill. 322, the court, speaking of threatened injuries that may be enjoined, said: "By irreparable injury is not meant such injury as is beyond the possibility of repair, or beyond possible compensation in damages, nor necessarily great injury or great damage, but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and because it is so large on the one hand, or so small on the other, is of such constant and frequent occurrence that no fair or reasonable redress can be had therefor in a court of law." In Holsman v. The Boiling Springs Bleaching Co., 14 N. J. Eq. 335, it is said: "Where the nuisance operates to destroy health, or diminish the comfort of a dwelling, an action at law furnishes no adequate remedy, and the party injured is entitled to protection by injunction." To the same effect are Cleveland v. Citizens' Gas Lt. Co., 20 N. J. Eq. 205; Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; and Wolcott v. Meleck, 11 N. J. Eq. 204, 66 Am. Dec. 790.

The judgment in this case enjoins defendants from operating engines or machinery, near to the dwelling house of plaintiff, "using fuel oil emitting offensive odors, or greasy dirt, soot, or smoke upon the said property of plaintiff." This judgment was justified by the facts found. It was reasonably necessary in order to protect the plaintiff in the comfortable enjoyment of her dwelling.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

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7 Cal. App. 385

McCONNELL v. BOARD OF SUP'RS OF LOS ANGELES COUNTY. (Civ. 321.)

(Court of Appeal, Second District, California. Jan. 11, 1908.)

1. MUNICIPAL CORPORATIONS—PETITION FOR INCORPORATION—FORMER EXISTENCE.

Under the Constitution guaranteeing to municipal corporations organized theretofore the right to their existence, and which does not prevent legislation repealing an act of incorporation where the corporation has failed to organize as such, the question of organization previous to the adoption of the Constitution becomes a fact to be heard and determined by the board of supervisors on the hearing of a petition for incorporation under the general law.

2. SAME—APPEAL.

Where the board of supervisors on a petition for incorporation of a city under the general law determined that there had been no organization under a former special statute which had been repealed, the intendments in favor of the regularity of the judgment of such board, nothing to the contrary appearing, will presuppose the taking of testimony with reference to such previous organization.

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Petition by Lee A. McConnell against the board of supervisors of the county of Los Angeles, state of California, and others, for a writ of review to annul an order with reference to the incorporation of the city of

Wilmington. From a judgment for plaintiff, defendants appeal. Reversed.

James C. Rives, E. A. Meserve, and Bicknell, Gibson, Trask, Dunn & Crutcher (Edward E. Bacon, of counsel), for appellant. Hunsaker & Britt (James S. Bennett, of counsel), for respondent.

ALLEN, P. J. Appeal from a judgment of the superior court of Los Angeles county. The board of supervisors of Los Angeles county, under the provisions of an act of the Legislature approved March 13, 1883 (Laws 1883, p. 93, c. 49), upon the hearing of a petition signed by the requisite number of residents of the locality affected, and after determining that all preliminary notices had been given and election held as required by such act, made its order directing that all of the territory embraced within certain boundaries set out in said order "is a duly incorporated municipal corporation of the sixth class, under the name and style of the 'City of Wilmington.'" Petitioner, a resident and taxpayer of Los Angeles county, and the owner of real property within said city, filed his petition in the superior court of Los Angeles county, alleging want of jurisdiction in the board of supervisors to order such incorporation, and praying said court for a writ of review, and that upon the hearing thereof said order be annulled. The superior court upon the hearing vacated and set aside said order of incorporation. From this judgment, the defendants appeal.

The vital question involved upon this appeal, and the one upon which the judgment of the lower court was based, relates to the constitutionality of the act of the Legislature passed in 1887 (St. 1887, p. 108, c. 91) repealing a former act of February 20, 1872 (St. 1872, p. 108, c. 113), entitled "An act to incorporate the town of Wilmington," as well as a certain act amendatory thereof. It is petitioner's contention that under the Constitution the Legislature could not repeal an act creating a municipality in existence at the date of the Constitution, as such instrument guaranteed to municipal corporations organized theretofore the right of continuing their existence and of saving their form of government. Our Supreme Court, in McConnell v. City of Wilmington (Cal.) 91 Pac. 524, has determined that the guaranty referred to extends only to such municipalities as were organized before the adoption of the Constitution, and does not prevent legislation where the corporation, although previously created, has failed to organize as such. The matter of organization previous to the adoption of the Constitution, then, became a fact to be heard and determined by the board of supervisors upon a hearing of the petition for incorporation. It had jurisdiction to hear and determine this question. If, as a fact, the town of Wilmington had not organized under the act of 1872, the act of 1887 became operative, and the territory embraced within the petition was subject to the order of the board with reference to incorporation. Respondent's contention is that the action of the board of supervisors upon such hearing was judicial. Upon that assumption the intendments in favor of the regularity of the judgment of such board, nothing to the contrary appearing, will presuppose the taking of testimony with reference to such previous organization. In our opinion, the board of supervisors was not without jurisdiction, and, so far as disclosed by the record, its order creating the municipality was warranted.

The judgment of the superior court is reversed.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 379

ROBERTS v. TRUE et ux. (Civ. 414.)

(Court of Appeal, Second District, California. Jan. 10, 1908. Rehearing Denied by Supreme Court March 10, 1908.)

1. Mortgages—Release and Satisfaction—Entry of Satisfaction of Record—Effect.

Defendant executed a deed of trust to plaintiff to secure a note, the legal title to the land being thereby conveyed to plaintiff, and, the note not being paid, the parties orally agreed that plaintiff should surrender the note and discharge the deed of trust in consideration of defendant conveying the property to plaintiff, and pursuant to the agreement plaintiff surrendered the note and indorsed on the margin of the record of the deed of trust an acknowledgment of full payment and satisfaction of the trust deed, but defendant thereafter filed a declaration of homestead on the property, and refused to convey the property as agreed. *Held*, that the indorsement of payment and satisfaction on the margin of the record was not sufficient to transfer the legal title to the property to defendant, and since the title remained in plaintiff by virtue of the trust deed an action by him to enforce specific performance of defendant's oral agreement to convey would not lie.

2. Homestead — Nature, Acquisition and Extent — Liabilities Enforceable Against Homestead.

The rights of defendant's wife, acquired by virtue of the declaration of homestead, are subject to the deed of trust.

3. Mortgages — Redemption—Right to Redeem—Deed of Trust.

There is no right to redeem from a sale by the trustee under a deed of trust.

4. Same—Foreclosure by Exercise of Power of Sale—Time for Exercise of Power and Limitation.

The statutory period of limitation which bars an action to foreclose a mortgage or recover a debt does not apply to the execution of the power of sale for nonpayment of a debt secured by a deed of trust.

5. Same — Persons Entitled to Exercise Power—Under Trust Deed—Trustee and Beneficiary Same Person—Effect.

Where property was conveyed to plaintiff as trustee under a deed of trust to secure a note of which he was payee, the fact that the title to the property, as well as the power of sale, was vested in plaintiff did not affect his right to sell the property under the trust deed.

Appeal from Superior Court, Kern County; M. L. Short, Judge.

Action by J. V. Roberts against Henry B. True and wife. From a judgment for plaintiff and an order denying a motion for a new trial, defendants appeal. Judgment and order reversed.

Laird & Packard and H. L. Packard, for appellants. Fay & Claflin and C. L. Claflin, for respondent.

SHAW, J. This is an action for the specific performance of a parol agreement to convey real estate. Judgment was rendered for plaintiff, from which, and an order denying their motion for a new trial, defendants appeal.

Defendants are husband and wife. For the purpose of securing the payment of a certain promissory note Henry B. True executed and delivered to plaintiff, Roberts, what purports on its face to be a deed of trust in the usual form (except that Roberts, the payee of the note, is made trustee therein with power of sale in case of default in the payment of the said note, but which instrument defendant Henry B. True alleges to have intended and understood to be a mortgage), whereby he conveyed to Roberts the legal title to the real estate in question. The note was not paid, and Roberts and Henry B. True made an oral agreement whereby plaintiff agreed to surrender the note and discharge such deed of trust, in consideration of which defendant Henry B. True was to convey the property to plaintiff and plaintiff was to lease the same to him for a term of three years. Pursuant to this agreement, plaintiff delivered the note to defendant Mary True, and on January 18, 1898, made the following indorsement upon the margin of the record of the deed of trust: "Full payment and satisfaction of the within trust deed hereby acknowledged. J. V. Roberts. Signed and acknowledged before me this 18th day of Jan., 1898, F. S. Benson, County Recorder, by J. W. Crosland, Deputy Recorder." And on or about January 20, 1898, plaintiff executed to True a lease of the said premises for a term of three years. On May 18, 1898, defendant Henry B. True filed a declaration of homestead upon the property, and thereafter refused to execute a deed to the land in accordance with his agreement with plaintiff; hence this suit.

The principal contention of appellants is that, as Mary True was not a party to the agreement, its terms cannot be enforced as against her rights which accrued by virtue of the filing of the declaration of homestead by her husband. It is unnecessary to enter upon a discussion of this point, as it is clear that plaintiff was not entitled to judgment for another reason.

The instrument is a deed of trust in the usual form, whereby the legal title to the property was vested in Roberts (Kraft Co. v. Bryan, 140 Cal. 73-80, 73 Pac. 745); and, unless the indorsement upon the margin of the record of the deed of trust constitutes a reconveyance, it follows that the legal title remains in Roberts. By express statutory provision the lien of a recorded mortgage may be satisfied by an indorsement upon the margin of the record, as made here (Civ. Code, § 2938); but such an indorsement is lacking in all the essential elements requisite to a transfer of title. This indorsement does not purport to be a conveyance of the land; none of the formalities requisite to a legal transfer of title were observed in making it. Such reconveyance of the property provided to be made in the deed of trust upon payment of the indebtedness as security for which it was given can only be made by an instrument in writing couched in suitable and apt words of transfer, duly executed and delivered. None of these formalities were observed. There was no reconveyance, and the legal title to the property is still vested in Roberts, whose duty it is, under the terms of the deed, to reconvey the property if the indebtedness has been paid (Civ. Code, § 871), and whose right it is thereunder to execute the trust, by selling the property, if the indebtedness be unpaid. Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651; Bateman v. Burr, 57 Cal. 480. The indorsement upon the margin of the record was a futile act, unavailing for the purpose of discharging the deed of trust.

The rights of Mary True, accruing to her by virtue of the declaration of homestead, are subject to the deed of trust, and those holding thereunder. Civ. Code, § 865; King v. Gotz, 70 Cal. 236, 11 Pac. 656; Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813. There is no redemption from a sale thereunder. Koch v. Briggs, 14 Cal. 257, 73 Am. Dec. 651. The expiration of the statutory time which bars an action to foreclose a mortgage or recover a debt does not apply to the execution of the power of sale for nonpayment of a debt secured by a deed of trust. Grant v. Burr, 54 Cal. 298. The fact that the title to the property, as well as the power to sell, is vested in Roberts, who was payee of the note secured by the deed of trust, does not affect his right to a sale of the property. Mayhall v. Eppinger, 137 Cal. 7, 69 Pac. 489.

Judgment and order are reversed.

We concur: ALLEN, P. J.; TAGGART, J

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7 Cal. App. 387

RICHARDS v. FARMERS' & MERCHANTS' BANK et al. (Civ. 403.)

(Court of Appeal, Third District, California. Jan. 11, 1908. Rehearing Denied by Supreme Court, March 10, 1908.)

1. PLEADING—DEMURRER—ADMISSIONS BY DEMURRER.

A demurrer admits the allegations of the complaint to be true, and for the purpose of deciding the demurrer the facts as alleged and so admitted to be true must constitute the sole guide in the determination of the propositions of law presented.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 525-534.]

2. Cancellation of Instruments—Right of Action—Conditions Precedent—Restoration of Former Status of Parties.

Generally a party seeking rescission upon the ground of fraud must, as to the subject-matter or consideration of the contract, place the other party in statu quo, or offer so to do, before he would be entitled to relief, but he is not required to restore that which, in any event, he would be entitled to retain, nor is he bound to restore what he has received where it is of no value whatever to either of the parties, or where he has merely received the individual promissory note of the other party, or where the contract is absolutely void, or where it clearly appears that the other party could not possibly have been injuriously affected by a failure to restore, or where, without his fault, there have been peculiar complications which make it impossible for him to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 32.]

3. Contracts—Construction in Pleadings.

Where a pleaded instrument is, because of the uncertainty of its language, susceptible of more than one construction as to its nature or as to the purpose intended by the parties to be attained by it, the construction of the party pleading it should be accepted, if such construction be reasonable, where the essential facts stated in the complaint are at least pro re nata admitted to be true.

4. Cancellation of Instruments—Right of Action—Conditions Precedent—Restoration of Consideration.

Certain instruments drawn up in settlement of pending suits recited that plaintiff, having examined defendants' books and papers, was satisfied with the accounts between them as kept by defendants, that a part of the money advanced by him and mentioned in the complaints was properly disbursed by defendants, and that the balance thereof he had just received, in consideration for which he released defendants from all claims of every kind which he then had or might or could have made against them. The complaint in an action to set aside the instruments, after setting them out, alleged that true and accurate accounts of the transactions between the parties were not exhibited to plaintiff when the instruments were executed, that he was thus fraudulently misled by defendants for the purpose of cheating him, and that facts learned subsequent to the execution of the instruments convinced him that the settlement was not a just and honest one; there being still due him a large sum of money in excess of the sum received by him. *Held*, on demurrer, that, in view of the allegations of the complaint and the theory upon which the suit proceeded, the instruments simply meant that a settlement of the differences between the parties had been reached, and that the sum paid plaintiff was, under all the facts then known to him, a just and equitable basis of such settlement, and not a mere "buying of peace" by defendants, and hence plaintiff, having received less than was due him, and being entitled to retain in any event the sum received, was not obliged to restore it to defendants, or offer so to do, before bringing suit to rescind the instruments and for an accounting.

5. Same — Proceedings — Pleading — Complaint.

In a suit to rescind certain instruments executed in settlement of partnership affairs, the complaint, which alleged that the defendants named as plaintiff's partners manipulated things so that plaintiff paid out more than his share; that they and the defendant bank, which was the depositary of the profits of the business, entered into a conspiracy to defraud plaintiff of his share in the profits; that plaintiff then brought suits against defendants, which were settled by agreement as shown by the instruments; that, to induce plaintiff to accept in settlement the sum given him, he was allowed to examine the defendants' books and accounts, but that only fictitious books and accounts, and not all of them, were exhibited to him; that the defendant corporation and the other defendants did not keep true accounts of the transactions between plaintiff and defendants; that the defendant corporation in obtaining the instruments parted with no valuable consideration; and that the sum paid plaintiff under the instruments was only a part of that justly due him—was not demurrable for ambiguity, the conspiracy being clearly enough charged, and, where the partners were referred to as "the defendants," the reference to the bank as the "defendant corporation" making the allegations sufficiently clear to enable defendants to know who and what were meant.

6. Limitation of Actions — Relief on Ground of Fraud—Discovery of Fraud.

By the express provisions of Code Civ. Proc. § 338, an action to rescind certain instruments on the ground of fraud is not barred, though the instruments were executed more than three years before its commencement, where it is shown that the fraud relied on was discovered within a year of the filing of the complaint.

7. Cancellation of Instruments—Actions —"Laches."

Though a suit to rescind certain instruments on the ground of fraud was not brought until almost a year after plaintiff's discovery of the fraud, the delay was not laches, under Civ. Code, § 1691, providing that suits to rescind must be promptly brought, where plaintiff was entitled in any event to retain what he received under the instrument, and defendants therefore were unharmed by the delay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, §§ 49-54.

For other definitions, see Words and Phrases, vol. 5, pp. 3969-3972; vol. 8, p. 7700.]

8. Same.

The rule as to laches invoked by courts of equity in analogy to statutory limitations of the time within which actions may be brought in courts of law to discourage the assertion of stale claims does not involve the laches contemplated by Civ. Code, § 1691, which provides that, upon discovering the fraud, rescission must be promptly sought, if the defrauded party is free from duress and aware of his right to rescind.

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by L. A. Richards against the Farmers' & Merchants' Bank and others. From a judgment for defendants, plaintiff appeals. Reversed.

William Hoff Cook and S. A. D. Gray, for appellant. Nicol & Orr and Bud & Thompson, for respondents.

HART, J. A demurrer to the second amended complaint having been sustained, with leave to amend, and plaintiff refusing to amend within the time allowed him by the court, judgment was entered against him. This appeal is from said judgment.

The suit was commenced for the purpose of obtaining a decree of the court rescinding and setting aside two certain instruments, releasing defendants of all certain claims growing out of the affairs of an alleged partnership made by plaintiff against them, and acknowledging satisfaction of said claims, to recover which two suits were previously instituted by the plaintiff against the defendants and pending at the time of the execution of said releases—one in San Joaquin county and the other in Contra Costa county —and for an accounting of the affairs of said partnership. The plaintiff and the defendants Guernsey, Fraser, and Rosenbaum in the month of December, 1891, purchased, as partners, it is alleged, a large tract of land in San Joaquin county known as the "Sargent Tract," comprising about 3,000 acres. It is alleged that the purchase price of the land was at the rate of $40 per acre, and that the agreement and understanding was that each of the said alleged partners was to pay an equal proportion, according to the extent of his interest, of the aggregate sum for the purchase of said land. The complaint charges that the defendants, named as partners, had management of the transaction, and so manipulated it and the payments made by the plaintiff that he, in fact, paid at the rate of more than $75 per acre for his share in the land, while the other partners paid at the rate of $40 per acre for their respective shares. The defendant bank, it is alleged, was the depositary of the profits of the business of said partnership, and that a conspiracy was entered into between said bank and said other defendants to so manipulate the funds belonging to said partnership so deposited with said bank as to defraud plaintiff of his proper share of the same. It is charged that the certain instruments of release and satisfaction referred to were procured from plaintiff by the defendants by means of fraud and deceit on the part of said defendants for the purpose of defrauding plaintiff, and that plaintiff, having learned of the misrepresentations and fraud thus practiced upon him after executing said instruments, and within one year from the date of the execution of the same, instituted this suit for their rescission and for an accounting. The complaint alleges that the defendants are indebted to plaintiff in an amount exceeding the sum of $15,000, received by him at the time of the execution of the releases mentioned. The plaintiff does not offer to restore, nor does he in fact restore, the sum so received by him. The contention of the respondents is, and the court below so held, that the complaint does not state a cause of action for rescission, because the plaintiff has not restored, nor offered to restore, to the defendants said sum of $15,000 paid to him in consideration of the execution of the instruments which it is sought to have rescinded. Upon the solution of this proposition rests the determination of the question of whether the objection to the complaint presented by the general demurrer is tenable. The court below also held the complaint to be obnoxious to the criticism involved in the special demurrer, that it is ambiguous and uncertain. The defendants further claim and so charge in their special demurrer that plaintiff's right of action is barred by the statute of limitations and by laches.

The instruments executed by plaintiff acknowledging satisfaction of any claims held or claimed to have been held by him against the defendants read as follows:

"I, L. A. Richards, plaintiff in that certain action now pending in the superior court of the county of San Joaquin, state of California, wherein D. A. Guernsey, P. B. Fraser, and D. S. Rosenbaum are defendants, and plaintiff also in that certain action now pending in the superior court of Contra Costa county, state of California, wherein Farmers' & Merchants' Bank of Stockton, P. B. Fraser, and D. S. Rosenbaum are defendants, do hereby declare that I have examined all accounts and transactions at any time heretofore had, kept, and taken by said defendants and by each of them respecting, relating to, or in anywise concerning any matter or business in which I was or now am in any manner or at all interested, and upon and after such examination I am satisfied with the accounts kept by said defendants and by any of them. I have examined in company with my attorneys, C. H. Fairall and Grove L. Johnson, all of the books and papers of Farmers' & Merchants' Bank of Stockton, Cal., relating to, appertaining, and concerning any and all of my transactions with said bank as a depositor, and from such examination I find that all moneys by me deposited or placed with said bank were duly and properly and upon checks credited to my account, and that the same were duly, properly, and upon checks drawn by me paid out by said bank, and that I have not now and had not had since March 21, 1894, any money in said bank belonging to me. I further declare that I have examined the books, papers, and accounts of P. B. Fraser and D. S. Rosenbaum, in company with my said attorneys, and therefrom I learn that the sum of $40,000 mentioned in my complaint in the said action now pending in the superior court of Contra Costa county was by them properly expended and disbursed in accordance with my directions given to them, and that upon the 29th day of September, 1890, the balance of said sum remaining after the payment of the amounts due from me to the San Joaquin Valley Bank, and upon notes owing then by me to said P. B. Fraser and D. S. Rosenbaum and for the costs of abstracts made for me, was by me received from said Fraser and Rosenbaum, and then deposited by me in said Farmers' & Merchants' Bank, and that there has not been since the 29th day of September, 1890, and is not now, any sum of money whatever due or owing or unpaid to me by said Fraser or Rosenbaum for or on account of the transactions mentioned and set out in my said complaint in said action now pending in said Contra Costa county, and in consideration of the foregoing I hereby acknowledge satisfaction in full of any and all claims and demands that I now have or might have or could make against said Farmers' & Merchants' Bank, P. B. Fraser, D. S. Rosenbaum, and D. A. Guernsey, or against any or either of them. Witness my hand this 16th day of December, 1902. L. A. Richards. Witness: C. H. Fairall, F. D. Nicol, Grove L. Johnson, Ed. R. Thompson."

"For and in consideration of the sum of fifteen thousand dollars, to me in hand paid by D. S. Rosenbaum, P. B. Fraser, and D. A. Guernsey, the receipt of which is hereby acknowledged, I, L. A. Richards, hereby release and acquit said P. B. Fraser, D. S. Rosenbaum and D. A. Guernsey, and the Farmers' & Merchants' Bank of Stockton, California, of and from any and all claims and demands of every kind, name and nature, which I now have or might or could make against the said named parties, or any or either of them; and I hereby acknowledge satisfaction in full of all actions and causes of action, either in law or in equity, which I now have or now maintain, or which I might now have or might now maintain, as against the said named parties and as against each and every one of them. In witness whereof I have hereunto set my hand and seal this 15th day of December, 1902. L. A. Richards. [Seal.] Witness: F. D. Nicol."

The complaint charges that the foregoing instruments were signed and delivered by the plaintiff to the defendants "through the false representations of the defendants, made by them with the purpose of cheating and defrauding plaintiff, and at their urgent solicitation and request." The complaint further avers that, after executing said instruments, plaintiff received information that at the time he so signed and delivered the same to the defendants the latter had not shown to him or to his attorneys "all of their books of account, books, papers or accounts as herein recited," and "that the books, books of account, accounts and papers then exhibited to him and his said attorneys, as therein recited, were not true and correct, but were false and fictitious, as the defendants then and there well knew, but of which fact plaintiff was then ignorant, and that plaintiff thereupon engaged an expert accountant to examine the papers, books of account, books and papers of the defendants"; that upon information received from said expert accountant, and from information obtained through certain depositions of the defendants, Fraser, Rosenbaum, and Guernsey, taken in a certain action pending in the superior court of San Joaquin county, wherein this plaintiff was plaintiff and the defendants herein were defendants, the plaintiff charges that "the defendant corporation and the other defendants did not keep true and correct books of account of the transactions and business between the plaintiff and the defendants in relation to the matters hereinbefore alleged"; that "the defendants did not exhibit to the plaintiff all of their accounts, books, or papers, or true and correct books of account, or accounts or papers, as recited in the aforesaid instruments." The true and correct books of account, etc., it is alleged, if they had been exhibited to plaintiff and his attorneys at the time the said instruments were executed, would have shown the recitals therein to be untrue. It is further alleged "that in obtaining said instruments from plaintiff the defendant corporation parted with no valuable consideration, or other consideration, and that at the time of the execution and delivery of said instruments the said sum of $15,000 therein recited was due, owing, and unpaid to plaintiff, and the defendants were then and there indebted to plaintiff in the sum of $15,000, in addition to the sums and amounts set forth in paragraph 6 of this complaint." After alleging that the plaintiff was induced to sign said instruments through misrepresentations and "a designed suppression of the truth" on the part of the defendants, the complaint avers that the recitals contained in said instruments do not state the truth; that there are certain large amounts, representing the profits of the alleged partnership, which were never accounted for by the defendants; and that plaintiff, through the alleged fraud perpetrated by the defendants, was deprived of his just proportion thereof, and he, therefore, asks for an accounting.

For the purposes of the case, the demurrer admits the allegations of the complaint to be true, and for the purposes of this decision, therefore, the facts as alleged and so admitted to be true must constitute the sole guide by which we must be governed in the determination of the propositions of law presented and necessary to be decided. The general rule as to rescission is that where a party desires to rescind, upon the ground of fraud, an executed contract by which he has received from the other party thereto something of value, he must, before he is entitled to such relief, either restore, or offer to restore, to said other party whatever of value he has so received. In other words, the party seeking rescission must, as to the subject-matter or consideration of the contract sought to be rescinded, place the other party to such contract in statu quo, or offer to do so, before he would be entitled to a rescission of the contract. This has always been the general rule as to rescission practiced in courts of equity and is the express rule in California. Section 1691, Civ. Code. See, also, Matteson v. Wagoner, 147 Cal. 744, 82 Pac. 436; Richards v. Fraser, 122 Cal. 457, 55 Pac. 246; Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797; Rohrbacher v. Kleebauer, 119 Cal. 260, 51 Pac. 34; Jurgens v. N. Y. Life Ins. Co., 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386; Maddock v. Russell, 109

Cal. 417, 42 Pac. 139; Bank v. Wickersham, 99 Cal. 655, 34 Pac. 444; Marten v. Burns Wine Co., 99 Cal. 355, 33 Pac. 1107; Gamble v. Tripp, 99 Cal. 223, 33 Pac. 851; Cal. Farm & Fruit Co. (a corporation) and Dugald Scott v. Leopoldo Schiappa-Pietra et al., (Cal.) 91 Pac. 593. There are, however, exceptions to this general rule. See cases cited. Among these exceptions is where "one who attempts to rescind a transaction on the ground of fraud is not required to restore that which, in any event, he would be entitled to retain." Richards v. Fraser, supra. Or, "for instance, where the thing received by the plaintiff is of no value whatever to either of the parties; or where the plaintiff has merely received the individual promissory note of the defendant; or where the contract is absolutely void; or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore; or where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties." Kelley v. Owens, supra.

The question here is: Was it the duty of the plaintiff, under the facts as pleaded, and which, as seen, must, for the purposes of this decision, be deemed to be true to restore or offer in good faith to restore the sum of $15,000, received by him from the defendants at the time of the execution of the instruments of release and satisfaction, as a condition precedent to his right to a rescission of the transaction evidenced by said instruments? If, under the pleaded facts, the plaintiff is, in any event, entitled to retain the money so received by him, then the transaction is within one of the exceptions referred to in the authorities cited, and restoration or offer to restore is consequently unnecessary, and it would therefore follow that the order sustaining the demurrer upon the general ground is erroneous. The learned judge of the court below, who filed an opinion setting forth his reasons for sustaining the general demurrer, and which is printed in respondents' brief, concedes the soundness of the position as thus stated, for he says: "If the $15,000 was paid as and for an adjustment of the accounts, or as the balance due to plaintiff upon a settlement of the accounts or as the amount agreed by all parties to be due, then plaintiff is entitled to retain the same whether such amount was arrived at by means of false and fraudulent accounts which concealed the true balance, or from an adjustment of true and correct accounts." But the learned judge does not so interpret the instruments, but declares that "it appears that the $15,000 was paid for the express purpose of preventing and estopping the plaintiff from prosecuting other and future actions against the defendants, or either or any of them, and that he now asks to be allowed to prosecute the very claims which he agreed not to prosecute, and at the same time retain the consideration for the agreement not to prosecute," and from this construction of the nature and intention of the instruments concludes that plaintiff must first, before he can prosecute his original cause of action, "restore the consideration for which he agreed not to do so."

We are, in view of the allegations of the complaint and the theory upon which the suit necessarily proceeds, unable to assent to the interpretation of the instruments thus given them by the trial court. There can be no doubt that the instruments involve an agreement not to prosecute any cause of action then pending between the parties at the instigation of plaintiff, and also that the plaintiff would not press any further claims he might have against the defendants. But these instruments, as we understand them from the averments of the complaint and the fair and reasonable intendments thereof, simply mean, and were intended to mean, that a settlement of the differences between the parties had been reached and that the sum of $15,000, paid by the defendants to plaintiff, was, under all the facts then known to plaintiff, a just and equitable basis of such settlement. In other words, we do not understand that the releases were intended by the parties—the plaintiff on the one side and the defendants on the other—for the purpose of merely evidencing the "buying of peace" by the defendants, without regard to whether the sum received by plaintiff was in fact due him or not, but as a settlement of the accounts between the parties, and, the facts being admitted by the demurrer, the settlement must be construed to mean an admission upon the part of the defendants, Fraser, Rosenbaum, and Guernsey, that at the time of such settlement there was at least that much due plaintiff as his share of the profits of the business in which, as partners, the parties had been engaged. There is no express language in the releases authorizing or warranting any other construction of the transaction evidenced thereby than that given here. We think that where a pleaded instrument is, because of the uncertainty of the language in which it is expressed, susceptible of more than one construction as to its nature or as to the purpose intended by the parties to be attained by it, the construction of the party pleading it should be accepted, if such construction be reasonable, where, as here, the essential facts stated in the complaint are at least pro re nata admitted to be true. The complaint alleges that the instruments releasing the defendants of all claims or debts and causes of action inuring to the plaintiff by reason of the partnership affairs of the parties were obtained through the fraudulent representations and the designed suppression of the truth by the defendants; that true and correct accounts of the transactions of the alleged partnership were not exhibited to the plaintiff when the instruments were executed; that he was thus fraudulently misled and deceived by the defendants for the purpose of cheating him; and that facts learned subsequently to the execution of the instruments convinced him that the settlement was not a just and honest one, and that there is still due him a large sum of money in excess of that received by him at the time of the execution of the releases. The theory reasonably arising upon the facts thus pleaded and contended for by plaintiff is that the sum accepted by him as a true adjustment of the partnership profits does not represent the amount justly due him, and that he is therefore, and by reason of the alleged imposition practiced upon him, entitled to an accounting in order that a true and just settlement may be obtained. This is, we say, the theory which necessarily arises upon the facts pleaded in the complaint, and as such must be accepted as the correct theory under the attack of the demurrer.

It will not be doubted that, if the facts alleged in the complaint are absolutely true, the defendants, Fraser, Rosenbaum, and Guernsey, still retain certain profits of the partnership business belonging to the plaintiff. The complaint, as we have seen, declares that there is, in addition to the $15,000 received by plaintiff on account of the partnership profits, a large sum on the same account still due. Why, then, should the law require so idle an act as to compel plaintiff to restore that which the demurrer necessarily admits would be his in any event? We are not concerned with the proposition of what the evidence might show upon a trial of the facts. We are in the determination of the question here restricted alone to a consideration of the uncontroverted facts pleaded in the complaint, and taking those facts and the theory reasonably and naturally arising upon them as our guide, as we are compelled to do, we are in no doubt, from the light thus reflected, but that the transaction represented by the said instruments of release and satisfaction is within the exceptions to the general rule as to rescission to which we have referred, and that the general demurrer, therefore, should have been overruled.

We think the objection to the complaint upon the ground of ambiguity and uncertainty is not sufficiently well founded to justify the order sustaining the special demurrer. The allegations could and no doubt should have been more certain, but we see no difficulty in determining from them the meaning of the pleader. All the defendants, including the defendant corporation, are clearly enough charged in paragraph 4 of the complaint with a conspiracy to defraud the plaintiff, and in paragraphs 5 and 6, where the defendants, Fraser, Rosenbaum, and Guernsey, are sometimes referred to as "the defendants," the reference in the same connection to the bank as the "defendant corporation" makes the allegations sufficiently clear to enable the defendants to know and understand who are and what is meant. The special demurrer should have been overruled.

The complaint does not show that the action is barred by the provisions of section 338 of the Code of Civil Procedure, as it is alleged that the false and fraudulent representations upon which plaintiff claims to have executed the instruments and thereby consummated a settlement with the defendants were discovered within one year of the filing of the complaint.

Nor do we think plaintiff is guilty of delay amounting to inexcusable laches in bringing his suit even if it may be conceded that, under the rule that the allegations of a pleading are to be construed most strongly against the pleader, the averments as to the time of the discovery of the alleged fraud may be taken as indicating that almost a year had passed after the discovery of the fraud before plaintiff filed his complaint. There is no fixed or invariable rule as to what will constitute laches under section 1691 of the Civil Code. Whether laches may or may not be successfully pleaded against the right to proceed in a suit must depend upon the circumstances of each particular case. In those cases, where the thing received by him who seeks to rescind an executed contract on the ground of fraud is of such a nature as that it may deteriorate in value, and the circumstances are such as that restoration is a necessary prerequisite to the relief, a few months' or even weeks' delay after the discovery of the fraud may be deemed inexcusable laches and lose the party his right of action. But in the case at bar there was no necessity for restoring the thing received, and no harm could therefore possibly result to the defendants by the delay, even if it embraced a period of nearly a year. The plaintiff took timely steps so far as the statute of limitations was concerned, and the rule as to laches which formerly was under the old practice and is perhaps sometimes now invoked by courts of equity in analogy to the statutory limitations as to the time within which actions may be brought in courts of law—to discourage the assertion of stale claims (vigilantibus non dormientibus æquitas subvenit)—does not, of course, involve the laches contemplated by section 1691 of the Civil Code. It may be that upon a trial of the issues of fact the evidence will establish circumstances showing such laches upon the part of plaintiff in bringing his suit as to defeat his right of action, and if so, and it is made an issue by the answer, a finding thereon, supported by sufficient proof, would sustain a judgment against plaintiff. But, as before suggested, we are not now dealing with questions of fact.

We think the judgment ought to be reversed; and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

7 Cal. App. 257

STOCKTON LUMBER CO. v. SCHULER et al. (Civ. 395.)

(Court of Appeal, Third District, California. Dec. 30, 1907.)

COURTS—APPELLATE JURISDICTION—EQUITY PROCEEDING—MECHANICS' LIENS—FORECLOSURE.

Where a complaint in a suit to foreclose certain materialmen's liens alleged that the contract between the owner and the contractor was void, and that plaintiffs had filed, and caused to be recorded, liens on the building for their respective claims, etc., and the owner deposited 25 per cent. of the contract price reserved for the benefit of the lienholders, the suit was in equity, so that an appeal should have been taken direct to the Supreme Court as provided by Const. art. 6, § 4, and not to the appellate court.

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by the Stockton Lumber Company against William C. Schuler and others. Judgment for defendants, and plaintiff appeals. Case transferred to Supreme Court.

Budd & Thompson, for appellant. Nicol & Orr, for respondent Schuler. R. C. Minor, for respondent Stockton Planing Mill.

HART, J. This is a suit to foreclose certain liens of materialmen and for a decree of court that the property upon which the liens were filed be sold and said liens be satisfied out of the proceeds of said sale. There are several distinct actions and the court below, in accordance with section 1195 of the Code of Civil Procedure, made an order consolidating them. The appeal is direct to this court.

We are of the opinion that the suit is one in equity, and should, therefore, under section 4 of article 6 of the Constitution, have been appealed directly to the Supreme Court. The complaints allege that, for reasons therein specified, the contract between the owner of the property and the contractor is void, and also aver that the plaintiffs duly filed and caused to be recorded liens upon the building for their respective claims. The 25 per cent. of the amount of the contract price was reserved by the owner of the property until after 35 days after the completion and acceptance of the building, and, upon the filing of the complaints herein, he deposited said sum in court to be distributed to the lienholders according as the court might so adjudge. The court found that the contract between the owner and contractor was valid, and rendered and caused to be entered a judgment that the lien claimants were entitled to a lien upon the fund deposited in court, but not upon the property, and ordered the money so deposited to be distributed accordingly. Appellant was probably in doubt as to whether the proceeding was an action at law or a suit in equity; hence appealed directly to this court.

But, as already suggested, we have no doubt that the proceeding is one calling for equitable relief, and that it is our duty to transfer the case to the Supreme Court. It is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

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7 Cal. App. 382

CARLSON v. CUCAMONGA WATER CO. (Civ. 417.)

(Court of Appeal, Second District, California. Jan. 10, 1908. Rehearing Denied by Supreme Court March 10, 1908.)

1. MASTER AND SERVANT—DUTY OF MASTER—DEFECTIVE APPLIANCES.

It is the duty of a master to provide reasonably safe appliances for the prosecution of its work, and an omission in that regard is negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 173, 178.]

2. SAME—QUESTIONS FOR JURY.

Whether a master was negligent in furnishing hoisting apparatus not reasonably safe for use in digging a well *held* a question for the jury though the evidence was not conflicting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010–1012.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Millie J. Carlson, administratrix of the estate of Hiram A. Carlson, deceased, against the Cucamonga Water Company, a corporation, for injuries to plaintiff's husband resulting in his death. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

Gregg & Surr, for appellant. F. A. Leonard and Byron Waters, for respondent.

ALLEN, P. J. Action for damages. Trial by jury. Judgment of nonsuit entered, from which plaintiff appeals.

Plaintiff's husband was employed by defendant to assist in digging a well. A whim was being used in hoisting material from the excavation. The derrick was about 20 feet in height, upon the top of which were placed 2 timbers nailed to the top of the derrick with tenpenny nails. Upon these timbers were fastened the bearings into which the ends of the shaft operated. The sheave wheel and shaft were attached together by means of a set screw, and it was intended that the wheel and shaft should revolve together, the wheel revolving between the two timbers, which timbers should act as a guard in keeping the wheel in place, and thereby keeping the ends of the shaft within the bearings. A cable ran from the whim over this sheave wheel and down to the bucket used in hoisting. This bucket weighed about 58 pounds, and, when filled, about 500 pounds. The duties of plaintiff's husband were to hook and unhook the bucket from the end of this cable, which duties required him to remain under the sheave wheel at the mouth of the well. The set screw proved ineffective, and the wheel became loosened from the shaft. The movement of the wheel upon the shaft caused it to work out of its bearings until one end escaped therefrom, and the weight of the bucket upon the cable pulled the wheel off the shaft, tearing loose the nails which held the supporting timbers in place, and the wheel fell, injuring plaintiff's husband, from which injury he soon thereafter died.

Evidence was presented by plaintiff to the jury tending to show that the construction of this hoisting apparatus was different from that usually employed in the vicinity in like work. A number of witnesses were examined, all of whom testified that they had never seen a hoisting apparatus where the sheave wheel was attached to the shaft, but, on the contrary, the shaft, by means of a set screw through the boxing imbedded in the shaft half of its diameter, and the boxing being closed at the ends, was held firmly in place and could not shift in either direction, and the sheave wheel revolved thereon. There was evidence showing that no guards of any kind were provided at the ends of this shaft to in any manner prevent its escape from the bearings in the event the set screw should fail to hold. It is further in evidence that in this case the set screw was only sunken into the shaft a sixteenth of an inch, and "that there was nothing to keep it from getting loose"; and, further, that when the shaft escaped from the bearings the weight upon the cable and wheel was sufficient to tear loose the tenpenny nails holding the timbers which supported the bearings, wheel, and shaft.

It must be a conceded proposition that it was the duty of the defendant to provide reasonably safe appliances in the prosecution of this work, and that an omission in that regard would be negligence. Whether this hoisting apparatus was faulty in its construction and not reasonably safe for the purposes intended, and that defendant was negligent in reference thereto, was a question of fact. Under the established rule that negligence is a question of fact even where there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence, we think it was the duty of the trial court to have submitted this question to the jury for their determination. "It is said to be the highest effort of the law to obtain the judgment of twelve men of the average of the community, * * * as to whether negligence does or does not exist in a given case." Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651; Wahlgren v. Market St. Ry. Co., 132 Cal. 664, 64 Pac. 993. We are of opinion that it cannot be said, as a matter of law, that it was not negligence for this defendant to have furnished an appliance constructed in the manner heretofore stated. There is nothing in the record indicating contributory negligence upon the part of the deceased, nor of any of the fellow employés, either in relation to the adjustment of the machinery furnished or otherwise, and, in our opinion, the court erred in granting the motion for a nonsuit.

Judgment reversed, and cause remanded for a new trial.

We concur: SHAW, J.; TAGGART, J.

7 Cal. App. 413

STOCKWELL v. BARNUM et al. (Civ. 428.)

(Court of Appeal, Second District, California. Jan. 11, 1908. Rehearing Denied by Supreme Court March 10, 1908.)

1. MORTGAGES—RIGHT TO SALE UNDER DEED OF TRUST—ASSIGNMENT OF DEBT—NECESSITY OF RECORDING.

A transferee of a negotiable promissory note, payment of which is secured by a deed of trust, whereby the title to the property and power of sale in case of default is vested in a third party as trustee, is not an incumbrancer to whom power of sale is given within the meaning of Civ. Code, § 858, providing that "where a power to sell real property is given to a mortgagee or other incumbrancer, in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in any person who, by assignment, becomes entitled to the money so secured to be paid, and may be executed by him whenever the assignment is duly acknowledged and recorded," and so such transferee, though the assignment of the note to him has not been recorded, may upon the maker's default demand a sale of the trust property to satisfy the indebtedness.

2. SAME — SALE BY TRUSTEE — CONDUCT OF SALE.

In an action to set aside a sale under a trust deed given to secure the payment of a note, it appeared that none of the officers of the trustee, a corporation, was present at the sale, which was made by an attorney of the trustee, who acted by virtue of a general resolution by the directors authorizing him, with several others, to act in such proceedings for the corporation. He had nothing to do with fixing the time when, nor the place where, the sale was to be made, nor whether or not the contingency had arisen which would justify the sale; these questions having been passed upon by the trustee through its proper officers. *Held* that, the attorney exercising no discretion imposed upon the trustee, the sale was legally made; it being permissible for a trustee to employ an auctioneer to cry a sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1077.]

3. SAME—APPOINTMENT OF ATTORNEY.

In such a case it was not necessary that the attorney's power to conduct the sale should have been conferred by a formal resolution adopted by the trustee's board of directors after the contingency justifying the sale had arisen, since the managing officer, in the absence of any resolution, might employ one to perform the mechanical act of making such a sale in the execution of a trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1036-1041.]

4. SAME—EFFECT AFTER SALE OF DEPOSIT OF AMOUNT OF DEBT.

Where property was sold under a trust deed given to secure the payment of a promissory note, it being clear that no tender of any amount was made in payment of the note, interest, or costs before sale, the fact that subsequent to the sale and before the execution of the trustee's deed to the purchaser of the property the maker of the note deposited with the trustee a sum of money sufficient to pay the amount due the holder thereof could not affect the validity of the sale, nor vest in the maker the right to a reconveyance of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1094.]

5. SAME—VALIDITY OF SALE.

Where a trust deed was executed to secure the payment of a note, and the holder of the note, before sale under the deed, specified the amount she was willing to bid for the property, and requested the trustee to have some one appear and make such bid for her, and an officer of the trustee requested an employé thereof to act for her, and such employé, in obedience to her instructions, but in no way representing the trustee, did appear and bid in for her, securing the property, the sale is not invalid for unfair conduct of the trustee, since a trustee himself may make a bid at the instance of the beneficiary without impairing the validity of the sale.

6. SAME — VACATING SALE — INADEQUACY OF PRICE.

Where under the terms of a trust deed it was the imperative duty of the trustee to sell the trust property, leaving him no discretion in the matter, mere inadequacy of price, standing alone, would not be sufficient to justify the vacation of a sale, and under such circumstances the price of $2,030.25 for property worth $3,500 is not so grossly inadequate as to raise the presumption of fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1086, 1087.]

7. SAME—NOTICE OF SALE.

A trustee in a trust deed is under no duty, when a sale is contemplated, to make other effort to procure bidders than to advertise the sale in the manner provided in the deed of trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1050-1069.]

8. CORPORATIONS — AGENTS — AUTHORITY OF AGENTS.

At a sale under a trust deed the attorney of the trustee, a corporation, acted as auctioneer. Thereafter the attorney stated to the former owner that he thought the purchaser would release the property for what it had cost her, whereupon such former owner deposited with the trustee money sufficient to cover such cost. The attorney then wrote the purchaser, stating that the sale worked a hardship on the owner, and suggesting that she, in consideration of the deposit, quitclaim the property to such owner, who had come to the office intending to redeem. *Held*, that the attorney in writing the letter had no right to bind the trustee; it not appearing that he had any authority to speak for the corporation after the sale, his effort being merely a laudable desire to aid the owner to repurchase the property.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by V. E. Stockwell against Elizabeth C. Barnum and another. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

Valentine & Newby, for appellant. J. Wiseman MacDonald and Lee C. Gates, for respondents.

SHAW, J. The action is to have set aside and vacated a sale made under a deed of trust by the Title Insurance & Trust Company, a corporation, as trustee, of certain real property. Judgment was rendered for defendants. Plaintiff moved for a new trial, which motion was denied. The appeal is from the judgment and order.

On November 10, 1904, Sparkman and wife made their promissory note whereby they promised to pay to Anna B. Brown and Bettina B. Brown, or order, at the Security Savings Bank of Los Angeles, the sum of $1,800, and delivered the same to said Anna and Bettina B. Brown. The note by its terms bore interest at the rate of 10 per cent., payable quarterly, and it was provided in said note that in case of default in the payment of any installment of interest when due the whole sum of principal and interest should become immediately due and payable, at the option of the holder of the note. For the purpose of securing payment of said note and interest thereon Sparkman and wife executed and delivered to the Title Insurance & Trust Company a deed of trust whereby they conveyed to said Title Insurance & Trust Company the legal title to certain real estate. Said deed of trust was in the form generally used for the purpose of securing indebtedness, and, among other things, provided: If default should be made in the payment of principal or any installment of interest when due, as provided in said promissory note, that said Title Insurance & Trust Company, as such trustee, on demand of said Anna B. Brown and Bettina B. Brown, or their heirs or assigns, should sell the real property therein described, or such part or parts thereof as in its discretion it should deem necessary to sell in order to accomplish the objects of the trust. Sparkman made default in the payment of the installment of interest due upon said note on February 10, 1905, and likewise defaulted in the payment of the installment of interest payable on May 10, 1905. On June 23, 1905, Anna B. Brown and Bettina B. Brown transferred the note to Elizabeth C. Barnum. On June 26, 1905, Barnum elected to declare the whole amount of the note due by reason of the default in the payment of interest, and demanded of said trustee that it proceed to sell said property in accordance with the terms and provisions of said deed of trust. Whereupon the trustee did, on July 3, 1905, pursuant to the provisions contained in said deed, advertise the property for sale on July 25, 1905. On July 25, 1905, prior to the time of the sale, Sparkman and wife, by deed, conveyed the real estate to plaintiff, Stockwell.

1. Section 858 of the Civil Code provides: "Where a power to sell real property is given to a mortgagee, or other incumbrancer, in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in any person who, by assignment, becomes entitled to the money so secured to be paid, and may be executed by him whenever the assignment is duly acknowledged and recorded." Appellant contends that the provisions of this section are applicable to the interests of beneficiaries under deeds of trust in the form here used, and that, as no assignment acknowledged and re-

corded as required by this section was made to Elizabeth C. Barnum, therefore no right was vested in her to demand a sale of the property under the terms of the deed. The deed of trust required the trustee, upon default, to sell the property upon demand of the parties to whom the note was made, or their assigns. The note was indorsed upon the back thereof as follows: "Cal., June 23d, 1905. For value received we hereby sell, assign, transfer, and set over unto Elizabeth C. Barnum, or order, all our right, title, and interest in and to this note, and the moneys due and to grow due thereon, with the interest, and in and to the deed of trust securing the same, but without recourse. Anna B. Brown, by Bettina B. Brown, Her Atty. in Fact. Bettina B. Brown"—and the same was delivered to Elizabeth C. Barnum. By this act the Browns transferred to Barnum all the rights secured to them under the provisions of the deed of trust. This transfer, however, did not include any power to sell the real estate. They had no such power. None had been given to them, and hence they could assign none. Such power was, under the provisions of the deed of trust, conferred upon the trustee in whom the legal title to the property was vested, and it alone could transfer it in executing the trust. In discussing a statute similar to section 858 the Supreme Court of Minnesota says: "That the record should correctly show the authority of a mortgagee or his assigns to sell is important to the mortgagor, because it is for his interest that the title should be as marketable as it may be, since he may be liable for a deficiency; and it is important to the mortgagor, or those claiming under him, because they may be entitled to a surplus." Thorp v. Merrill, 21 Minn. 336. And in Morris v. McKnight, 1 N. D. 271, 47 N. W. 375, the court, in considering the same subject, uses the following language: "We conclude that when a party seeks to foreclose a mortgage in this state by advertisement, claiming such right as assignee, the record must show complete legal title to such mortgage in such assignee; otherwise such foreclosure will be a nullity. Any other rule would discourage bidding at such foreclosure sales, and result in the sacrifice of property, and the title so conveyed would remain under suspicion, and values be thereby depreciated. A still more unfortunate result would be the fact that the mortgagor and those claiming under him could not with safety redeem from such sales. Either the right to redeem must be abandoned, or a redemption made with the risk of finding the legal title to the mortgage in some person other than the pretended assignee." This reasoning, while conclusively showing the necessity for the Code provision as to mortgagees or other incumbrancers in whom a power of sale is vested, is wholly foreign to deeds of trust, which, instead of creating a lien only, as in the case of a mortgage, passes the legal title to the trustee, thus enabling him in executing the trust to transfer to the purchaser a marketable record title. It is immaterial who holds the note. The transferee of a negotiable promissory note, payment of which is secured by a deed of trust whereby the title to the property and power of sale in case of default is vested in a third party as trustee, is not an incumbrancer to whom power of sale is given, within the meaning of section 858 of the Civil Code.

2. None of the officers of the trustee were present at the sale; but the property was actually offered, and the sale made to respondent Barnum by W. H. Jamison, one of the legal counsel of the trustee, who acted in that behalf by virtue of a general resolution adopted February 3, 1905, by the board of directors of the trustee, authorizing him as one of several others to act in such proceedings for and on behalf of the corporation. Conceding that said resolution purported to delegate discretionary powers, nevertheless, so far as appears from the record in this case, Jamison did not perform other than a ministerial act. He did not concern himself with any discretion, the exercise of which was imposed upon the trustee. He had nothing to do with fixing the time when, nor the place where, the sale was to be made; nor whether or not the contingency had arisen which would justify the trustee in selling the property. All these questions seem to have been determined and passed upon by the trustee, which, through its proper officers, with its corporate seal affixed thereto, published a notice of the time and place of sale in due and proper form, under and in accordance with which the sale was conducted by Jamison, who, for the trustee, acted as an auctioneer in crying the sale. There is abundant authority in both this and other jurisdictions to sustain the right of a trustee in employing an auctioneer to cry a sale. Fogarty v. Sawyer, 23 Cal. 570; Kennedy v. Dunn, 58 Cal. 340; Connolly v. Belt, 5 Cranch (C. C.) 405, Fed. Cas. No. 3,117.

Appellant further contends that, conceding the board of directors might empower its attorney to conduct the sale, such power should have been conferred by a formal resolution adopted by its board after the contingency justifying the sale had arisen. We think it competent for the managing officer, in the absence of any resolution, to employ one to perform the mechanical act of making a sale in the execution of a trust. There would seem to be no more reason in such formal action in this case than there would be for like formal action authorizing the delivery of papers held by the corporation in escrow. Bank v. Stone, 121 Cal. 208, 53 Pac. 634. The making of the sale was not such a corporate act as required formal action of the board of directors. It was neither making nor authorizing a sale of its own real estate. The case of Salfield v. Sutter, etc., Co., 94 Cal. 549, 29 Pac. 1105, cited by appellant, is not in point; for the reason that formal action of the board was there held necessary by virtue of the provisions of section 2310 of the Civil Code, which section has no application to the facts under consideration.

3. It is clear that no tender of any amount was made in payment of the note, interest, or costs before sale, and the fact that subsequent to the sale, and before the execution of the trustee's deed to the purchaser of the property, appellant deposited with the trustee a sum of money sufficient to pay the amount due Barnum, with costs, could not affect the validity of the sale, nor vest in appellant the right to a reconveyance of the property.

4. It is next contended that the sale should be set aside on account of unfair conduct of the trustee. Prior to the execution of the deed of trust Sparkman was indebted to Barnum, and to secure payment of such indebtedness he and his wife executed to Barnum a deed to said property, absolute in form, but intended as a mortgage. This deed was not filed for record until January 25, 1905. It does not appear that any one was deterred from bidding by reason of the existence of the deed, or misled into the belief that it was other than a subsequent mortgage. There was some correspondence between Barnum and the trustee with reference to the purchase of the note from the Browns. A careful inspection of this correspondence, however, does not disclose any unfairness toward appellant upon the part of the trustee, and appellant does not suggest wherein any conduct of the trustee with reference to this deed, or in connection with the correspondence, prejudiced appellant. Kraft Co. v. Bryan, 140 Cal. 73, 73 Pac. 745. Mrs. Barnum specified the amount which she was willing to bid for the property, and requested the trustee to have some one appear and make such bid. One of the officers of the corporation requested an employé thereof to act for her, and in obedience to her instructions he did appear and bid in for her, and in her name, the property for the amount of the indebtedness and costs. He merely carried out her instructions and in doing this did not in any way represent the trustee. "The trustee may himself make the bid at the instance of the beneficiary, without impairing the validity of the sale." Felton v. Le Breton, 92 Cal. 467, 28 Pac. 490. The conduct of the trustee in giving instructions to Mrs. Barnum does not indicate a desire to act unfairly. On the contrary, as between both parties, it is manifest that the trustee diligently endeavored to impartially perform the duties imposed upon it, and with the utmost fairness towards Sparkman, appellant, and Mrs. Barnum.

The property sold for $2,039.25, and the court finds that at the date of said sale its value was $3,500. It is contended that this inadequacy of price, taken in connection with the alleged unfairness of the trustee, constitutes sufficient grounds for reversal. The record discloses no unfairness on the part of the trustee; nor is it made to appear wherein plaintiff was injured by any wrongful or fraudulent act of the trustee. Under the terms of the deed it was the imperative duty of the trustee to sell the property. It had no discretion in the matter. In such case inadequacy of price, standing alone, is not sufficient to justify the vacation of a sale. The inadequacy may be so gross as will in itself indicate misconduct, unfairness, or fraud on the part of the trustee, but such is not the case here. The deed imposed an obligation upon the trustee to accept the highest bid offered, and it could not, without a violation of its duty to Barnum, refuse it. Carter v. Abshire, 48 Mo. 300; Clark v. St. Louis, Alton, etc., R. R. Co., 58 How. Prac. (N. Y.) 21; Horsey v. Hough, 38 Md. 130; Copsey v. Sacramento Bank, 133 Cal. 660, 66 Pac. 204, 85 Am. St. Rep. 238. In the case of Herbert Kraft Co. v. Bryan, supra, the court, in considering a like subject, says: "As plaintiff was the highest bidder, it is difficult to see how the trustees could have refused to accept the bid without violating their duty to the executor." Perry on Trusts (5th Ed.) § 602z. The trustee was under no duty to make other effort to procure bidders than to advertise the sale in the manner provided in the deed of trust. Harlin v. Nation, 126 Mo. 27, 27 S. W. 330.

5. After the sale, in a conversation with appellant, Mr. Jamison stated that he thought Mrs. Barnum would let him have the property for what it had cost her. Stockwell thereupon, at Jamison's suggestion, deposited with the trust company which had acted as trustee a sum of money sufficient to cover the cost of the property to Barnum. Jamison then wrote to Mrs. Barnum suggesting that she, in consideration of this deposit for her account, quitclaim the property to Stockwell. and stated that he had come to the office intending to redeem, and that the sale worked a hardship upon Stockwell. The court held that Jamison in writing this letter had no right to bind the trustee. There was no error in the ruling of the court. It could not bind Mrs. Barnum in any way, and it does not appear that he had any authority to speak for the corporation after the sale. Moreover it does not purport to be a statement of fact, but rather an expression of opinion, and, under the circumstances, a laudable desire to aid appellant in a repurchase of the property from Barnum.

It is unnecessary to refer directly to other points urged by appellant, as they are sufficiently covered by the foregoing discussion.

Judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J

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7 Cal. App. 421

MABRY v. RANDOLPH et al. (Civ. 446.)

(Court of Appeal, Second District, California. Jan. 13, 1908.)

1. APPEAL—THEORY OF CAUSE—ISSUES.

Where an issue of agency in a suit to set aside an exchange of property for fraud was tried in good faith, without any objection on the pleadings in the trial court, a judgment will not be reversed on appeal on the ground that such issue was not tendered by the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1137–1139.]

2. FRAUD—TRUTH OF REPRESENTATIONS—RELIANCE—PLEADING.

Where, in a suit to set aside an exchange of an orange grove for city property for fraud, the complaint alleged that plaintiff relied on the good faith and representations of his agents when he made and delivered the deed to his orange grove to defendant R., who was the mere tool of such agents, who were the purchasers in fact, the complaint sufficiently averred that plaintiff believed the representations alleged to have been made to him by such agents.

3. EXCHANGE OF PROPERTY — RESCISSION — FRAUD.

In a suit to set aside an exchange of property, evidence *held* to establish a fraudulent conspiracy on the part of defendants acting as plaintiff's agents, who, in fact, procured the exchange for their own benefit under false representations as to the value of the property exchanged.

4. SAME—REMEDIES.

Where plaintiff's agents, acting ostensibly in his interest, fraudulently procured an exchange of property for their own benefit, plaintiff's remedy by rescission of the contract was not exclusive; a court of equity under such circumstances being authorized to direct a reconveyance of the property on appropriate terms without any previous rescission by the defrauding party.

5. SAME—RESCISSION—NOTICE.

Plaintiff, having been fraudulently induced by his agents to exchange an orange grove for city property, on discovering the fraud, and learning that the agents were negotiating a sale of the orange grove to T., notified T. in writing of his ownership of the grove, and that he intended to have the exchange set aside on account of the fraud, and also notified the person to whom the agents had the property transferred for their benefit of his intention, and demanded a restoration of the property offering to reconvey the city property, and tendered a deed and rent for the use of the property. *Held*, that such written demand constituted a sufficient notice of plaintiff's election to rescind.

6. SAME — FRAUD — DISCOVERY—ELECTION TO RESCIND—TIME.

Where plaintiff's agents by fraudulent representations induced him to make an exchange of property ostensibly to another, but in fact for the benefit of such agents, they were estopped to complain of plaintiff's delay in discovering the fraud and electing to rescind.

7. EQUITY—MAXIMS—APPLICATION.

The maxim that equity rewards the diligent has no application to the diligent in concealment and deceit.

8. EVIDENCE—EXPERTS—COMPETENCY—VALUE OF LAND—DETERMINATION.

The qualification of a witness to give an expert opinion as to value of land must be left largely to the determination of the trial court, whose ruling will not be disturbed in the absence of an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2363.]

9. EXCHANGE OF PROPERTY—RESCISSION—EVIDENCE.

In a suit to set aside an exchange of plaintiff's orange grove for a city residence for alleged fraud of plaintiff's agents, evidence as to the price at which plaintiff had listed his orange grove for sale, the fact that the agents removed all signs from the house and evidence of identification before showing it to plaintiff, and plaintiff's knowledge of the ownership of the property, together with the price at which the owner of the house was offering it at the time, was admissible.

10. APPEAL—PREJUDICE—EVIDENCE.

Defendants were not prejudiced by the allowance of objectionable questions, where the same matter was elicited by other questions not objected to.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4170.]

11. WITNESSES — EXAMINATION — FORM OF QUESTIONS.

The use of the words "what did you understand" in the examination of a witness instead of "what was said" or "what was done" is objectionable.

12. EVIDENCE—OPINIONS—FACTS OR CONCLUSIONS.

A question as to whether or not there was any conspiracy to defraud plaintiff was objectionable as calling for a conclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2149–2195.]

13. SAME—EXPERT TESTIMONY—VALUE.

In a suit to rescind an exchange of an orange grove for city property, a question to a qualified witness calling for the value of the orange grove, such issue being raised by the pleadings, was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2332.]

14. APPEAL — RULINGS ON EVIDENCE — PREJUDICE.

Where, in a suit to rescind an exchange of property, the judgment was based on a breach of trust by appellants, the exclusion of evidence as to the value of the property which plaintiff exchanged was not prejudicial to defendants, the amount of damage sustained being immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4187–4193.]

15. BROKERS—FRAUD—RIGHTS OF PRINCIPAL.

Where plaintiff's brokers induced him to make an exchange of property by fraudulent representations, and procured a transfer of plaintiff's property to a third person for their own benefit, plaintiff was entitled to the entire profit the brokers made in the transaction over the commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 26, 48–50.]

16. WITNESSES — EXAMINATION — LEADING QUESTIONS.

In a suit to restrain an exchange of property, a question asked of one of the defendants, "Did you make any representations to Mr. Mabry [plaintiff] with reference to the value of the property?" was not objectionable as leading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 838–846.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Suit by William M. Mabry against M. Randolph and others. From a judgment for plaintiff, defendants Randolph and W. T. Michaels appeal. Affirmed.

Davis, Kemp & Post and H. H. Appel, for appellants. James P. Clark and M. M. Meyers, for respondent.

TAGGART, J. A suit in equity to compel restoration of property procured by fraud. The appeal is from the judgment. The facts relied upon for recovery, and substantially as alleged in the complaint, are as follows: On June 2, 1905, plaintiff was the owner of an orange grove situated near the town of San Dimas of the value of $7,500, and against which there subsisted a mortgage of $2,500. The defendant Michaels, with whom the property was listed for exchange, on that day represented to plaintiff that the Maxon Realty Company could effect an advantageous exchange of the grove for other property, and thereby induced plaintiff to go to the office of that company, where he met one of the Maxon brothers, who constituted the company, and the defendant Bell, who, he was told by Maxon, was associated in business with them. The Maxon Realty company engaged to act for plaintiff, and to procure an exchange of his orange grove for a house and lot in the city of Los Angeles, a written authority for which purpose was given to the Maxon Realty Company, and the commissions for their services in this behalf fixed at $125. The same day plaintiff was taken by Bell to see the house, from which, in pursuance of the scheme of appellants to cheat and defraud plaintiff, all signs and marks that would indicate its ownership had been removed, and it was represented to him by Bell and one of the Maxons that the owner thereof held the property for sale at $8,500, and would not sell for less, and that this was the reasonable value of it. It was also represented to him that the property was incumbered by a mortgage for $3,500. The truth was, and it was well known to appellants, that the owners thereof, Winstanley by name, were offering the property for sale at $4,000, and it was mortgaged for $1,800, and no more. Plaintiff went to San Francisco that afternoon, leaving the matter, including the examination of title, in the hands of the Maxon Realty Company, as his agents, to be closed up. On the following day appellants, acting through Bell, purchased the Winstanley property from the owners thereof, taking title to the property in the name of the defendant Randolph (who permitted her name to be used for a nominal consideration), and gave as a consideration therefor the sum of $3,800; the purchase price being made up of a small sum in cash, two notes of $850 secured by a second mortgage on the property, and the original $1,800 mortgage standing against the Winstanleys. On the 5th of June plaintiff wrote the Maxon Realty Company not to make the exchange, and attempted to recall the authority given to that company. He was informed that the agreement for the exchange had already been made, when, in fact, it was not made until after his letter was received. On June 14, 1905, relying on the good faith of his said agents, and their representations that he was legally bound to carry out the transaction, and as to the value at which the owners of the house and lot held the said property, he made a deed of the orange grove to the defendant Randolph, and accepted a deed from her of the house and lot, and paid appellants the commission for making the exchange. During all this time the names of the real owners were concealed from plaintiff and his inquiries as to their names unanswered or evaded; and during said time plaintiff was unacquainted with the value of property in the portion of Los Angeles city where this house was located, and appellants knew this, and knew that plaintiff relied entirely upon their judgment as to such value. On August 12, 1905, defendant Randolph, at the direction of the other appellants, negotiated a loan of $3,200 on said orange grove, paid off the mortgage for $2,500 theretofore subsisting on the property, and appropriated the residue. On August 26th, plaintiff having learned that appellants were negotiating a sale of the orange grove to the defendant Thomas, and having discovered the fraud practiced upon him in the exchange, notified Thomas in writing of his ownership of the property, and that he intended to have the exchange set aside on account of the fraud. On August 29th he notified the defendant Randolph of his intention in writing, and demanded a restoration of his property, at the same time offering to reconvey the house and lot, and tendering a deed and $60 in money as rent for the use of the property from June 14th. On the following day the orange grove was conveyed to Thomas, and on September 2, 1905, this action was commenced. The rights of defendants Thomas, Title Insurance & Trust Company, and Rainey were protected by the judgment, and they do not join in the appeal.

It is contended by appellants that the complaint is defective upon two theories: (1) That there is no direct allegation that appellants or any of them were the agents of the plaintiff in said transactions so as to create a relation of confidence between them and obligate them as trustees; and (2) that there is an absence of averment of the belief by plaintiff of the representations alleged to have been made to him by the defendants, thus failing to state a cause of action on the ground of false and fraudulent representations. In respect to the first matter, it appears from the record that the answer expressly denies such an agency, that evidence was introduced by plaintiff at the trial to support the theory of agency, that defendants introduced evidence to rebut it, that no objection to the evidence upon this ground was interposed by either party, that such an issue was fully tried and findings made thereon by the court. If the complaint were without allegation in this respect, the judgment would not be reversed by an appellate court on this ground, the issue having been already tried in good faith and without objection upon the pleadings before the court. But the complaint is not entirely lacking in this respect. It contains numerous recitals of the relation of principal and agent between the parties and the reliance of plaintiff on defendants because of that relation. It also alleges that defendants induced the plaintiff "to enter into a writing authorizing the said Maxon Realty Company to make for plaintiff an exchange of his * * * orange grove for the * * * house and lot, and agreeing to pay to said Maxon Realty Company $125 commission for acting as agent for plaintiff in making such exchange," and that the commission was paid by plaintiff and accepted by appellants for services in making such exchange. The other objection to the complaint appears to be equally ill founded. It is expressly alleged that plaintiff relied upon the good faith and representations of defendants when he made and delivered the deed of his orange orchard to the defendant Randolph, who was the mere tool of the other appellants. A reliance upon the representations of another person in respect to any fact necessarily implies a belief in the truth of the statement thus made. David v. Moore, 46 Or. 148, 79 Pac. 417.

The motion for a nonsuit was properly denied. The acts of fraud alleged in the complaint were proven by evidence from which but one inference could be drawn, and which fully warranted the findings made. Every case of fraud must be determined upon its own particular facts and circumstances. The relation of principal and agent between the plaintiff and the Maxon Realty Company, and the combination and conspiracy between the Maxon Realty Company and the other appellants, were clearly alleged and proven. The sale by Randolph to plaintiff was a sale by the Maxon Realty Company and Bell. The law prohibits an agent from purchasing property after the creation of the agency and selling it to his principal at an advance without a full disclosure to his principal of all the facts connected with his purchase. Nothing is wanting to establish a case of the grossest fraud. The attempt to convey the property after demand for a restoration shows an intent to prevent the plaintiff from obtaining redress, which gives color to the whole transaction. In addition to this, it was clearly proven that an attempt was made to manufacture evidence by the alteration of the written agreement between plaintiff and the Maxon Realty Company after the plaintiff began to assert his rights. The evidences of fraud and conspiracy are overwhelming.

The other ground of the motion, that a sufficient notice of rescission was not served by plaintiff, cannot be considered in connection with the facts of this case. Rescission is not an exclusive remedy in cases of fraud of this character. Where a trustee obtains the property of his beneficiary by fraudulent means, a court of equity may direct a reconveyance of the property upon terms appropriate to the case without any previous effort at rescission by the party defrauded. More v. More, 133 Cal. 489, 65 Pac. 1044. We think, however, the written demand made by plaintiff here was sufficient, if a notice had been prerequisite to recovery. It does not lie in the mouth of appellants to complain of the want of promptness of plaintiff in discovering the fraud and proceeding to rescind, since it was their concealment in violation of their duty to him and his interests which prevented him from knowing the actual conditions at the time of the transaction. Equity rewards the diligent, but this has no application to the diligent in concealment and deceit.

The qualification of a witness to give an expert opinion as to the value of land must be left largely to the determination of the trial court. In a community where land changes hands oftener in a 12 months than its products are marketed, and real estate values form the principal topic of conversation, a different rule must be applied from that which obtains in older and longer settled sections, where the exchange of real estate is an exceptional transaction. We cannot say that the trial court abused its discretion in allowing plaintiff and the witness Hall to testify as to the value of the orange grove, and, in the absence of an abuse of discretion, the ruling of that court will not be disturbed. Howland v. Oakland, 110 Cal. 521, 42 Pac. 983.

The questions asked of plaintiff as to the price at which his orange grove was listed, the removal of the signs from the Winstanley house, and his knowledge of the ownership of the property bore directly upon issues made by the pleadings. This is also true of the testimony of Winstanley in relation to the same matter, and to the price at which he was offering his place on June 2, 1905. The notice of rescission was competent, was a sufficient demand for restoration of the property, and properly admitted in evidence. While two of the questions propounded to plaintiff were open to the objection that they called for the conclusion of the witness, they were not prejudicial, as the same matter was elicited by questions elsewhere, which were not objected to, and which called for facts. The use of the words "what did you understand," when counsel evidently intended to inquire "what was said" or "what was done" by the parties, is a common error, but for that reason alone is not to be commended or the use encouraged. In the instance at bar no prejudice resulted from it.

The question addressed to the defendant George Maxon as to whether or not there was any conspiracy to defraud plaintiff called for a conclusion which the court should make and the objection to it was properly sustained. The inquiry as to the value of the orange grove of the witness Nowlin called for competent testimony from a qualified witness upon an issue made by the pleadings, but its rejection was not prejudicial, as the judgment of that court rests upon a breach of trust of appellants, and the amount of damage becomes immaterial. This is true also of the question as to the value of the Winstanley property addressed to C. C. Maxon. It being established that the Maxon Realty Company were trustees for plaintiff, and that they acquired the Winstanley property during the existence of the fiduciary relation for a sum less than one-half of that which they represented to their principal they had paid, the judgment of the court would have to be sustained whatever the value of the property. It was not so much a question of value, but one of bona fides, and the principal was entitled to every dollar that his agents made in the transaction except the commission agreed to be paid to them. The question propounded to the defendant George Maxon, "Did you make any representations to Mr. Mabry with reference to the value of the property?" was not open to the objection that it was leading, since, as a defendant, he was entitled to have his attention directed to the charge made against him, and permitted to negative it; but it was substantially answered later, and no prejudice from the ruling of the court is apparent.

No prejudicial error appearing in the record, the judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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PEOPLE v. SCHMITZ. (Cr. 115.)

(Court of Appeal, First District, California. Jan. 9, 1908. Rehearing Denied by Supreme Court March 9, 1908.)

1. Criminal Law—Appeal—Notice—Time for Serving.

Under Pen. Code, § 1240, providing that an appeal is taken by filing a notice stating the appeal and serving a copy thereof upon the adverse party, the order of filing and of service, if contemporaneous, is immaterial.

2. Same—Estoppel to Question Service.

Where the district attorney indorsed on defendant's notice of appeal an admission of "due service" thereof, the people were estopped to afterwards claim there was no service.

3. Same—Time for Taking Appeal.

Under Pen. Code, § 1239, requiring an appeal from a judgment to be taken within 90 days after its "rendition" and from an order within 60 days after it is "made," and under section 1240 providing that an appeal is taken by filing with the clerk of the court in which the judgment is "entered" a notice stating the appeal, etc., an appeal may be taken before the judgment or order appealed from is entered.

4. Jurors—Challenges—Time for Making.

Under Pen. Code, § 1068, providing that a challenge must be taken before the juror is sworn to try the cause, but that the court may "for cause" permit it to be taken afterwards before the jury is completed, a juror may only be challenged, after he is sworn, for cause, and the cause must be founded upon a proper showing of fact upon which the court can exercise its discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 558.]

5. Same—Relationship to Accused.

Under Pen. Code, § 1074, authorizing challenge of a juror for implied bias, if he is related to defendant by consanguinity or affinity within the fourth degree, it was improper to sustain a challenge for cause on a showing that the juror might be a fourth or fifth cousin or "something through marriage," but that the juror never knew it until recently.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 413–415.]

6. Criminal Law—Appeal—Presumption.

Defendant having exhausted his peremptory challenges, it must be presumed that the improper exclusion of jurors, after they had been sworn to try the cause, prejudiced his rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3090–3099.]

7. Same—Elisor—Appointment—Defendant's Rights.

If taking charge of a jury be the execution of an order in a proceeding within Pol. Code, § 4192, providing for the execution of orders by an elisor when it appears that the sheriff and coroner are disqualified, etc., on application by the district attorney for the appointment of an elisor to keep the jury together, defendant has the right to be heard as to the sheriff's, the coroner's, and the proposed elisor's qualifications.

8. Same—Hearsay Testimony.

Under Code Civ. Proc. § 1845, authorizing one to testify to those facts only which he knows of his own knowledge, except where his opinions or the declarations of others are admissible, and under section 1870, authorizing evidence of the precise fact in issue; the acts, declarations or admissions of a party as evidence against him; an act or declaration of another in the presence and within the observation of a party, and his conduct in relation thereto; and, after proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator and relating to the conspiracy—in a trial for extortion committed by a threat to prevent restaurateurs from obtaining liquor licenses, the following testimony for the people was inadmissible as hearsay: That at a meeting the restaurateurs talked about what could be done, and saw that they were going to be "held up"; that one of them said they'd better see codefendant, and went to see him, and on returning stated that codefendant said he would take the case for $10,000; that witness knew how his partner obtained the money he gave codefendant; that codefendant would not take witness' check, nor gold, nor give a receipt; that witness told the restaurateurs that, from his observation and how things were going in the city and had been going for years, codefendant was the only man who could help them, that it was a question of life and death with them; that witness' partner told him he had agreed to pay codefendant, and the partners talked as to how it was to be paid, and that witness paid one of the restaurateurs his share; that witness agreed to employ codefendant, and paid the money because he couldn't otherwise do business without a license, because codefendant had influence before the commissioners; and that codefendant was the only man who could help the restaurateurs—the conversations occurring in defendant's absence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 973–983.]

9. Same.

The admission of hearsay testimony injurious to defendant is reversible error.

10. Witnesses—Cross-Examination of Defendant—Scope.

Under Pen. Code, § 688, accused may not be compelled to be a witness against himself, but under section 1323, if he offers himself as a witness, he may be cross-examined on all matters "about which he was examined in chief." In a trial for extortion, the people claimed that defendant as mayor, exercising power over the police commissioners, conspired with his codefendant to refuse restaurateurs liquor licenses so they would be compelled to employ codefendant, and thus pay for the licenses, and that codefendant divided his ostensible fees with defendant. As his own witness, defendant denied and was examined respecting testimony for the people by a commissioner that defendant told him that the French restaurants were bad, and ought to be closed, and that the commissioner did not visit one of them at the right time to discover that it was improperly run; and that the commissioner told defendant that it was reported that money had been raised by the restaurateurs to obtain their licenses. *Held*, under section 1323, that defendant could not be cross-examined as to whether codefendant paid him any of the money which it was claimed codefendant received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 982.]

11. Criminal Law — Appeal — Review — Harmless Error — Evidence — Error Not Cured.

Where defendant, in a trial for extortion, was improperly asked on his cross-examination whether his codefendant paid him money alleged to have been extorted, the question not relating to his direct examination, the error was not cured by a negative answer, where the prosecution subsequently used the cross-examination as a basis for introducing evidence to contradict defendant's denial that he received money, testimony which should have been given in chief by the prosecution.

12. Same — Reception of Evidence — Order of Proof.

In a trial for extortion alleged to have been committed by conspiracy, the prosecution should have introduced in chief all the evidence tending to show the guilt of the defendant on trial, and improperly withheld, until it was offered in the guise of rebuttal, evidence tending to show that he received part of money paid to his codefendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1618.]

13. Witnesses — Cross-Examination—Propriety.

Defendant was tried for extortion committed pursuant to a conspiracy with his codefendant to prevent restaurateurs from obtaining liquor licenses until they should pay codefendant money ostensibly as an attorney's fee. Codefendant, testifying for the people, stated that he paid part of money so obtained to defendant. *Held*, that it was improper to exclude the following questions asked him on cross-examination: What the facts were that would in his judgment be favorable to defendant, if he should testify to the facts in all their details, codefendant having admitted that he told the prosecution that such would be the effect of such testimony; whether he told representatives of the prosecution that he would not "stand for" anything less than complete immunity, he having admitted conversations with them as to the leniency to be shown him in case he should testify fully to the facts; whether his plea of not guilty, for which a plea of guilty was afterwards substituted, was true; what he meant by that statement that he was not guilty; why, if he were not guilty, he changed his plea after a conversation with a representative of the prosecution in which codefendant was told that the representative would do all he could for codefendant to secure leniency; why, after swearing that he was not guilty, he entered a plea of guilty, it appearing that before pleading guilty he verified an answer in a civil suit in which he denied his guilt; whether, before paying the money to defendant, he had any conversation with him respecting a division of the money obtained from the restaurateurs; whether the restaurateurs came to codefendant or he went to them; whether he told defendant that he had threatened any restaurateur that if they did not pay their licenses would be suspended; and whether codefendant was not testifying under the expectation of complete immunity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 985, 986.]

14. Same—Cross-Examination — Codefendant.

Under Code Civ. Proc. § 1844, providing that the presumption that a witness speaks truthfully may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence, and that the jury are the exclusive judges of his credibility, and under section 2061, providing that the testimony of an accomplice should be viewed with distrust, where one pleads guilty and testifies against his codefendant, the broadest scope should be allowed in his cross-examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 985, 986.]

15. Intoxicating Liquors—License to Sell—Nature—"Property."

A license to sell liquors is not "property" in the ordinary sense of the word, but a mere permission, and the license is but the evidence that the permission has been given by the proper authorities.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5693–5728; vol. 8, pp. 7768–7770.]

16. Extortion — Indictment — Sufficiency—Character of Injury Threatened.

Under Pen. Code, § 518, defining extortion as the obtaining of property from another, with his consent, induced by a wrongful use of force, or fear, or under color of official right, and under section 519, providing that fear such as will constitute extortion may be induced by a threat to do an unlawful injury to the property of him threatened, an indictment charging that defendants are guilty "of a felony, to wit, extortion"; that they unlawfully and feloniously extorted from persons named, with their consent $1,175, by the wrongful use of fear, induced by means or threats to do an unlawful injury to such persons' property; that such persons sold liquors at retail, and were required to obtain a license from a city and county; that the threat was that if such persons did not pay the sums demanded they could not and would not obtain the license; and that defendants would prevent them from obtaining a license and prevent them from selling liquors—is insufficient for failing to show that the specific injury threatened was an unlawful injury.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2622–2624.]

17. Same—Requisites of Offense.

Under Pen. Code, § 519, providing that fear such as will constitute extortion may be induced by a threat to do an unlawful injury, to constitute an offense, the injury threatened must be, in itself, unlawful, irrespective of the purpose with which the threat is made.

18. Words and Phrases—"Unlawful."

"Unlawful," as applied to threatened injury to property, means contrary to law; that is, an injury threatened must be unlawful, irrespective of the purpose with which the threat is used.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7186–7187.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Eugene E. Schmitz was convicted of extortion, and he appeals from the conviction and an order denying a new trial. Reversed, with directions to discharge defendant.

Campbell, Metson & Drew, Chas. H. Fairall and John J. Barrett, for appellant. Attorney General Webb and W. H. Langdon, for the People.

COOPER, P. J. Defendant was tried and convicted of the crime of extortion. After the verdict of the jury on July 8, 1907, he made a motion for a new trial, which was denied, and thereupon the court pronounced judgment, sentencing him to the state prison for the term of five years. Thereafter, on the same day, the defendant served upon the district attorney a notice of appeal from the judgment and from the order denying the motion for a new trial, and then immediately filed the same with the clerk.

1. The district attorney moves to dismiss the appeal in this court upon two grounds: First, that the notice was served before it was filed; and, second, that the appeal was premature because taken before the judgment was entered. The provisions of the Penal Code applicable to the motion are as follows:

"1239. An appeal from a judgment must be taken within ninety days after its rendition, and from an order within sixty days after it is made.

"1240. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party."

As to the first ground, the statute provides for filing and serving the notice, and there does not appear to be anything in the statute, and there certainly is no reason for holding that where the filing and serving are contemporaneous, the order in which they are done is material. It is necessary under the statute that the notice be filed and served, and if on the same day and about the same minute the notice is served and filed, what difference could it possibly make? The statute requires certain things to be done with the notice, and the appeal depends upon doing them. They were done, and the order of doing them under the facts of this case is immaterial. It would strike any fair-minded person as being, not only highly technical, but without reason, to hold that a notice filed at 10 o'clock a. m. on the 8th day of July, 1907, and served a minute later, would be a good notice and give this court jurisdiction, and that a notice served at 10 o'clock a. m. and filed the next minute would be a worthless notice, and would not give the court jurisdiction; and yet this is what the district attorney asks us to hold. Counsel have not been able to cite any case supporting such contention, and all the cases to which our attention has been called hold that the order of the filing and service, if contemporaneous, is immaterial. It has been so held in civil cases under a section of the practice act which required the notice to be filed and served (Buffendeau v. Edmondson, 24 Cal. 94; Wright v. Ross, 26 Cal. 262; Hewes v. Carville, etc., Co., 62 Cal. 516); and in criminal cases the rule is the same. People v. Ah Yute, 56 Cal. 119; People v. Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73. Not only this but the notice of appeal has indorsed upon it: "Due service of the above notice of appeal is hereby admitted this 8th day of July, 1907. W. H. Langdon, District Attorney." It would have been but fair to defendant to decline to accept "due service" if the district attorney intended in any way to object to such service. Defendant could then have filed and served the notice, but the district attorney will not be allowed to admit due service, and then, contrary to his written admission, claim that there was in fact no service. People v. Grigsby, 62 Cal. 482.

The second point is equally without merit. The appeal was taken after the judgment was rendered, and from the order after it was made, and this was sufficient under the language of section 1239 of the Penal Code. It was not necessary for defendant to have waited until the judgment and order were entered. The provisions of section 1239 and 1240 are almost exactly in the language of the provision of the practice act in force before the adoption of the Codes with respect to the time of taking an appeal. Section 336 of the Civil Practice Act was as follows:

"An appeal may be taken:

"First, from a final judgment in an action or special proceeding commenced in the court in which the judgment is rendered within one year after the rendition of the judgment.

"Second, from a judgment rendered on an appeal from an inferior court within ninety days after the rendition of the judgment.

"Third, from an order within sixty days after the order is made."

It will be noticed that under the practice act the appeal from the judgment must have been taken after the rendition, and so under the provisions of the Penal Code. It will also be noticed that under the practice act the appeal from an order must have been taken after the order was made, and so in the Penal Code. It was settled by a long line of decisions under the practice act that the time for appeal from a judgment commences to run from and may be taken upon the rendition of the judgment, and before its entry. In Gray v. Palmer, 28 Cal. 416, it was said: "Section 336 of the practice act authorizes an appeal to be taken from a final judgment 'within one year after the rendition of the judgment.' * * * After a careful review of these and other sections of the practice act we cannot resist the conclusion that the terms 'rendition' and 'entry' are used in different senses, and to express the ideas appropriate to those words respectively; and that there is a rendition of a judgment before it is actually entered in the judgment book. Different stages of the proceeding are recognized by the statute as initial points from which other proceedings may be taken, or other rights acquired. Thus the right of appeal attaches, and time for taking it commences to run from the rendition of the judgment by the court." In Peck v. Courtis, 31 Cal. 207, the court said: "The judgment thus rendered on the 22d day of December, 1863, was not in fact entered in the judgment book by the clerk till July 25th, 1864, some six months after its rendition. But an appeal from a final judgment must be taken 'within one year after the rendition' of the judgment. Prac. Act, § 336. The time begins to run from the time the judgment is rendered, not from the time it is entered. The rendition and entry of a judgment are entirely different acts—one is to be performed by the court, and must be first in order of time, and the other by the clerk." To the same effect, see Genella v. Relyea, 32 Cal. 159; Wagganheim v. Hook, 35 Cal. 216; Wetherbee v. Dunn, 36 Cal. 249; Webster v. Cook, 38 Cal. 423. And we are of opinion that the criminal cases that have arisen under the sections of the Penal Code cited support the view that the right of appeal arises immediately upon the rendition of the judgment. In Ward v. Dunne, 136 Cal. 19, 68 Pac. 105, the opinion was written by the chief justice, ordering a peremptory writ of mandate to compel the defendant as trial judge to settle a bill of exceptions. It was there said: "The petitioner was required to appeal from the judgment one year from its rendition (Pen. Code, § 1239), and, to obtain a stay of proceedings, he must appeal promptly without waiting for the entry of the judgment."

The district attorney contends that section 1240 of the Penal Code must mean that an appeal cannot be taken until the judgment or order is entered because it is therein provided that the notice of appeal must be filed "with the clerk of the court in which the judgment or order appealed from is entered." The language is not the best that could have been employed by the Legislature, but the meaning does not appear doubtful. The place where the notice must be filed was the main thing. The words "is entered" are used in the sense of "required to be entered," or "where the law requires it to be entered." Even if the words are not clear as to their meaning we could not for this reason deprive a defendant of his right to appeal after the "rendition" of the judgment. The construction contended for would be contrary to the practice in criminal cases in regard to appeals as understood by the profession for half a century. It would be contrary to the view expressed by the chief justice in Ward v. Dunne here quoted. Counsel for respondent cite People v. Lenon, 77 Cal. 308, 19 Pac. 521, which they claim is directly in point. In that case no judgment appeared in the record, which of course was necessary in order to review the judgment on appeal. The opinion states: "But the notice of appeal is from 'the judgment rendered against him on the 14th day of May, 1888.' The minutes of the court for that day show a continuance of the case until the 16th of the same month." It does not appear that any judgment was ever rendered in that case, and hence it has no bearing on the question here. The motion to dismiss the appeal is denied.

We will examine some of the alleged errors with a view to determining whether or not the substantial rights of the defendant were jeopardized or impaired by the rulings complained of. Defendant was entitled to a fair and impartial trial, and to the right to have a fair and impartial jury impaneled in the manner provided in the Code. He was entitled to the benefit of the rules of law excluding incompetent and hearsay evidence, and to have his rights guarded and protected by the calm, dispassionate judgment of an impartial tribunal. Where a defendant has been fairly and impartially tried, his constitutional rights given to him, and only legal evidence admitted, and a jury under such trial has returned a verdict of guilty, the courts always endeavor to avoid the reversal of a case for errors which do not apparently affect his substantial rights.

2. The court, under defendant's objections, allowed challenges on behalf of the people to the jurors Harris and Bray. After three jurors had been examined, passed, and sworn to try the case, the district attorney asked the court to permit the people to challenge the said juror Harris (who was one of the three) peremptorily. The court thereupon, without any cause being shown or even stated, and under defendant's objection, permitted the people to challenge the said juror peremptorily, and he was excused. Section 1068 of the Penal Code provides that a challenge must be taken "when the juror appears and before he is sworn to try the cause; but the court may for cause permit it to be taken after the juror is sworn and before the jury is completed." It appears evident that the court could not under the section permit a challenge except "for cause," and the cause must have been based on some fact and founded upon a proper showing of facts, upon which the court could have exercised its discretion. If the court, after a juror has been sworn to try the case, can permit him to be challenged without cause, the words "for cause" should be stricken from the statute. The Code evidently intended that after a juror has been examined, passed, and has taken a solemn oath to try the case he could not then, except for a valid reason, be, at the caprice of one of the parties, discharged. He became a juror in that case, and thus a part of the machinery of the court. He became a part of the tribunal for the purpose of determining the guilt or innocence of the defendant. That tribunal was changed without the consent of the defendant, and in the interest of his adversary. Greer v. Norvill, 3 Hill (S. C.) 262. Defendant had the right to rely upon the fact that the juror had been sworn in exercising his right to his own peremptory challenges. The mandate of the statute appears plain and should have been followed. We know of no case, and none has been called to our attention, in which such challenge was upheld. In the early case of People v. Rodriguez, 10 Cal. 59, the court said: "The challenge may be al-

lowed, for good cause, after the juror is sworn. In this case no good cause was shown, and the offer to challenge was rightfully refused." See People v. Reynolds, 16 Cal. 132; People v. Scoggins, 37 Cal. 679; People v. Bemmerly, 87 Cal. 120, 25 Pac. 266; People v. Ward, 105 Cal. 338, 38 Pac. 945; People v. Durrant, 116 Cal. 196, 48 Pac. 75. In the last-mentioned case the correct rule is laid down by the court, speaking through Mr. Justice Henshaw, where it is said: "Section 1068 of the Penal Code provides that a challenge (either peremptory or for cause) must be taken when the juror appears and before he is sworn to try the cause, but the court may for cause permit it to be taken after the juror is sworn. It was not error therefore for the court to permit a re-examination of the juror upon matters coming to the knowledge of the people or defendant after his acceptance, and before the completion of the jury. The course here pursued was that followed in People v. Bemmerly, 87 Cal. 117,[1] and approved by this court." The same rule was laid down in the later case of People v. Owens, 123 Cal. 488, 56 Pac. 251. There the juror Spencer was excused for cause after he had been sworn to try the case, but upon examination in court "it was shown that the juror in arriving at his verdict would be influenced by his friendship for the relatives of the defendant." Section 371 of the Code of Criminal Procedure of New York is in substance the same as section 1068 of our Penal Code. It provides: "A challenge must be taken when the juror appears and before he is sworn; but the court may, in its discretion, for good cause set aside a juror at any time before evidence is given in the action." The Court of Appeals, in People v. Hughes, 137 N. Y. 29, 32 N. E. 1105, said: "The obvious meaning of section 371 is that a challenge for good cause, which is required to be taken before the juror is sworn, may nevertheless be taken thereafter and before evidence is given, in the discretion of the court. If it does not mean that it must necessarily mean that the court may, for any good reason, even though undisclosed, set aside a sworn juror, in its discretion. I do not think that is its meaning or its purpose. If it is, there was no sound objection possible for the prisoner's counsel to take."

If we apply the reasoning of the case of People v. Hughes to the case at bar, what is the result? A challenge to a juror, either peremptory or for cause, must be taken before the juror is sworn in the first instance. If such challenge is peremptory it is a right given by the statute, and if for cause it must be for some cause shown to the court during the examination of the juror. If the contention of the district attorney be correct, then after a juror is sworn he can be challenged and set aside without any cause of any kind being shown. The rule we have stated is the rule in other jurisdictions. Greer v. State, 14 Tex. App. 179; Bell v. State, 115 Ala. 35, 22 South. 526; Montague v. Commonwealth, 10 Grat. (Va.) 767; Greer v. Norvill, 3 Hill (S. C.) 262; Thorp v. Deming, 78 Mich. 124, 43 N. W. 1097; People v. Dolan, 51 Mich. 610, 17 N. W. 78.

After the juror Bray, who was one of the three, had been examined, passed, and sworn to try the case, the court permitted the district attorney to further examine him, and then sustained the challenge of the district attorney to such juror for cause. It must be presumed that at the time the juror was passed and sworn to try the cause the record up to this point showed that he was a qualified juror. The district attorney, by the further examination desired to show that the juror was related to the defendant, and this is the evidence of the juror in full: "Mr. Heney: Q. It is reported in the paper, Mr. Bray, that you are related in some way, and that it is one of the statutory grounds of challenge in case it should be so, to the defendant, Schmitz. Is that a fact that you are? A. Not that I know of. Q. Through your wife? A. It might be fourth or fifth cousins or something through marriage, but I never knew it until I saw it come out in the paper. I see that the paper said that I lived—it is twenty-eight years since I lived in Watsonville, and when I left there I was married here. My wife came from the old country, and she had no people living there at all, except I think the Sheehys and Murphys were related, but I do not know anything about the Driscolls, and as far as I am concerned I knew nothing about it until since the papers came out. I never recognized Mayor Schmitz. I was never any nearer to Mayor Schmitz than I am now. Q. The Code provision, Mr. Bray, recognizes the fourth degree of relationship, so if it was the fourth degree it would be proper to consider it. A. I really don't know how far it is. I asked to get off the jury. The Court: I want to say at this time when the court adjourned at noon you made some statement to me, and you finally stated to me that you proposed to ask the court and counsel to be excused from serving on this jury by reason of some relationship to the defendant. A. That was it, just through the paper. Q. You made that statement though to me, did you not? A. Yes, sir. Q. Do you now desire to be excused? A. Why, certainly. Q. Do you request counsel and the court to excuse you? A. I would like to be excused. Q. For the reason that you are related in some way to the defendant? A. Well, if they say so. I don't know anything about it. Q. Are you? A. Not that I know of—not that I know of."

The district attorney then challenged the juror "on the relationship and on the grounds provided in sections 1072 and 1073, Penal Code." Under section 1074 a challenge to a juror may be taken for implied bias if the juror is related by consanguinity or affinity within the fourth degree to the defendant. The juror said he never knew anything of any relationship until he saw it in the newspaper. That "it might be fourth or fifth cousins or something through marriage, but I never knew it until it came out in the paper." The court, on this showing and nothing more, sustained the challenge to the juror under defendant's objection. The evidence entirely failed to show any relationship by consanguinity or affinity within the fourth degree. In fact it did not show any relationship of the juror to defendant in any degree or in any way. The judge, in ruling upon the challenge, said: "I think any relationship, no matter how remote, ought to keep a person off the jury." It was not for the court to set up its judgment against the statute as to the qualifications of a juror. The juror did not know defendant, and did not know of any relationship. He only knew that he had seen something about it in the papers. If this juror could thus be excused without cause, there is no reason why the same thing could not have been repeated as often as the district attorney might have requested it. It is plain that the effect of the ruling was to give to the prosecution an additional peremptory challenge. The defendant exhausted his peremptory challenges, and it must be presumed that the removal of the jurors Harris and Bray without cause, after they had been sworn, was injurious to his rights. Defendant had the right to have the jury impaneled according to the law of the state under which he was being tried. The prosecution did not have the right to arbitrarily dismiss qualified jurors unless it could be done as provided by the Code. The views here expressed are ably supported in an exhaustive opinion written by Mr. Justice Henshaw in People v. Helm (Cal. Sup.) 93 Pac. 99. The case was reversed upon the rulings of the trial judge refusing to sustain defendant's challenges to certain jurors on the ground of implied bias. The court said that, if the defendant had been compelled to exhaust his peremptory challenges to relieve himself of jurors who should have been excused by the court for cause, "the rulings of the court upon such jurors becomes a most important matter of review."

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[1] 25 Pac. 266.

The Code provisions in regard to the impanelment of jurors and their qualifications have in view the right of the defendant to a fair and impartial jury, and one not picked and selected by the prosecution. The defendant is given twice the number of peremptory challenges that are given to the people. His liberty, and in many cases his life, is at stake. When public passions have been aroused, and oftentimes a desire for conviction taken possession of the public mind there is more reason that the rights of a defendant should be carefully guarded at every step. It was well said by Judge Cooley in Holt v. People, 13 Mich. 224, that if, after an examination of a juror, there is "a reasonable doubt of the impartiality of the juror the defendant should be given the benefit of the doubt."

3. After the jury had been empaneled and sworn, the district attorney asked the court to appoint an elisor under section 4192 of the Political Code to take charge of the jury, under the order of the court, that the jury be kept together. In support of the motion he offered several affidavits. After some discussion and objections the following took place: "The Court: It is my intention, it has always been my intention, to order this jury to be taken in charge by a competent and proper person when the time comes. I will read the affidavits. I will read them myself. Counsel for Defendant: We object to their being read by the court. The Court: Just pass the affidavits up to me." After the court had read the affidavits counsel for defendant said: "That the matter may be regular I want the reporter to register our objection. The District Attorney: That is a matter over which neither of us have any control. It is nothing with which we are concerned. The Court (to defendant's counsel): It is no concern of yours, Mr. Barrett; you have nothing to do with it. Mr. Barrett: I am going to take an exception to that. The Court: You may do so. Object to the whole thing, but I want to make it plain to you that it is none of your business. Mr. Barrett: I understand it is the attitude of the court that it is none of my business? The Court: Exactly. The court, in the performance of its duty, proposes to have this jury locked up and placed in charge of a competent and proper person. You can object. I believe you have objected, and I would like to have you take your seat." After some other discussion the attorneys for the defendant objected to the court reading the affidavit. "The Court: Mr. Barrett, I am going to ask you to take your seat. Mr. Barrett: I except to the order requiring me to take my seat. I except to your honor reading the affidavit until we have had an opportunity to file counter affidavits. The Court: You may take your seat now. Mr. Barrett: Very well. Save an exception." Counsel for defendant then stated to the court that the affidavits had not been served upon defendant nor his counsel, and that they contained much irrelevant and immaterial matter, and objected to "your honor at this time considering these affidavits before they have been served upon us, and until we have had an opportunity to file reply affidavits." The court thereupon overruled the objection, and admitted the affidavits in evidence after reading them. The court then made an order declaring the sheriff and the coroner each disqualified, and appointing one Biggy to act as elisor, to which the defendant duly excepted. The court refused to allow defendant to file affidavits relating to the enmity of Biggy to defendant, touching the qualification of Biggy to act as elisor in said matter, to which ruling refusing leave to file affidavits showing such disqualification the defendant excepted.

The right to appoint an elisor is claimed under section 4192 of the Political Code, which provides that "process and orders in an action or proceeding may be executed by a person residing in the county designated by the court or the judge thereof, and denominated an elisor," when it appears by affidavit to the satisfaction of the court or judge that the sheriff and coroner "are disqualified, or by reason of any bias, prejudice or other cause, would not act promptly or impartially." Let it be conceded for the purpose of this discussion that taking charge of a jury in a criminal case during the trial is the execution of an order in the proceeding, and that the affidavits filed by the district attorney showed a prima facie case of disqualification of the sheriff and coroner. Was it no concern or business of the defendant as to whether or not the officers of the law should be set aside, and a third party placed in charge of the jury? Must the ex parte affidavits offered by the prosecution, that had not even been served upon the defendant or his counsel, be held conclusive upon defendant, and was this a question upon which he had no right to be heard? Without analyzing the rulings of the court in detail, it is sufficient to say that it appears that the court refused to allow the defendant to file counter affidavits as to the fact of the disqualification of the sheriff and coroner, and acted upon the ex parte affidavits of the prosecution, which had not been even served upon the defendant. The court further refused to hear the defendant as to the enmity and disqualification of the elisor Biggy. It was held by the court that the prosecution might have the sheriff and coroner declared disqualified from taking charge of the jury because they would not act impartially. It was in the next breath held that the defendant had no right to show that the elisor was disqualified by reason of bias and prejudice against defendant. These matters were of the utmost importance to defendant. If it was necessary, in order to subserve the ends of justice, that the political friends of the defendant should not have charge of the jury, it was equally necessary, in order to protect the rights of the defendant, that the elisor should not be a personal enemy of the defendant or in the employ of the prosecution. Fair dealing and the rights of the defendant required that he should be heard upon both propositions. If, after giving the defendant the right to be heard by affidavits or otherwise, the court, upon a full investigation of the facts, concluded that the sheriff and the coroner were disqualified, that would be a matter resting in the sound discretion of the court, and if the court concluded to appoint an elisor it was equally important that the elisor should not have any bias or prejudice either for or against the defendant. Defendant had the right to be heard as to the qualifications of the sheriff and coroner, and also as to whether or not Biggy was qualified. If the sheriff, by reason of his friendship for defendant, might in some way have influenced the jury, if they had been placed in his charge, it is equally clear that the enmity of Biggy to the defendant, or his friendship for the prosecution, might in some way have influenced the jury. It was of the utmost importance to the defendant.

4. The court erred in admitting hearsay evidence of the witnesses Loupe, Blance, Malfanti, Debret, and Rosenthal. The evidence and the many exceptions and rulings are discussed under one heading, and the time at our disposal will not permit us to discuss them in detail. The evidence related to many statements and conversations made by the parties named, in the absence of the defendant, and in the absence of Ruef, who is charged with the same offense, as to the necessity of employing Ruef, the amount of the fee to be paid him, and the proportion to be paid by each. The following is a sample of such hearsay evidence. The witness Debret testified that at one of these meetings "we were talking about what could be done, and we could see that we were going to be held up. * * * Priet went to see Ruef only after the special meeting of the board of police commissioners was called, and when he came back he did not get any satisfaction at all. * * * We talked the matter over, and we saw that we could not get away without paying. Then he said we had better go and see Ruef. So he went to see Mr. Ruef. * * * When Priet came back he said Ruef told him he would take the case for $10,000. He was to be paid $5,000 first year, and $5,000, the following year. * * * Yes, I knew in what way my partner got the money that he gave to Ruef. Mr. Ruef would not take my check, would not take any gold, he would not give any receipt for it." The witness Rosenthal testified that at one of these meetings "I told them, from my observation and how things were going in the city, and had been going on for some years, that there was only one man who could help them—it was a question of life and death with them, and I said 'there was only one man who could help you, and that was Mr. Ruef.'" The witness Adler testified that at one of these meetings "Priet came back to my place and said he had made an agreement for $5,000 a year with Mr. Ruef for two years. We had a talk as to how it was to be paid. My share was $1,175 a year, which I paid to Malfanti. I agreed to employ Ruef, and paid that money because I could not run my business without a license—to get my license—because he had influence before the commissioners, he was the only man who could help us." The testimony was all objected to because hearsay, and as to matters and things that took place in the absence of the defendant. The acts and declarations were the acts and declarations of third parties. If Ruef was a co-conspirator, there is no act or declaration of Ruef given in evidence in furtherance of such

conspiracy. It is the policy of the law to exclude hearsay evidence with certain exceptions, well known to the profession. A defendant has the right to be confronted with the witnesses against him as to any act, matter, or thing done or said by him, tending to connect him with the commission of an offense. His admissions, if he has made any, may be received against him. His conduct and acts in many cases are admissible. If he has entered into a conspiracy the declaration of a co-conspirator during the continuance of the conspiracy and in furtherance of the common design is admissible in evidence. But the sages of the law and the learned judges have established the rule that the independent acts and declarations of one man shall not be evidence against another. It is sufficient for every one to answer for his own sins, and not for the sins of his neighbor. The rule is thus laid down in our Code of Civil Procedure, § 1845: "A witness can testify to those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible."

Section 1870 declares:

"Evidence may be given upon a trial of the following facts:

"1. The precise fact in dispute.

"2. The acts, declarations, or admissions of a party, as evidence against such party.

"3. An act or declaration of another in the presence and within the observation of a party, and his conduct in relation thereto.

* * *

"6. After proof of a conspiracy the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy."

The evidence admitted does not come within any of the exceptions to the rule. The conversations, statements, opinions, and agreements of these proprietors of French restaurants, made without the authority of the defendant and in his absence, were all hearsay, and should not have been admitted. It is the rule well established that the admission of hearsay evidence that is injurious to a defendant is ground for reversal. People v. Griffin, 52 Cal. 616; People v. Gonzales, 71 Cal. 569, 12 Pac. 783; People v. Hall, 94 Cal. 595, 30 Pac. 7; People v. Hill, 123 Cal. 571, 56 Pac. 443; People v. Landis, 139 Cal. 426, 73 Pac. 153.

5. The theory of the prosecution was that the defendant, as mayor of the city of San Francisco, exercising his powers over the board of police commissioners, and particularly with the police commissioner Reagan, had conspired with his codefendant Ruef to refuse to issue licenses to the French restaurant keepers so that they would be compelled to employ Ruef, and thus pay for their licenses; that Reagan was an honest man, and was prevailed upon and advised by defendant, who had influence over him; that while Ruef, the co-conspirator, received the $5,000 ostensibly as an attorney's fee, he being an attorney, he divided with and paid a part of it to defendant. The prosecution did not place Ruef upon the stand as a witness in chief, but closed its case without any attempt to prove by direct testimony that Ruef gave to defendant, or that defendant ever received any of the money so claimed to have been paid to Ruef, or that he was ever paid any money by any one on account of such licenses. Reagan, a witness for the prosecution, testified to certain conversations had with defendant. One, Malfanti, also testified to a conversation with defendant. Defendant, as a witness in his own behalf, was examined in chief upon four separate matters as to conversations and statements. Reagan testified that he had a conversation with defendant early in the summer of 1904 in the mayor's office in the New City Hall, in which conversation, in the language of Reagan, "the mayor told me they were bad places, to hold them up, and if possible to close them up, to visit them, and see for myself what they were." The defendant was examined in chief as to this conversation, and in effect denied that he had so stated to Reagan, his language being, "In that conversation I did not state to Mr. Reagan that the French restaurants were all bad and ought to be closed up. I did not state to him that I wanted him to close them up." Reagan further testified that at the request of the defendant he visited the New Poodle Dog restaurant, was shown all over the house, saw nothing wrong, and so reported to defendant; that defendant said to witness "that I didn't call at the right time." The defendant testified in chief to the fact that Reagan did report to him as Reagan stated, but said: "I did not say to him that he did not go at the right time." Reagan further testified that after the police commissioners had revoked the license of the Tortoni restaurant he reported the facts to defendant, stating the substance of the testimony which had been produced before the board as to the immoral women being brought there, and that the defendant then said, "they were all bad, that they should be closed up. I went to the mayor and said it was reported to me that $28,000 was collected as a fund by the restaurants to be used to secure the reissuance of their licenses." Defendant testified in substance to the same facts, as to Reagan reporting to him, but said, "At that time I did not say to Reagan that Tortoni's was bad, but that all the rest of them were as bad as Tortoni's." Nor did Reagan "state to me that there had been a fund of $28,000 as a sack raised by the French restaurants for the purpose of obtaining their licenses."

Malfanti, the proprietor of Delmonico's, as a witness for the prosecution, testified to a conversation with the defendant in the early part of 1905 in the presence of Priet and Blanco, in which conversation he asked defendant why the licenses of the French restaurants were being held up, and that defendant said: "I'll see what I can do. I will have a special meeting of the police commission. I will be there myself, and see what I can do. We don't want to do anything wrong about those places." The defendant, as a witness in his own behalf, admitted this conversation in substance. His evidence is: "Malfanti came into the room, and said to me, 'Mayor, what is the matter? Our licenses are being held up.' I said, 'I don't know; I don't think there is anything the matter, but I will see them this afternoon and see what can be done.'"

The entire testimony of defendant in chief was as to the conversations as above stated and his version of them. The name of Ruef was not mentioned. It was not even mentioned that any money was paid to Ruef or to any one else. The defendant had not denied the conversation with Malfanti. He did deny, and was examined about, the following statements made by Reagan: (1) That he told Reagan that the French restaurants were all bad and ought to be closed. (2) That he told Reagan, after Reagan's visit to the Poodle Dog, that he did not call at the right time. (3) That Reagan told defendant that it was reported that $28,000 had been raised as a fund by the French restaurants so as to get their licenses. The three matters stated, although apparently not of much importance, were all the matters concerning which the defendant was examined in chief.

On cross-examination the prosecution asked, and defendant was compelled to answer, the following questions: "Did Ruef pay you any part of the $5,000 that has been testified he received from the French restaurants?" The question was repeated in many ways and forms, and defendant was always compelled to answer it. His attorneys objected to all of the questions on the ground that they were incompetent and not proper cross-examination, and the objections were overruled. The following is a part of the record: "Mr. Heney: Q. Did not Mr. Ruef pay you one-half of the $3,000 which was paid to him by Malfanti in January, 1906, and didn't he tell you at that time—well, first, didn't he pay one-half of that money to you? Mr. Campbell: I object to that on the same ground, the ground it is incompetent, irrelevant and immaterial, and not cross-examination. The Court: That is the second? Mr. Heney: That is the second. The Court: I will overrule the objection. Mr. Campbell: I will give you the same instruction, Mr. Defendant, in relation to that. Mr. Barrett: Does you honor hold there are no limits to the right of cross-examination? The Court: Take your exception. Mr. Barrett: I take an exception. I would like your honor to inform us so we may guide ourselves. The Court: Just take your seat. (To the bailiff:) Put him in his seat, and if he does not take it put him out of the room. Mr. Barrett: We assign as misconduct the remarks of your honor in respect to this witness. The Court: Answer the question."

In our opinion the cross-examination was entirely improper, and was not confined to the matters about which defendant had been examined in chief. The Penal Code provides (section 688) that no person can be compelled in a criminal action to be a witness against himself, and further (section 1323): "But if a defendant offers himself as a witness he may be cross-examined as to all matters about which he was examined in chief." The defendant, by placing himself upon the stand, became subject to the rules that govern any other witness except as expressly provided in the Code. He was subject to the rules for impeachment that apply to all witnesses. He was subject to cross-examination fully as to all matters about which he had been examined in chief. The cross-examination was as to whether Ruef paid defendant any of the $5,000, which it was claimed Ruef received. Let us ask the plain common sense question as addressed to a person of ordinary understanding, was defendant examined in chief about the $5,000 or the payment of any part of it to himself? The answer is, "No." If the defendant was examined in chief about the payment of money to himself by Ruef how does it appear? The conversation with Reagan about the French restaurants all being bad and that they should be closed, was not about the payment of money to defendant by Ruef. The conversation as to Reagan's visit to the Poodle Dog was not about the payment of money to defendant by Ruef. The conversation with Reagan to the effect that Reagan told defendant that he (Reagan) had been told that $28,000 had been raised as a fund by the French restaurants was not about the payment of money by Ruef to defendant. Whether or not Reagan had made such statement was the subject about which defendant had testified. Reagan had testified that he informed defendant of a certain report. Defendant denied that such information was given him by Reagan. The decisions are uniform that under the section quoted the cross-examination of a defendant cannot be extended beyond the subject-matters concerning which he was examined in chief. People v. McGungill, 41 Cal. 429; People v. Rozelle, 78 Cal. 93, 20 Pac. 36; People v. Gallagher, 100 Cal. 466, 35 Pac. 80; People v. Arrighini, 122 Cal. 126, 54 Pac. 591; People v. Morton, 139 Cal. 727, 73 Pac. 609.

We have carefully examined the case of People v. Gallagher, supra, relied upon by the prosecution, but find nothing in it in any way inconsistent with what has been said. The question in cross-examination of the defendant in that case related to sums of money being changed into currency in San Francisco in company with and in connection with one Bieggs, who was particeps criminis, and as to defendant going to Sixteenth street with $6,000 at Bieggs' dictation, but defendant in his direct examination had testified about meeting Bieggs by appointment, that he did not advise Bieggs to draw the money from the bank, or to go off with it, nor suggest nor consent to his doing so. It is plain that the cross-examination related to the very matters—"Bieggs," "the money," and "going away with it"—which had been testified to by the witness in chief. We fully agree with the statement in that case that if the questions "would have the tendency to elucidate from him the whole truth about any matters upon which he had been examined in chief" they would be proper; but the reasoning does not apply to the facts in this case, because this defendant was not examined about the matter in chief.

The cross-examination being erroneous, the error was not cured by the witness answering the question in the negative, for the reason that the prosecution subsequently used this examination of the defendant as a basis for introducing certain evidence of Ruef, which properly was a part of the case of the people in chief. People v. Morton, supra. Negative answers were perhaps what the prosecution expected, so that under the guise of rebuttal they could call Ruef to the stand to contradict the defendant, and that is what was done. It is evident that by the rules of law, and that regard to fairness which characterize every criminal trial, if the prosecution had evidence to prove that defendant took or accepted part of the money extorted by the conspiracy and paid to his accomplice Ruef such evidence should have been produced as a part of the case for the prosecution. The defendant had the right to hear the evidence against him before being required to meet it. The evidence, and all the evidence, tending to show his guilt should have been produced. If Ruef paid or gave defendant money, part of the proceeds of the crime, the prosecution should have produced the evidence as a part of its case. The defendant would then have had the right to meet the evidence as part of his defense. In this case Ruef was not placed upon the witness stand, nor was any evidence given as to any money being paid to defendant; but the evidence was held back until defendant was asked the questions in cross-examination. Then, in the guise of rebuttal, the evidence of Ruef was brought forth, under the claim that it was to contradict the defendant, but really for the purpose of proving facts which were part of the case for the prosecution in the first instance. Such practice would be a great injustice to a defendant. It would be contrary to the way criminal trials are usually conducted in our courts. It would be contrary to every man's sense of right and justice. It is of much more importance that every defendant should have a fair and impartial trial under the rules of evidence laid down by the ablest judges and established by centuries of experience, than that a defendant in some particular case should be convicted. It is important that a defendant, if guilty of the crime with which he is charged, should be convicted; but it is of greater importance that the constitutional right of each and every one to a fair trial, under the rules of evidence and the forms of law adopted in the light of experience, shall be preserved inviolate. It goes to the very foundation of our republican institutions.

6. The prosecution, under the claim that it was rebuttal, called for the first time the witness Ruef, who was allowed under defendant's objection, and defendant, to testify that about January or February, 1906, he gave to defendant at one time $2,500, and at another $1,500 in currency, at the same time stating to defendant that it was part of the money he (the witness) had received from the French restaurants as a fee under his agreement with them, and that if defendant would receive it he would be glad to pay it to him, and that defendant did receive it. The evidence could not possibly have been rebuttal except for the purpose of contradicting the statement elicited from defendant on cross-examination; and as we have already held that such cross-examination was erroneous, it is not necessary to discuss the question in this regard further. The defendant's counsel asked many questions of the witness Ruef in cross-examination, to which objections were sustained, only a few of which we will notice, as they are enough to illustrate the view we entertain of the ruling.

The witness admitted that he had stated to the prosecution that if he should testify to the facts in all their details, as they are, the larger part of them would in his judgment be favorable to the defendant. Counsel for the defendant then asked the question: "Well, what were these facts? State them now in detail in relation to this case?" The court sustained the objection of the prosecution to this question. The witness testified that he had had many conversations with Mr. Burns, a detective in the employ of the prosecution, and with Mr. Heney, a deputy district attorney, as to his testimony, and as to leniency being shown him in case he should testify fully as to the facts. The attorney for the defendant then asked him: "Did you at any conversation with these gentlemen tell them that you would not stand for anything except complete immunity?" The court sustained the objection of the district attorney to this question upon the ground that it was irrelevant, incompetent, and immaterial and no foundation had been laid. The witness had in the first place pleaded not guilty to the indictment in this case, but afterwards withdrew his plea, and entered a plea of "guilty." Defendant's counsel, after eliciting such facts from the witness, asked him the following questions (referring to his plea of "not guilty"; "Q. Was that true?" "Q.

What do you mean then, Mr. Ruef, by that statement that you were not guilty of this charge?" "Q. Mr. Ruef, why, if you were not guilty in this case, as you stated, did you change your plea after you had your conversation with Mr. Burns, in which he told you he would do all he could for you to secure leniency in these indictments?" To each of the above questions the court sustained objections made by the district attorney upon the ground that they were not proper cross-examination.

The attention of this witness was called to a verified answer filed by him in November, 1906, in a civil suit which had been brought against him by the district attorney, in which he swore that he had not committed any felony or any crime in any way in connection with the matters alleged in the complaint which had been filed against him. Defendant's counsel, then, with the answer before them, asked the witness several questions as to portions of the answer, and as to why, after swearing that he had not committed any crime, he afterwards entered a plea of guilty as to the same matter. The court again sustained the objection of the district attorney to each and every such question as not proper cross-examination. The witness was asked as to the time of paying or giving to the defendant the money in currency as testified to by him, and defendant's counsel then asked the following question: "Q. Did you have, prior to that time, any conversation with defendant in relation to any division, or giving him any part of any fee which you received from the French restaurant keepers?" The court under the objection of the prosecution, refused to permit the witness to answer. Other questions were: "Q. Mr. Ruef, did you go to the French restaurant keepers, or did they come to you?" "Q. Did you tell the defendant in any conversation that you had ever threatened any restaurant keeper that if they did not pay you any money their licenses would be held up?" "Q. Now I will ask you this, Mr. Ruef, if you are not now giving your testimony under the expectation of immunity—complete immunity?" The court refused to permit any of these questions to be answered, and held that they were not proper cross-examination.

These rulings were erroneous and highly prejudicial to defendant. The witness Ruef was jointly accused of the alleged crime for which the defendant was being tried. Not only this, but he had confessed it and pleaded guilty to it. He was the party who made the contract with the proprietors of the French restaurants, and who received the money from them. After having done all these things, and after having confessed himself guilty of a felony, he turned and took the witness stand against one who had been his friend—at least his political friend. He not only confessed himself a criminal, but went upon the stand to assist in convicting his codefendant of the alleged crime of which he had pleaded guilty. His conduct had been such that under the plain provisions of the Penal Code his evidence was branded so that the defendant could not have been convicted upon it without corroborative testimony. Then was it not fair and just to defendant, in order to investigate and arrive at the truth, that the reasons, motives, and surroundings of the witness should be laid bare. He had changed his plea of "not guilty" to one of "guilty," and his attitude of friendship to defendant to that of a witness aiding and assisting the prosecution. If he had been promised complete immunity, did not the defendant have the right to lay the fact before the jury so that they might determine the weight to give his evidence? If he had, in another case, before any promise had been made to him, sworn to facts inconsistent with his present testimony, was that no concern of the defendant? The jury had the right to believe the witness Ruef, but the defendant had the right to investigate every motive, every statement, every act, and everything that might in any reasonable way have influenced him in his testimony, and to have the jury know this before passing its judgment. In such cases it is elementary that the broadest scope should be allowed in the cross-examination of the witness. It is provided in the Code of Civil Procedure, section 1844, that the presumption that a witness speaks the truth may be "repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence, and the jury are the exclusive judges of his credibility. See People v. Mitchell (Cal. App.) 89 Pac. 853. It is further laid down in the Code (Code Civ. Proc. § 2061) "that the testimony of an accomplice ought to be viewed with distrust." The court allowed the prosecution a broad range in the cross-examination of the defendant, who is protected by the statute, and who had not confessed to having committed a crime; while on the other hand it narrowed and confined the cross-examination of the co-conspirator, who was not protected by the statute, and who had branded himself as a felon. Such is not the policy of the law.

7. Defendant's demurrer to the indictment was overruled, and it is now insisted that the indictment does not state facts sufficient to show that any public offense has been committed. It is necessary to pass upon the question, for the reason that if the indictment fails to charge defendant with a public offense that is the end of the case. The indictment charges in substance, that defendants are guilty "of a felony, to wit, extortion," committed on the 15th day of January, 1905, in the city and county of San Francisco, as follows: That defendants did unlawfully and feloniously extort from the parties named in the indictments, with their consent, $1,175, by the wrongful use of fear, induced by means of threats to do an unlawful injury to the property of the parties named, the specific threat being alleged as follows:

"That the said Joseph Malfanti, Charles Kelb and William Lafrenz were then and there engaged in the business of maintaining and conducting a restaurant in the city and county of San Francisco and of selling at retail spirituous, malt and fermented liquors and wines therein, and for the purpose of continuing the selling of said liquors and wines, the said Joseph Malfanti, Charles Kelb and William Lafrenz were required to have and obtain a license from the city and county of San Francisco, and the said license was necessary to the said Joseph Malfanti, Charles Kelb and William Lafrenz for the profitable maintenance and conduct of the said business and the selling of said liquors and wines, all of which facts the said Eugene E. Schmitz and Abraham Ruef then and there well knew; that the said defendants Eugene E. Schmitz and Abraham Ruef, then and there unlawfully, feloniously, corruptly and knowingly threatened the said Joseph Malfanti, Charles Kelb and William Lafrenz that, unless the said Joseph Malfanti, Charles Kelb and William Lafrenz should then and there pay to them the said sum of money hereinbefore referred to, and promise and agree to pay one year thereafter a further sum of one thousand dollars, the said Joseph Malfanti, Charles Kelb and William Lafrenz could not and would not obtain said license for the sale of said liquors and wines from the said city and county of San Francisco, and the said defendants Eugene E. Schmitz and Abraham Ruef would prevent the said Joesph Malfanti, Charles Kelb and William Lafrenz from carrying on or conducting the said business of selling said wines and liquors at retail as aforesaid."

The indictment is claimed to be invalid for two reasons: First, that it does not allege any threat to injure property; and, second, that it does not allege that the threat was to do an unlawful injury. Extortion is defined in the Penal Code (section 518) as "the obtaining of property from another, with his consent, induced by a wrongful use of force, or fear, or under color of official right." "Sec. 519. Fear such as will constitute extortion may be induced by a threat either: (1) to do an unlawful injury to the person or property of the individual threatened, or to any relation of his, or member of his family. * * *"

It is not claimed that the money was obtained by force, or under color of official right, as there is no allegation in the indictment that defendant ever held office. It is plain that the extortion relied upon is the threat to injure the property of the parties named in the indictment. The indictment states that the parties whose money was taken were engaged in the business of conducting a restaurant, and of selling spirituous liquors and wines at retail, "and for the purpose of selling said liquors and wines the said (parties) were required to have and obtain a license from the city and county of San Francisco, and the said license was necessary to said (parties) for the profitable maintenance and conduct of said business and the selling of the said wines and liquors." The threat, as alleged, was that if the parties named did not pay the sums demanded they "could not and would not obtain said license for the sale of said liquors and wines," and that defendants would prevent the said parties "from receiving said license or obtaining the same, and prevent (said parties) from carrying on or conducting the said business of selling said wines and liquors at retail as aforesaid." The threat alleged is a threat to prevent the parties from obtaining a liquor license, and thus to prevent them from carrying on the business of selling wines and liquors at retail. There is no allegation as to any threat to injure any business in direct terms, but only the threat to prevent the parties from obtaining a license to sell liquors.

A license to sell liquors is not property in the ordinary sense of the word, but a mere permission, and the license is but the evidence that the permission has been given by the proper authorities. Hevren v. Reed, 126 Cal. 219, 58 Pac. 536; City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674; Sprayberry v. Atlanta, 87 Ga. 120, 13 S. E. 197; McConkie v. Remley, 119 Iowa, 512, 93 N. W. 505. There is grave doubt as to whether a threat to prevent a party from obtaining a permission or license, by one who has no authority in the premises, is a threat to injure property within the meaning of the sections quoted. Pen. Code, § 7, subds. 10 and 12; In re McCabe, 29 Mont. 28, 73 Pac. 1106; Wolf v. Wall, 40 Ohio St. 111; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287. It is, however, unnecessary to decide the question in this case for the reason that we are clearly of the opinion that the indictment is insufficient, because it does not allege nor show that the specific injury threatened was an unlawful injury. The indictment does use the words "unlawful injury" in the first part of it; but when the facts are specifically set forth as to what the defendants threatened to do we find that the threat was that defendants "would prevent the said Joseph Malfanti, Charles Kelb and William Lafrenz from receiving said license or obtaining the same." There is no allegation that any unlawful act was threatened, and the attorneys for the prosecution frankly admit that they rely upon the fact that the defendants obtained the money by threatening to do an injury, which they claim was unlawful solely for the reason that the threats were made with intent to extort money. In other words, it is claimed that even though the French restaurant proprietors were violating the law, and conducting immoral places used as resorts by lewd women, and thus not legally entitled to a license to sell liquor, a threat to prevent the issuance of licenses to such places by laying the facts before the board of police commissioners in a legal manner, constitutes a crime if such threat was made with the intent to extort money. Such in our opinion is not the law. The statute uses the words that the threat must be to do "an unlawful injury"; and in order to charge a crime the indictment must aver in some way that the threat was to do an unlawful injury. It is apparent from the language of the statute which we have hereinbefore quoted that it is not every kind of fear that will support a charge of extortion because of property obtained thereby. The fear must be induced by one of the threats enumerated in the statute. The Legislature has seen fit to provide that the threatened injury to property upon which a charge of extortion may be predicated must be an unlawful injury to property. That is, the injury threatened must be, in itself, unlawful, irrespective of the purpose with which the threat is made. As the word "unlawful" is used in the statute it qualifies the "injury" and not the "threat." Unlawful means contrary to law. It is true that from a high standard of ethics it could not be claimed that one could extort money by a threat to do a lawful act, if the intent was to get money by the use of the threat, but every wrong is not made a crime. There are many wrongs done every day that are not enumerated in the category of crimes contained in the Penal Code, that are of much more serious consequence in their nature than others which are defined therein; but we must look to the statute to find whether or not an act is a public offense for which a prosecution will lie. To procure property from others by a mere threat to do a lawful act is not a crime. The object of the statute—or at least one of its objects—is to protect the party from whom the property is extorted; and if such party pays the money in order to secure protection in violating the law himself he cannot be heard to complain. He in such case would be a party to the violation of the law. In this case, if the parties as a fact paid the money in order to prevent the evidence as to the character of places they kept from being exposed to the board of police commissioners, they are not in a position to complain. A man owning a lot would have the right to build a stable upon it. If he should threaten his neighbor that he would build such stable unless paid $1,000, and under this threat the $1,000 was paid, the party receiving the money would not be guilty of a crime. He did not threaten to do an unlawful injury, because he had the right to build the stable upon his own lot. Any one has the right to go before the board of police commissioners, if that body will hear him, and object to the granting of a license to sell liquors to a person who is keeping a place in violation of the law. He has the right to threaten to do so. He would not be morally justified in obtaining money to induce him not to carry out his threat, but if he did receive money under such circumstances he would not come within the provisions of the statute. It is necessary in other crimes to allege that the act was unlawful. Murder is the unlawful killing of a human being with malice aforethought. Mayhem is unlawfully depriving a human being of a member of his body. An assault is an unlawful attempt to commit an injury upon the person of another, and in other crimes the act must either be alleged to be unlawful or felonious, or the facts must show it to be so. In People v. Loveless (Sp. Sess.) 84 N. Y. Supp. 1114, it is said that unlawful injury means "an injury resulting from an act prohibited by the laws of the state." To the same effect, see State v. Haynorth, 35 Tenn. 64; Johnson v. State, 66 Ohio St. 59, 63 N. E. 607, 61 L. R. A. 277, 90 Am. St. Rep. 564; Tatum v. State, 66 Ala. 465; 2 Bishop's New Crim. Law, 178; Davis v. State, 37 Tex. Cr. R. 47, 38 S. W. 792, 66 Am. St. Rep. 791.

Many other questions are discussed as to refusing certain instructions asked by defendant, and as to the insufficiency of the evidence to justify the verdict, but in view of the holding as to the indictment it would serve no useful purpose to discuss them.

The judgment and order are reversed, and the trial court is directed to sustain the demurrer to the indictment, and discharge the defendant as to such indictment.

We concur: HALL, J.; KERRIGAN, J.

7 Cal. App. 330

PEOPLE v. SCHMITZ. (Cr. 1,451.)

(Supreme Court of California. March 9, 1908.)

1. THREATS—EXTORTION—ESSENTIALS OF OFFENSE—UNLAWFUL INJURY.

Under Pen. Code, § 520, providing for the punishment of one who extorts money, etc., from another, under circumstances not amounting to robbery, through any threat such as is mentioned in section 519, and under section 519, providing that fear such as will constitute extortion may be induced by a threat to do an "unlawful" injury to the person or property of him threatened, or to his relative, etc., or to accuse him of crime, etc., to constitute criminal extortion committed by a threat to injure property of him threatened, the injury threatened must be in itself unlawful, irrespective of whether the purpose is to obtain money to which the threatening person is not entitled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Threats, § 1.]

2. SAME—"UNLAWFUL INJURY."

An "unlawful injury," within Pen. Code, § 519, providing that extortion may be accomplished by a threat to do unlawful injury to property, can include no injury that is not of such character that, if it had been committed as threatened, it would have constituted an actionable wrong, an injury for which suit for the resultant damages could be brought against the defendant, or which, if merely threatened, could be enjoined in equity, if the remedy at law were deemed inadequate.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7190.]

3. SAME—LIQUOR LICENSES—PREVENTING ISSUANCE.

It being lawful for police commissioners to refuse a liquor license, no matter how great the loss caused thereby to the applicant, and it being lawful for one by legitimate persuasion or argument to attempt to induce the commissioners to refuse a license, though such person maliciously intends to injure the applicant, the conjunction of the lawful persuasion inducing the lawful refusal of the license with the malicious motive instigating the persuasion would not make the act refusing the license an unlawful act, nor make the resulting injury unlawful, within Pen. Code, §§ 519, 520, providing for the punishment of one committing extortion by a threat to unlawfully injure property.

4. SAME.

To make an injury from the lawful act of a third person unlawful as to the person inducing the act, and within Pen. Code, §§ 519, 520, providing for the punishment of one committing extortion by a threat to unlawfully injure property, the act must be procured by some unlawful means sufficient to take away the free consent of the third person to the act causing the injury—such means as enumerated in Civ. Code, § 1567, including duress, menace, fraud, undue influence, or mistake.

5. SAME—INDICTMENT—SUFFICIENCY.

Under Pen. Code, §§ 519, 520, providing for the punishment of one committing extortion by a threat to unlawfully injure property, an indictment charging that defendant threatened certain restaurant keepers that, if money was not paid to him, he would prevent them from obtaining a retail liquor license, and thereby destroy or render unprofitable their business, of which the sale of liquors formed the remunerative part, insufficiently charges extortion, in that it does not show how defendant proposed to, or how it was understood he would, accomplish the same, whether by fair persuasion and lawful influence over the police commissioners, or by duress, menace, fraud, or unlawful influence; the court being unable to assume, in the absence of the averment to that effect, that defendant was the mayor, and as such in a position to exercise power and undue influence over the police commissioners, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Threats, §§ 9, 10.]

6. INDICTMENT—REQUISITES—PRESUMPTIONS.

An indictment must show that a crime has been committed. It cannot be aided by imagination or presumption.

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Eugene E. Schmitz having been convicted of extortion, and the conviction having been reversed by the District Court of Appeal on his appeal, the people apply to the Supreme Court for a hearing and determination of the appeal. Application denied.

Campbell, Metson & Drew, Chas. H. Fairall, and John J. Barrett, for appellant. U. S. Webb, Atty. Gen., and W. H. Langdon, Dist. Atty. (Heney & Cobb and J. J. Dwyer, of counsel), for the People.

PER CURIAM. This is an application by respondent for a hearing and determination of this appeal by this court, after decision and judgment by the District Court of Appeal for the First District. There is absolutely no merit in the contention of respondent that the appeal was prematurely taken, and hence should be dismissed. This matter was sufficiently and satisfactorily covered by what is said in regard thereto in the opinion of the District Court of Appeal.

The court is unanimous in the opinion that the District Court of Appeal was correct in its conclusion that the indictment was insufficient, in that it did not show that the specific injury to the property of the restaurant keepers threatened by the defendant was an "unlawful injury." It is very clear that, to constitute the crime of extortion committed by means of any threat to injure property of the person threatened, the injury threatened, as was in effect said by the learned District Court, must be in itself unlawful, irrespective of whether or not the purpose with which the threat is made is to obtain money to which the person threatening is not entitled. Section 520 of the Penal Code provides that the threat must be such as is mentioned in the preceding section, and the preceding section, in subdivision 1 (the only subdivision here applicable), says that the threat must be one "to do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family." The word "unlawful," as used in this statute, qualifies the word "injury" alone. If the injury threatened to property is one which the person threatening has an absolute legal right to do, he cannot be held to have threatened "to do an unlawful injury" to the property, even though his motive in making the threat is to obtain from the person threatened money to which he is not entitled, and consequently it cannot be held to be an injury within the provisions of sections 519 and 520 of the Penal Code. The statutory provision is so clear in this respect that no room is left for other construction. This conclusion is strengthened by the distinction between said subdivision 1 of section 519 and each of the other subdivisions of that section, wherein the element or unlawfulness of the act threatened is omitted. That this is the proper construction of the law under consideration was fully recognized by the Court of Appeals of New York in considering a precisely similar provision of the Penal Code of that state, in a case much relied on by the respondent. People v. Hughes, 137 N.Y. 37, 32 N.E. 1105.

What is meant by the term "unlawful injury"? Giving to such term the broadest meaning possible under the authorities, it can include no injury that is not of such a character that, if it had been committed as threatened, it would have constituted an actionable wrong, an injury for which an action for the resultant damages could be maintained against the defendant, or which, if merely threatened, could be enjoined in equity if the remedy at law were deemed inadequate. Applying this to the case at bar: It was within the lawful power of the police commissioners of San Francisco to withhold from the restaurant keepers a license to sell liquors at retail in their restaurant, no matter how great the pecuniary loss thereby caused to the business. It was also lawful for any person, by legitimate persuasion or argument, to endeavor to prevail upon the commissioners to refuse the license, although such person was actuated by a malicious intent to injure the restaurant keepers and cause them pecuniary loss. The conjunction of the lawful persuasion inducing the lawful refusal of the license with the malicious motive instigating the persuasion would not convert the lawful act of refusing the license into an unlawful one, nor make the resulting injury unlawful or actionable. In order to make an injury from the lawful act of a third person a cause of action against the person inducing the act, such act must be procured by some means which the law denounces as unlawful. We think a review of the authorities satisfactorily shows that the means employed must be something which the law considers sufficient to take away the free consent of the third person, in this case the police commissioners, to the act which causes the injury, the consent essential to the validity of a contract. The means referred to are thus enumerated in section 1567 of our Civil Code: "An apparent consent is not real or free when obtained through: (1) Duress; (2) menace; (3) fraud; (4) undue influence; or (5) mistake." A contract obtained by such means is declared to be voidable. If A., by such means, induces B. to do a lawful act injuring the property of C., an action will lie by C. against A. for the damage thereby caused. But, if A. merely persuades or advises B. to do the injurious act, no action will lie against A. in favor of C. We are not here speaking of an act unlawful in itself, in which case A. might be liable as an accomplice. We refer to acts by B. which, though injurious to C.'s property, are lawful in character, but which he would not have done but for the unlawful means used by A. upon him.

The difference between an unlawful injury and an act which, though morally wrong and in fact injurious, does not furnish legal grounds of action, is illustrated by the two cases of Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233, and People v. Hughes, supra. In Boyson v. Thorn, Boyson and his wife were lodging at the Palace Hotel. Thorn, maliciously intending to injure Boyson in person and property, induced Newlands, the proprietor of the hotel, to eject Boyson and his wife from the hotel, whereby Boyson sustained damage. This was done without the use of duress, menace, fraud, deception, or undue influence upon Newlands; the only means alleged being lawful advice and persuasion with malicious intent. It was held that no unlawful injury had been committed by Thorn upon Boyson; the reason being that the means used to induce the injurious act of Newlands were not unlawful in character, and that the malicious use of lawful means to induce a lawful act did not make the resulting injury unlawful. In People v. Hughes, the defendant was the head of a labor organization known as the "Knights of Labor." Adler & Bros. were engaged in selling goods at wholesale, and the success and profit of the business depended on the patronage of retail dealers in the same goods. The firm had disregarded a request of the order, made through Hughes, to employ only a specified number of apprentices, and the order, for that cause, acting through Hughes and by means of its influence over the retailers arising from the fact that its members were numerous and were consumers of large quantities of the goods, had caused a boycott by the retailers against Adler & Bros. Thereupon Adler & Bros. removed the cause of the boycott by reducing the number of their apprentices to the desired number and apologized to Hughes for their previous disobedience. Hughes then threatened that, notwithstanding this compliance, unless a certain sum of money was paid him he could and would induce the retailers to continue to boycott, and that he would do this by deception in concealing from the order the fact that the cause of the boycott had ceased to exist and by means of his power as head of the order and the influence of the order which he could by that means bring to bear upon the retailers; that is to say, that he would induce the retailers to commit the injury by means of his deceit, fraud, and undue influence. The court says that the retailers had the lawful right to withdraw their custom and Hughes had the lawful right by proper means to induce them to do so, but that this was a threat of an unlawful injury to property because of the unlawful means proposed to be used; that is, the deceit and undue influence.

The question whether malice alone should be considered in law as sufficient to make an injury resulting from a lawful act the subject of an action for redress, or whether the use of unlawful means to induce the lawful act is essential, is a question of public policy. Both are morally wrong, and the reason for the distinction is not to be found in the difference in the moral qualities of the respective elements. It is founded upon the conviction that to hold the former sufficient would, in the administration of the rule, cause injustice to be done more frequently than justice, and that it would be unwise to hold a man answerable in an action solely because of the state of his mind, emotions, and feelings. In many of the cases where an injury from the lawful act of a third person has been declared unlawful, there is no discussion of this phase of the subject; and frequently the elements of menace and undue influence are confused. But in nearly all of them—indeed, in most of those exceptional cases in which malice alone has been held to make the injury unlawful—it will be found that the defendant employed some one of the unlawful means above mentioned in procuring the act to be done, or that he threatened so to do. For citations to cases on the subject, see 18 Am. & Eng. Ency. of Law, 88; 19 Am. & Eng. Ency. of Law, 626; 16 Am. & Eng. Ency. of Law, 1113; 1 Cyc. 651, 663, 669; 1 Cent. Dig. col. 1110. See 8 Harvard Law Review, pp. 1 to 14.

In this case the indictment charges that the defendant threatened the restaurant keepers that, if money was not paid him, he would prevent them from obtaining or receiving a retail liquor license and thereby destroy or render unprofitable their restaurant business, of which the sale of liquors at retail formed the remunerative part. It is not stated how the defendant proposed to do this, or how it was understood by the parties that he would accomplish it, whether by fair persuasion and lawful influence over the commissioners, or by duress, menace, fraud, or undue influence exercised upon them. This is not a case where it is sufficient to charge an offense in the language of the statute defining it. The court cannot assume, in the absence of any averment to that effect, that Schmitz was mayor of the city and as such in a position to exercise power and undue influence over the members of the board of police commissioners, or that Ruef, his codefendant, was a person in practical control of the city government because of his political activity and influence, or otherwise able to exert an undue influence over the board; nor can it be inferred, or presumed, when it is not so charged, that the defendant threatened to prevent the issuance of the license by unlawful means, and not solely by lawful and innocent persuasion and argument. It may well have been the case that the threat made did not express in words any intent or purpose to use any of the unlawful means referred to, and yet that the purpose and ability to use such means successfully were perfectly understood by the parties concerned, because of the circumstances known to them. This absence of express avowal would not obviate the necessity of pleading the facts necessary to make the threat criminal.

It is an elementary principle of criminal law that the indictment must show that a crime has been committed. "In no case can the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence, and, if the facts stated may or may not constitute a crime, the presumption is that no crime is charged." People v. Terrill, 127 Cal. 100, 59 Pac. 836. It should be added that neither of the two New York cases strongly relied on by the respondent (People v. Hughes, supra, and People v. Barondess, 133 N. Y. 649, 31 N. E. 240) involved any question of the sufficiency of an indictment, and that there is nothing in the opinions in said cases that is in conflict with the views we have expressed.

The attorneys for the respondent base their application for a hearing in this court solely upon the alleged errors of the District Court in refusing to dismiss the appeal and in holding the indictment to be insufficient, and expressly limit such application to these two points. They introduce their application with the statement that they are convinced that upon a full discussion of the case "it will be found and decided by this court that levying blackmail upon licensed businesses by the mayor and the political boss of a metropolitan community is a crime under the law of California, and should not go unwhipped of justice." This is a gross misstatement of the case and of the question to be decided, as presented by the indictment. We again emphasize the fact that the indictment does not aver that Schmitz was mayor, or that Ruef was a political boss, or that either of them had any power, or influence, or control over the police commissioners, or that they threatened to use such power, influence, or control in preventing the issuance of a license.

The question whether or not the fact, if it be a fact, that the restaurant keepers were unfit persons, who should not have been licensed, would be a good defense to a good indictment for extortion, is also a question foreign to the discussion of the sufficiency of the indictment. Any intimations in the opinion of the District Court of Appeal that such unfitness would justify the extortion of money by a threat of the use of unlawful means to procure the refusal of a license must be considered as obiter dicta, and we do not wish to be understood as approving them.

The application for a hearing and determination of this appeal by this court, after decision and judgment by the District Court of Appeal of the First District, is denied.

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153 Cal. 95

FIRST NAT. BANK OF REDLANDS v. BOWERS. (L. A. 1,978.)

(Supreme Court of California. Feb. 24, 1908.)

GUARANTY—REMEDIES OF CREDITORS—SUFFICIENCY OF EVIDENCE.

Evidence in an action on a contract of guaranty considered, and *held* sufficient to support judgment for defendant.

Department 2. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by the First National Bank of Redlands against Gertrude S. Bowers. Judgment for defendant, and plaintiff appeals. Affirmed.

Gregg & Surr and J. S. Chapman, for appellant. Curtis & Curtis and Hunsaker & Britt, for respondent.

PER CURIAM. The facts touching the controversy between these parties will be found elaborately set forth in the opinion of this court upon a former appeal. First National Bank v. Bowers, 141 Cal. 253, 74 Pac. 856. Upon the first trial the lower court construed the guaranty given by defendant to plaintiff as being so free from doubt as not to call for or permit the introduction of evidence touching the circumstances of its execution in explanation of it, and held, in accordance with the contention of defendant, that the guaranty of "90 per cent. of the face of all drafts for oranges with bill of lading attached" meant that such bills of lading as accompanied the drafts should have been transferred to the bank by the Haight Fruit Company, so as to operate as a pledge of the oranges and as security for the benefit of the guarantor, and by such transfer to place the consignment under the absolute control of the bank and beyond the control of the fruit company; that this was a condition precedent to her liability under the guaranty, and, not having been complied with, such liability never attached. First National Bank v. Bowers, 141 Cal. 258, 259, 74 Pac. 856. Upon appeal this court held that the wording of the guaranty was not so plain, unambiguous, and certain as to have justified the court in refusing evidence explanatory of it.

A new trial was had before a jury, and such evidence was introduced. The verdict of the jury, followed by the judgment of the court, was in favor of the defendant. Plaintiff's brief upon appeal is devoted in great part to an analysis and criticism of the evidence of the defense and to attacks upon the instructions given by the court. It would be impossible, within the limitations of a judicial opinion, to discuss these matters seriatim. Mrs. Bowers' plea and evidence was in accord with the construction, which, as above stated, the trial court in the first instance put upon the instrument of guaranty. The testimony, in effect, was that it was represented to her by the president of the bank that the bill of lading operated to give the bank control of each shipment of oranges; that she had no knowledge that the fruit company could divert these shipments and obtain money for them as they did, notwithstanding the bill of lading held by the bank. She testified that the guaranty was drawn by one of the bank officials after presentation by her to that official of a form of guaranty prepared by her brother; that the form of guaranty prepared by her brother contained a provision whereby the bank, allowing the Haight Fruit Company to draw 90 per cent. of the face of each draft, was to retain the surplus as a security fund to the end of the season, and that she was thus liable for only 90 per cent. of the face of all drafts drawn during the season, and not for 90 per cent. of the face of each and every draft; that the bank official who prepared the guaranty which she actually signed declared to her that it was in all essential particulars identical with that which she presented for his approval; and that under this representation she executed the guaranty in question.

This evidence, believed by the jury, as from their verdict it was, justifies the judgment of the court, which judgment and the order denying plaintiff's motion for a new trial are therefore affirmed.

153 Cal. 103

GALVIN v. HUNT, Judge. (S. F. 4,851.)

(Supreme Court of California. Feb. 24. 1908.)

EXCEPTIONS, BILL OF — SETTLEMENT AND SIGNING—REQUISITES—INSERTION OF DOCUMENTS—EMBODYING AMENDMENTS.

Plaintiff, who had been ordered to engross a bill of exceptions, was unable to insert certain documents in accordance with the order of the court allowing amendments to his proposed bill, because the documents were lost, and defendant's attorney, who had the only copies in existence, would not allow him to copy them, but descriptions of the documents were inserted. The bill was engrossed by copying plaintiff's proposed bill, and attaching thereto a copy of the amendments allowed. *Held*, that the judge was not justified in refusing to sign the bill for failure to insert the documents, but he was for failure to embody the amendments in the bill.

In Bank. Mandamus proceedings brought by E. M. Galvin against John Hunt, judge of the superior court of the city and county of San Francisco. Writ denied.

Frank McGowan and Robert Ash, for petitioner. E. M. Galvin, in pro. per. John J. Barrett, George C. Ross, and Garoutte & Goodman, for defendant.

SHAW, J. This is a proceeding in mandamus to compel the respondent to sign a bill of exceptions in his official capacity as judge of the superior court of the city and county of San Francisco. It is alleged in the petition that the bill of exceptions, after having been duly settled by the respondent, was by him ordered engrossed; that petitioner thereupon engrossed the bill and presented the same to respondent for his certificate and signature, whereupon he refused to sign or certify it. The petitioner, who was the plaintiff in the suit of Galvin v. Fannen, served on the defendant, Fannen, a draft of his proposed bill of exceptions. Fannen in due time served on Galvin his proposed amendments thereto. The proposed bill and amendments were then presented to the judge and by him settled, a number of the amendments being allowed, and this made it necessary to engross the bill for certification and signature. The petitioner was directed to engross it, accordingly, and was allowed 10 days to do so. Within that time he presented to the respondent for signature the document which he claims was the engrossed bill. The respondent refused to sign the same, on the ground that it was not properly or correctly engrossed.

Among the amendments proposed and allowed were two calling for the insertion of certain documents which had once been in possession of Galvin, or his attorney, but which, through the carelessness of one of their employés, had been lost. The only existing copies of these documents were in possession of the attorney of the defendant, Fannen, and said attorney refused to allow Galvin, or his attorney, to see these copies, in engrossing the bill, or to give them the opportunity to have copies thereof made for that purpose. In the proposed amendments these documents were not set out in full, but were merely referred to therein by description. In the engrossed bill they were omitted, and in lieu thereof the descriptions contained in the proposed amendments were set out. In excuse for this omission it was stated therein that the plaintiff was unable to insert them because he had not been furnished with copies. The respondent, in his answer to the petition herein, alleges that the petitioner did have copies of the lost documents and could have inserted them, but upon the hearing before this court, it was shown by affidavit, and virtually admitted, that the only copies the petitioner ever possessed were the originals which had been lost before the settlement of the bill. One of the objections to the engrossed bill was the omission of these documents.

The petitioner contends that it was the duty of the respondent, under the circumstances stated, to require the attorney for Fannen to produce his copies of the documents for use in engrossing the bill, or to afford the petitioner an opportunity to copy them for that purpose, and to allow the petitioner further time to engross the bill until this could be done. If this were the only objection to the engrossed bill offered we think it would have been the duty of the judge to do as petitioner contends. But an inspection of the so-called engrossed bill shows that it is defective in many other particulars. The petitioner had merely copied the plaintiff's draft, as originally proposed, with certain blanks therein filled by inserting the documents called for, and had attached to it a copy, in hæc verba, of the amendments allowed thereto. Some of these amendments called for the omission of long passages of the original draft and the insertion of other and different matter in lieu thereof. Others required the insertion of copies of documents, either in the possession of Galvin or his attorney, or accessible to them. The result of this method of engrossment is a mass of rather incoherent matter, much of which should not appear at all, and the omission of other material matters which should and could have been inserted. In addition to these substantial defects, it appears that the engrossed bill embraces numerous other errors in copying, several of which are material. If the lost documents were supplied and correctly copied, the engrossed bill would nevertheless, because of the other errors referred to, fail to truly or fully set forth the matters directed to be inserted therein, or to correctly exhibit the proceedings which the bill would purport to introduce into the record on appeal. The petitioner did not make to the trial judge, and does not make here, any excuse whatever for the incorporation of these errors into the engrossed bill. The respondent, for these reasons, was fully justified in refusing to settle or certify the bill as presented.

The writ is denied.

We concur: ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.; SLOSS, J.; LORIGAN, J.

153 Cal. 86

HUFFNER et al. v. SAWDAY et al.

(L. A. 1,941.)

(Supreme Court of California. Feb. 18, 1908.)

1. Appeal — Review — Harmless Error — Pleading.

Where the complaint is uncertain, but it is apparent from the record that defendants were not thereby misled or embarrassed in making their defense, the overruling of a demurrer to the complaint is not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4098–4105.]

2. Waters and Water Courses — Natural Water Courses—Diversion—Actions—Defenses.

In an action to prevent defendants from diverting the water from a stream used by plaintiffs for irrigation purposes, it is no defense that the stream is dry during the summer months, and that the bed changes often, since such circumstances are usual with a water course, and do not deprive those owning land fronting on the river bed of the character of riparian owners.

3. Same—Use for Irrigation.

In an action to enjoin diversion of water from a stream from which plaintiffs irrigate, a finding that plaintiffs' land had been irrigated from the stream for 25 years is immaterial, since plaintiffs are entitled to have it continue in its customary flow, subject to reasonable use by other riparian owners.

4. Same—Quantity of Water.

In an action to enjoin the diversion of water from a stream, where the evidence showed that plaintiffs had, when the supply permitted, irrigated by means of water taken from the stream, the fact that for several years the stream had been dry for a longer time each year than usual, and that they had not been able to get as much water as theretofore, did not destroy the continuity of their use, or deprive them of the right to use the amount formerly diverted if the stream should again furnish that amount.

5. Same—Injury from Diversion.

Where the evidence, in an action to enjoin a diversion of water from a stream from which plaintiffs irrigated their land, showed that the stream was dry part of the year, and that when the water began to flow it took several weeks to reach plaintiffs' land, owing to the sandy bottom of the bed which must necessarily become saturated before any water would flow over it, a diversion by defendants would postpone the time required to reach plaintiffs and result in their injury, since they were entitled to have the stream maintained in its natural state.

6. Appeal — Questions in Lower Court—Matters Not Presented.

The appellant cannot complain that the court did not reserve to him a right which was not asserted in his pleadings.

In Bank. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Gaspar A. Huffner and others against F. R. Sawday and others. From a judgment for plaintiffs and an order denying a motion for a new trial, defendants appeal. Affirmed.

W. R. Andrews and Collier, Smith & Holcomb, for appellants. V. E. Shaw and Shaw & Winnek, for respondents.

SLOSS, J. This is an action to enjoin the defendants from diverting water from a stream known as the "San Pasqual River." The plaintiffs recovered judgment, and the defendants appeal from the judgment and from an order denying their motion for a new trial.

The complaint sets forth two counts or causes of action. Each of the counts alleges that the San Pasqual river is a stream arising in the Volcan mountains, in San Diego county, whence it flows in a westerly course through the San Pasqual valley to the Pacific Ocean; that the plaintiffs are, respectively, owners of 17 several parcels of land in the San Pasqual valley, each of which is irrigable and in cultivation, and that said plaintiffs and their predecessors have for more than 30 years cultivated their land by means of water taken from said stream, which furnishes the only means of irrigating these lands. It is alleged that the defendants assert the right to, and, unless restrained, will divert at a point about 25 miles above plaintiffs' lands, the waters of the stream to the extent of 3,000 inches, and that, if the defendants are permitted to make this diversion, each of the plaintiffs will be deprived of water for irrigation.

The foregoing averments are, as has been said, common to both counts. The first contains the further allegation that the San Pasqual river in its natural course flows over, through, and along each of the tracts described as belonging to the various plaintiffs, and that the defendants' asserted right of diversion is based upon a notice of appropriation, according to which the water is to be used upon land situated outside of the watershed tributary to San Pasqual river. The second count alleges, in addition to what has been stated, that 2,500 inches of water is required to properly irrigate the lands belonging to the plaintiffs, and that, in order to obtain such supply, the plaintiffs and their predecessors did, prior to 1878, appropriate from the waters of the stream 2,500 inches, and they have ever since diverted all the water flowing in said stream up to 2,500 inches, and conducted the same upon their several tracts for use therein. It is further alleged in the second count that the water in the stream at plaintiffs' point of diversion rarely exceeds 2,000 inches, and during most of the irrigating season is less than 1,000 inches.

It will be seen that the plaintiffs rely upon two different grounds of objection to the proposed diversion by defendants. In the first count they stand upon their right as riparian proprietors; in the second count they assert a claim as prior appropriators. It may be said at this point that no error was committed in overruling the demurrer to the complaint. The sufficiency of each count to state a cause of action was not, and is not now, questioned. The only points made are that the complaint is uncertain in some particulars. We think the pleading is not open to the objections raised, but, even if it were, it is apparent from the record that the defendants were not thereby misled or embarrassed in making their defense, and the overruling of the demurrer would therefore afford no ground for reversal. Gassen v. Bower, 72 Cal. 555, 14 Pac. 206; Alexander v. Central L. & M. Co., 104 Cal. 532, 38 Pac. 410; Rooney v. Gray Brothers, 145 Cal. 753, 79 Pac. 523.

The answer denies all the allegations of each count, except as to the source of the San Pasqual river, and the assertion by defendants of the right, and their intention, to take and divert 3,000 inches of the waters of the stream, as alleged by plaintiffs. The defendants also plead a separate defense, in which they allege that they hold, pursuant to the mining laws of the United States, certain placer mining claims, of the value of over $1,000,000. That it is necessary in order to work these claims to take the waters of the stream to the extent of 3,000 inches. It is further averred that on April 8, 1893, they posted at the proposed point of diversion a notice of appropriation of the waters of the San Pasqual river, to the extent aforesaid, in accordance with the provisions of section 1415 of the Civil Code; that they duly recorded their notice, commenced the construction of their ditch and tunnel within 60 days after posting their notice, and have ever since continued such construction diligently and uninterruptedly; the work already done being of the value of $25,000, and amounting to three-fourths of the work necessary to be done. It is alleged that this work was done by the defendants in good faith and with the acquiescence and consent of plaintiffs. The answer further alleges that six-sevenths of the water of the watershed flow into the stream below defendants' point of diversion, and that the stream flows on the surface "only during times of flood and immediately thereafter, at all of which times there is sufficient water to supply the plaintiffs fully and adequately without taking or requiring any of the waters claimed by defendants."

The court found that the San Pasqual river is a water course as alleged in the complaint; that the plaintiffs are the owners of the respective tracts claimed by them; that 10 of the 17 holdings described in the complaint border upon the stream. It is found that the plaintiffs' lands have been irrigated from the stream for 25 years, and would be of little value without irrigation. The findings declare that for the past 8 years the entire flow of the stream has been inadequate to irrigate the lands of the plaintiffs, and that if the defendants are permitted to divert the waters from the stream each of the plaintiffs will be deprived of water for irrigating his tract of land, and will suffer irreparable loss and damage. The court found that the defendants had posted and recorded their notice of appropriation, and had performed the work as alleged in their answer, but had not prosecuted the same diligently. The place to which the defendants claim the right to take the water is found to be on a different watershed from that tributary to the San Pasqual river. There is a finding against the plea of acquiescence and consent on the part of the plaintiffs. The judgment decrees that the defendants have no right or title to the waters of the San Pasqual river, and no right to divert the same, and perpetually enjoins them from taking or diverting from the river any of the waters of the stream or in any manner whatsoever interrupting, obstructing, or interfering with the free, usual, or customary flow of water down or through said stream.

Many of the findings are attacked as unsupported by the evidence. In connection with the finding of the existence of a water course as alleged, attention is called to evidence that the San Pasqual river does not at all seasons of the year carry a flowing body of water through the San Pasqual valley, in which the plaintiffs' lands are situated, and that the location of the river bed or channel is subject to change. It appears that in this valley the stream is dry during the summer months, and that its surface flow begins, in years of ordinary rainfall, about the end of November, and ceases in June. The soil is sandy, and the river bed "varies greatly and changes often," as stated by a witness for the plaintiffs. These circumstances are not inconsistent with the existence of a water course, nor do they deprive those owning land fronting on the bed of the stream of the character of riparian proprietors. Lux v. Haggin, 69 Cal. 255, 417, 418, 4 Pac. 919, 10 Pac. 674; Spangler v. San Francisco, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158; Los Angeles Cemetery Ass'n v. City of Los Angeles, 103 Cal. 461, 37 Pac. 375.

Finding 15, to the effect that a large part of each of the tracts described in the complaint has for 25 years been continuously cultivated by means of water taken from the stream, is, it is contended, contrary to the evidence. The finding on this point is, so far as concerns the plaintiffs who have riparian rights, not material. Their right to restrain the diversion, by others than riparian owners, of water which would if undisturbed flow past their lands, does not rest upon the extent to which they have used the water, nor upon the injury which might be done to their present use. Even if these plaintiffs had never made any use of the water flowing past their land, they had the right to have it continue in its customary flow, subject to such diminution as might result from reasonable use by other riparian proprietors. This is a right of property, a "part and parcel" of the land itself (Duckworth v. Watsonville W. & L. Co. [Cal. Sup.] 89 Pac. 340), and plaintiffs are entitled to have restrained any act which would infringe upon this right. In Southern Cal. I. Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767, the court said: "It is not necessary in such cases for the plaintiff to show damage, in order that it may be entitled to a judgment. It is enough if it appears that the continuance of the acts of the defendants will deprive it of a right of property, a valuable part of its estate. The taking of the water beyond the watershed would, therefore, be an injury to the plaintiff's riparian right which, under the pleadings and findings in the case, the plaintiff was entitled to have enjoined." In Stanford v. Felt, 71 Cal. 249, 16 Pac. 900, it is said: "Nor is the owner lower down the stream required to show, in order to procure an injunction, any actual present damage. The diversion, by lapse of time, may grow into a right. To prevent such result, an injunction will be awarded." These, and other authorities to the same effect, are reviewed in Anaheim Union Water v. Fuller (Cal. Sup.) 88 Pac. 978, 11 L. R. A. (N. S.) 1062, in which the doctrine is reasserted.

In so far, however, as the rights of the plaintiffs rest upon prior appropriation and use, it was no doubt necessary for them to show that the proposed diversion would diminish the flow of water which they had been receiving for use upon their lands. That a part of the lands of each of the plaintiffs had been, for many years, irrigated by means of water taken from the stream, whenever the supply of water permitted, was fully shown by the evidence. The last seven years preceding the trial of the action had been exceptionally "dry," and during them the flow of water had ceased earlier in the spring than in former years. The fact that during this period the plaintiffs had not been able to get as much water as theretofore did not destroy the continuity of their use, nor deprive them of the right to use the amount formerly diverted in the event that the flow of the stream should again furnish such amount. It is urged that there is no evidence to support the finding that the proposed diversion by defendants would cause irreparable damage or loss to plaintiffs. But the plaintiffs offered evidence to show that, during the seven or eight years preceding the trial, the flow of water in the stream had been so light that there was no surface flow at the lower end of the valley. One of defendants' witnesses testified that nobody in the San Pasqual valley "gets plenty of water for irrigation." It is apparent that if, as matters now stand, the plaintiffs are unable to get from the stream all the water they need (and claim to be entitled to), they will be damaged, if defendants are permitted to divert, at a higher point, 3,000 inches of the water of the stream. It is true that there is evidence to the effect that during the summer months, when the stream is dry in the San Pasqual valley, there is some water running at the defendants' point of diversion. It does not follow, however, that the taking of this water would not injure the respondents. There are long stretches of sandy bottom between the defendants' proposed works and the lands of the plaintiffs. Water flowing over the rocky bed above sinks into the sand, which must become saturated before there can be a flow over its surface. To so fill this sand requires, as a witness testifies, several weeks. The court was justified in drawing from this testimony the inference that an interruption to the flow of this water would prevent or diminish the saturation of the sandy bed underlying the stream and thereby materially postpone the time when a surface flow would come to plaintiffs' lands. Such postponement would be a clear injury to the plaintiffs, whose interest in the waters of the stream included the right to have the river bed continue to hold sufficient water to supply and support the surface stream in its natural state. Los Angeles v. Pomeroy, 124 Cal. 621, 57 Pac. 585; McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849; Cohen v. La Canada Co., 142 Cal. 437, 76 Pac. 47; Verdugo Canyon Water Co. v. Verdugo (filed Jan. 23, 1908) 93 Pac. 1021.

The appellants make the further point that they are restrained from taking any of the water of the stream, although the evidence shows that in times of flood large quantities of water, far exceeding any amount that can be used by the plaintiffs, pass down the stream. It has been held that an injunction will not issue to restrain a diversion of water during times of extraordinary floods where such diversion will not perceptibly diminish the stream below. Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704; Heilbron v. 76 L. & W. Co., 80 Cal. 189, 22 Pac. 62; Fifield v. S. V. W. W., 130 Cal. 552, 62 Pac. 1054. But the pleadings in this case raise no issue as to the right to take flood waters. The answer contains an allegation (hereinbefore quoted) with reference to the flow of the stream during times of flood, but the purpose of this allegation was, not to claim the flood waters for defendants, but to limit the plaintiffs to the surplus of flood waters remaining after the defendants had taken the 3,000 inches claimed by them. As was said in Anaheim Union Water Company v. Fuller, supra, "The defendants do not propose to limit the diversion to times of high water, but, on the contrary, they will take it during the time of its greatest scarcity. There is no question of the diversion of flood water involved in the case. The right which they assert is to take the ordinary water of the stream." It may be questioned whether the decree, properly construed, purports to deal with anything beyond the ordinary flow of the stream. But, in any event, the appellants are not in a position to complain that the court did not in specific terms reserve to them a right which they had not asserted.

The point is made that the decree should have permitted the defendants to divert the water, on condition that they returned it to the river above plaintiffs' lands, no less diminished than it would have been in its natural flow to the point of return. It may be that a decree so limited would have been proper if the evidence had shown that the defendants were able and willing to make such return of the water. Gould v. Eaton, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181; Montecito Valley Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113. But here there was testimony from one of the defendants themselves that the water, if diverted, would return to the San Pasqual valley through the Santa Maria creek, and evidence was introduced to show that this creek joins the San Pasqual below the lands of the plaintiffs. If, as the trial court had the right to believe, this was the true state of facts, there was no way in which the defendants could divert the water claimed by them without injury to the plaintiffs.

The findings already discussed lead to the conclusion that the plaintiffs, whether, as riparian proprietors or as prior appropriators of all the waters ordinarily flowing in the stream, had a right superior to that of the defendants, even if the latter did everything required under the statute to constitute a valid appropriation. There is no occasion, therefore, to consider whether the evidence justified the finding that the defendants had failed to prosecute their work diligently. If the finding on this point had been in their favor, it would not have enlarged the rights of the appellants.

The judgment and order are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

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CERINI v. DE LONG et al. (Civ. 430.)

(Court of Appeal, Third District, California. Jan. 11, 1908. Rehearing Denied by Supreme Court March 10, 1908.)

1. Counties—Change of Boundary Lines—Election—Ballots.

Under Act March 14, 1907 (St. 1907, p. 260, c. 214), providing for an election to determine the question of change of certain boundary lines, and declaring that the provisions of the Political Code relating to the canvassing of returns of general elections shall apply, the ballots voted at such election are to be delivered to the clerk and kept sealed, as required by Pol. Code, § 1264.

2. Same — Commissioners to Canvass Returns—Powers.

Act March 14, 1907 (St. 1907, p. 260, c. 214), providing for a county line election, requires the appointment of a board of commissioners to hold such election and canvass the returns, etc., in every respect, except as otherwise provided, in accordance with the general election law for the election of county and township officers. Pol. Code, § 1281, provides that the canvass of election returns shall be by opening the returns and estimating the vote of each county or township for each person voted for, and for and against each proposition voted on at the election and a declaration of the result thereof, and section 1261 declares that the returns shall consist of a copy of the register on which the word "voted" shall have been marked as the ballots were received, together with certificates of registration, a list of the persons challenged, a copy of the list of voters, and a tally list. *Held*, that the commissioners in canvassing the returns of a special county line election had no judicial power, but acted in a purely ministerial capacity, and therefore had no authority to consider matters not shown by the returns for the purpose of declaring the election invalid.

3. Mandamus—Scope of Remedy—Election Officers—Canvassing Returns.

Mandamus is the proper remedy to compel canvassing officers to discharge their duties and canvass the returns of an election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 150–157.]

4. Counties — Boundary Line Election — Canvassing Returns—Mandamus — Petition.

Act March 14, 1907 (St. 1907, p. 260, c. 214), provided for the appointment of commissioners to hold a county boundary line election to be conducted in accordance with the general election law for the election of county and township officers. The act provided that all qualified electors in the state who had been residents and electors in the territory for 90 days preceding the election should be qualified to vote, that the great register of F. county used at the election in 1906 in the described territory should be prima facie evidence of the qualification of electors, and that the county clerk should furnish a sealed certificate showing the additional names of voters registered since the great register was printed, etc. The clerk furnished certificates showing the additional names of voters up to within 40 days prior to the holding of the election, but refused to furnish any certificate showing the names of voters registered as residing within the territory within 40 days prior to the election, and for this reason the commissioners held the election to be void and refused to canvass the returns. *Held*, that the furnishing of such certificate was not so far jurisdictional to the ordering or conducting the election or the canvass of the returns that a petition for mandamus to compel them to canvass such returns was not demurrable because it failed to allege that the clerk performed his duty in furnishing such certificates.

5. Mandamus — Official Duty — Performance—Elections.

The duty imposed on the county clerk of Fresno county by Act March 14, 1907 (St. 1907, p. 260, c. 214), to furnish county line election commissioners with a list of voters within the territory described in the act who had registered since the printing of the great register of the county for 1906, was mandatory, and performance thereof could be compelled by mandamus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 150–157.]

6. Counties—Boundary Line—Elections—Registration.

Act March 14, 1907 (St. 1907, p. 260, c. 214), providing for a county boundary line election, required that it should be conducted according to the general election law for the election of county and township officers, that the qualified electors residing within the territory described, for ninety days preceding the election, should be entitled to vote, that the great register of F. county used at the election of 1906 should be prima facie evidence of the qualification of electors, and that the county clerk should furnish to the commissioners certificates showing additional voters registered since the printing of the list. Pol. Code, § 1094, provides for registration of voters in even-numbered years to begin on January 1st of such years, to be continuous except during the 40 days immediately preceding any election, when it shall cease as to electors residing in the territory within which the election is to be held. *Held*, that the county clerk properly refused to certify to such election commissioners the names of voters within the territory who registered within 40 days prior to the holding of such election.

7. SAME—CANVASSING RETURNS.

Where county line election commissioners were required to canvass the returns in accordance with the law regulating election of county and township officers, such board had no power, after examining the returns from one precinct and finding an alleged defect therein, to assume that all the returns were similarly affected, and reject them en masse without opening or scanning them, and order new election.

8. SAME—CONTEST—REMEDIES.

Code Civ. Proc. § 187, provides that, if the course of proceeding be not specifically pointed out by statute, the mode of proceeding may be adopted which may appear most conformable to the spirit of the Code, and Civ. Code, § 3523, declares that for every wrong there is a remedy. *Held*, that since Act March 14, 1907 (St. 1907, p. 260, c. 214), providing for a county line election, contained no provision for a contest thereof, such an election was subject to review by a suit in equity.

Mandamus by John Cerini against D. M. De Long and others, commissioners, appointed to carry out Act March 14, 1907 (St. 1907, p. 260, c. 214), to change, establish, and permanently locate the boundary line of Kings county and a portion of the south boundary line of Fresno county, and to provide for the submission of such change to the qualified electors of the territory affected thereby. On demurrer to the petition and answer. Demurrer to petition overruled. Demurrer to answer sustained.

M. K. Harris, Cartwright & Cashin, and Southerland & Barbour, for petitioner. Charles G. Lamberson, for defendants.

CHIPMAN, P. J. Mandamus. The petition alleges the following facts: That petitioner is a qualified elector of the territory described in section 1 of the act approved March 14, 1907 (St. 1907, p. 260, c. 214), relating to the establishment of the boundary line between the counties of Kings and Fresno. That defendants are the duly appointed and qualified commissioners to carry out the provisions of said act. That pursuant to said act said commissioners duly ordered and gave notice of an election to be held within said territory, and each precinct thereof, on December 10, 1907. That said election was so held on said day, "and thereafter the election returns from the officers of the said several precincts established by said board in said territory, authenticated as required by law, were all duly made to said board at its office established by it in the city of Coalinga within the said territory." That on the 17th day of December, 1907, and after said returns had been so made and received by said board, all the members thereof met as a board of canvassers, at its said office, for the purpose of canvassing the returns of said election, as required by said act. "That the said board, wholly disregarding the duty imposed upon it by law in the premises, expressly refused, and does now refuse, to canvass the said returns made by the officers of said election, or to certify the results thereof, but, on the contrary, by resolution then and there adopted, declared the said election and all proceedings taken in the various precincts of said territory in relation thereto to be void, and ordered that an election be called to be held in all of the precincts so established by said board in said territory on the 14th day of January, 1908. And your petitioner alleges that said board does not intend to, and will not, canvass the election returns heretofore made to it, and will not certify the results thereof as required by law or at all." The resolution last above referred to was as follows: "It is ordered that the said election held in the various precincts in said district described in said act, on the 10th day of December, 1907, was not in truth, or in fact, or in contemplation of law, such an election as provided for by said act, and that the same is void, and that all the proceedings taken in the various precincts of said district in relation to holding an election on the 10th day of December, 1907, are hereby set aside." Then follows a further order calling another election for January 14, 1908, and directing the secretary of the board to demand of the county clerk a certificate showing the names of all qualified electors residing in said district "prior to three months before said time for said election, who have been duly registered upon the great register of said county prior to the time set for said election." This resolution is preceded by numerous whereases reciting some of the provisions of the act, the steps taken under it by the board, the failure of the county clerk to furnish the board a certificate showing the registration of certain qualified voters, and some other alleged facts. But these recitals are not before us as admitted facts and cannot be considered at this time as bearing upon the sufficiency of the petition. A general demurrer to the petition was interposed for insufficiency of facts, and a special demurrer on the ground that the petition is ambiguous for the reason that it does not appear therefrom "whether or not the county clerk of Fresno county furnished to the said commissioners a certificate, under seal, showing the additional names of the voters on the great register of the county of Fresno registered as residing in the said territory described in said act mentioned in said petition, since the last great register of Fresno county was printed and up to the 10th day of December, 1907, as provided by section three of said act." Three of the defendants filed an answer to the petition, and to this the plaintiff interposed a general demurrer. Both demurrers were argued and submitted and are now to be disposed of. Two of the defendants admitted the truth of the averments of the petition and expressed a readiness to proceed with the canvass.

The Demurrer to the Petition.

The act under which the election was authorized provides for the appointment by the Governor of five persons "who shall be and constitute a board of commissioners to carry out" its provisions. It points out how the board is to organize, and provides that three of the members shall be necessary to transact business. It is made the duty of said board of commissioners, after they have duly organized, to divide the territory into not less than five nor more than nine election precincts where the elections are to be held, and provides that: "Said commissioners and the clerk elected by them are hereby authorized, empowered and required to discharge the same duties as are now required by law of boards of supervisors and county clerks * * * so far as the same apply to holding elections, canvassing the returns and certifying the results thereof; they shall keep a full record of their proceedings, transmitting to the Secretary of State a certified copy thereof and filing the original, with the original election returns, in the office of the county clerk of the county of Fresno; and in case the qualified electors of said territory * * * shall vote in favor of such change as herein provided the said commissioners shall file a certified copy of all their proceedings and of said election returns with the county clerk of the county of Kings; and thereupon the powers and duties of said commissioners shall cease and terminate. * * * Said election shall be conducted in every respect, except as otherwise herein provided, in accordance with the general election law for the election of county and township officers. All qualified electors of this state who have been residents and electors in the said territory last herein described for ninety days preceding the election herein provided for shall be qualified to vote at said election. The great register of Fresno county used at the general election held in the year 1906 in the territory last above described shall be prima facie evidence of the qualification of electors; the county clerk of the county of Fresno is hereby directed to furnish said commissioners a certificate under seal, showing the additional names of the voters on the great register of the county of Fresno, registered as residing in said territory hereinbefore described, since the last great register of Fresno county was printed, and the certificate of the county clerk of Fresno county under seal, showing the registration of any qualified voter residing in the said territory prior to three months before such election shall entitle the holder thereof, if otherwise qualified by law, to vote at said election." The act then provides that, if 60 per cent. of the votes cast upon the question of annexation of said territory to Kings county shall be in favor of such annexation, the territory shall become a part of such county "from and after the day upon which the returns of said election shall be ascertained and declared by said board of commissioners." The act also requires the officers of election precincts to make returns to said board within six days after the day of election.

The provisions of the Political Code to which, in canvassing the returns, the board must conform, are found in sections 1280 and 1281, and are as follows: "If at the time of the meeting, the returns from each precinct in the county in which polls were opened have been received, the board must then and there proceed to canvass the returns. * * *" Section 1280. "The canvass must be made public, and by opening the returns and estimating the vote of such county or township for each person voted for, and for and against each proposition voted upon at said election, and declaring the result thereof. * * *" Section 1281. Section 1261 of the same Code designates the papers and documents which constitute the "returns," so called, and which are to be sent to the clerk, and upon them the "canvass" is to be made. These returns consist of "the copy of the register upon which one of the judges marked the word 'voted' as the ballots were received, all certificates of registration received by it, one of the lists of persons challenged, one copy of the list of voters, and one of the tally lists and list attached thereto." Section 1261. The ballots are to be delivered to the clerk, and are not to be opened, but must be kept sealed as provided in section 1264.

There are certain well-established rules of law which may be stated in this sequence, though bearing more appropriately upon the discussion arising under the demurrer to the answer. The board of canvassers (commissioners here) have no judicial power, but act in a purely ministerial capacity; their duty being only to cast up the votes and make their award in accordance with the result thus ascertained. Calaveras County v. Brockway, 30 Cal. 326; People v. Stewart, 132 Cal. 283, 64 Pac. 285; Davis v. Grunig, 143 Cal. 336, 76 Pac. 1102; Borchard v. Supervisors, 144 Cal. 10, 17, 77 Pac. 708; Gibson v. Twaddle, 1 Cal. App. 126, 81 Pac. 727; McCrary on Elections (4th Ed.) § 261. Speaking of the rule, Judge McCrary says: "But of course it does not follow from this doctrine that canvassing and return judges must receive and count whatever purports to be a return, whether it bears upon its face sufficient proof that it is such or not. The true rule is this: They must receive and count the votes as shown by the returns, *and they cannot go behind the returns for any purpose* (italics his). And this necessarily implies that if a paper is presented as a return, and there is a question as to whether it is a return or not, they must decide that question from what appears upon the face of the paper. Thus, in New York, it has been held that the duties of the canvassers were 'to attend at the proper office and calculate and ascertain the number of votes given at any election and certify the same to be a true canvass. This is not a judicial act, but purely ministerial. They have no power to controvert the votes of electors.'" Id. § 262. In People v. Head, 25 Ill. 325, 328, the court said: "They may probably judge whether the returns are in due form, but after that they can only compute the votes for the several candidates and declare the result." And in Lawrence v. Schmaulhausen, 123 Ill. 321, 14 N. E. 255, it was held that a canvassing board should reject the return made by the judges of election if not accompanied by the certificate required by statute. But as to this Judge McCrary says: "In determining the form of the returns they must consider the substance, and not be too technical. If there is substantial compliance with the law it is enough." In a sense the power to determine whether the papers transmitted to the canvassing board are genuine election returns, duly signed and authenticated, is judicial or quasi judicial, but the general rule is not impaired by conceding such limited powers to the canvassing officers. In Sweeny v. Adams, 141 Cal. 558, 561, 75 Pac. 182, 183, the court said: "It is from the face of these returns, and from no other data, that the canvassing board declares who is elected." Mandamus is the proper remedy to compel the canvassing officers to discharge their duties. McCrary on Elections, § 385; Pacheco v. Beck, 52 Cal. 3; Code Civ. Proc. § 1087.

It appears from the petition that the board of commissioners authorized by the act was duly organized; that pursuant to the act of the Legislature notice of the election was duly given; that the election was held pursuant to the act, and the returns thereof from the officers of all the precincts were duly returned, authenticated as required by law, and made to the board of canvassers; that upon their receipt by the board it met to canvass the same, but failed and refused to canvass said returns and declared the election void and ordered a new election. It will be observed that the petition is silent as to whether or not the clerk of Fresno county furnished the certificate referred to in section 3 of the act, and this omission is made the ground of defendant's demurrer. It was urged by defendants at the hearing that the board refused to canvass the returns because the clerk failed to furnish this certificate; that this provision of the statute is mandatory, and compliance therewith was jurisdictional, without which the board was powerless to proceed, and hence such fact should have been alleged in the petition, citing People v. Castro, 39 Cal. 65, 68, and other cases. The reasons impelling the board to refuse to canvass the returns are not now before us. We are to consider only the sufficiency of the facts as alleged in the petition. The action in People v. Castro was to collect a special school tax levied for the purpose of erecting a schoolhouse in a certain school district. A demurrer to the complaint was overruled, and the cause went to trial on the issues of fact presented by the complaint and answer. On the appeal it was held that the demurrer to the complaint should have been sustained. It does not appear what facts were alleged in the complaint. The Attorney General, Hamilton, in his brief in support of the complaint, with characteristic humor, confessed that the complaint gave "marked evidences of a cheerful and contented disregard of rules and precedents" in pleading. It is to be inferred from the opinion of the court that there was a failure, among others, to allege that an election had been held authorizing the tax levy. The court said: "There was no power to levy the tax, except on a vote of the electors, had in the prescribed method; and the holding of such an election was a jurisdictional fact, lying at the foundation of the proceeding. It was a fact on which the defendant was entitled to take issue, and, if denied, must be proved. It was therefore necessary to aver it with precision and in such manner as to admit of a direct issue upon the facts averred. The complaint is wholly defective in this respect, and presents no issuable facts touching the election."

The act here before us made the great register for 1906 evidence as to who were entitled to vote at the election, and also directed the county clerk to furnish a certificate "showing the additional names of the voters on the great register * * * since the last great register of Fresno county was printed." The act also made it the duty of the Secretary of State to furnish the board the requisite quantity of ballot paper for use at said election. We shall have occasion more particularly to inquire into the meaning of the act when we come to consider the demurrer to the answer. The powers of the board as well as the duty of the county clerk are there more appropriately brought under review. We do not think that the petition is fatally defective because it fails to state that the clerk performed his duty in the matter referred to, any more than because it fails to state that the Secretary of State performed his duty in supplying ballot paper. The statute made the great register of 1906 prima facie evidence of the qualification of electors and imposed no duty upon the clerk to furnish certified copies of this register. We cannot assume that there were any additional names of voters registered after the printing of the last great register, and we may presume official duty performed. It was made mandatory upon the county clerk to furnish the names contemplated by the statute, if there were any, and he could have been compelled by mandamus to do so, and in that sense the duty placed upon the clerk is mandatory. We do not think, however, that its performance was so far jurisdictional to the action taken in ordering the election or in conducting the election, or in canvassing the returns, that the facts should have been alleged in the petition as a necessary prerequisite to granting the relief now sought.

Demurrer to the Answer.

The issues presented by the answer were at the argument conceded to relate to the alleged failure of the county clerk to perform the duty devolved upon him by the act. There is a denial, it is true, that there was any election held or any returns of any election sent to or received by the board; but in the argument these averments were taken rather as alleging the legal effect of what took place than what in fact occurred. The real issues upon which we are asked to place our decision are found in what is called the separate answer and defense of defendants. These allegations, in substance, are: That upon calling the election the board directed its clerk to demand of the county clerk of Fresno county a certificate, under seal, showing the additional names of the voters on the great register since the last great register was printed; that such demand was made, and refused by the said county clerk, except that he did furnish such certificates "showing the additional names of the voters * * * up to within forty days prior to the holding of said election, but * * * refused to furnish any certificate * * * showing such additional names of voters * * * registered as residing in the said territory at any time within forty days prior to the said election." It is alleged upon information and belief that "upwards of three hundred qualified electors of this state, who had been residents and electors of the said territory * * * for ninety days preceding the 10th day of December, 1907, which said names and the whole number thereof the said county clerk refused to place in any certificate given to these defendants under the seal of said clerk"; that said number of qualified electors was by said illegal action of said clerk deprived of the right to vote at said election; and that had they been permitted to vote "the result of said election would and might have been changed." It is then alleged that the board met on December 17, 1907, to canvass the returns of any election that had been held on December 10th, and in pursuance of its duty the said board "did open the returns which were supposed to have been made by the officer of election at Pleasant Valley precinct * * * and ascertained from an inspection of such supposed returns that one hundred and seventeen persons had been permitted to vote at said precinct without being upon any list of voters certified by the county clerk of Fresno county, under seal, and without producing or showing any certificate of the county clerk of Fresno county, under seal, showing the registration of any qualified voter residing in said territory prior to three months before such election, as is provided by section 3 of the said act of the Legislature referred to in the petition herein, and thereupon these defendants suspended further canvassing of the returns made by the officers of said alleged election and passed a resolution, a copy of which is hereunto attached, * * * and these defendants allege that all the statements contained in said resolution were and are true, and that no election was in truth and in fact held in the said district on the 10th day of December, 1907." The answer then shows that the board has ordered a new election. The resolution referred to recites that the board called an election to be held December 10, 1907, pursuant to the act; sets forth the provisions of section 3 of the act, the refusal of the county clerk to furnish the certificate hereinbefore mentioned, and that by reason of such failure on his part many voters were deprived of the right to vote, that "a large number of voters who had been registered on the great register of the county of Fresno prior to the said election were allowed to vote * * * without producing any certificate of the county clerk of Fresno county under seal, as provided by said act," that the failure "of the county clerk to perform his duty under said act as herein recited and the action of the boards of election in receiving the votes of electors without the certificate of said county clerk, under seal, might have changed the result of said election had the law * * * been properly complied with. Now, therefore, it is ordered," etc. This order has been set forth above.

It seems to us that in pursuing the course thus taken by the canvassing board it acted in a judicial capacity and in excess of its power as such board. The answer shows that the county clerk did make the certificate required by him by the statute except as to registrations made "within forty days prior to the holding of said election." It was his construction of the act that the general law (section 1094, Pol. Code) governed in the matter of registration. It reads: "* * * Such registration shall begin on the first day of January of such years, and shall be in progress at all times except during the forty days immediately preceding any election, when it shall cease as to electors residing in the territory within which such election is to be held. * * *" The board contended, as was stated at the hearing, that it was the duty of the county clerk to certify as to all registrations made up to the day of the election, under the provision of the act which reads: "All qualified electors of this state who have been residents and electors of the said territory last herein described for ninety days preceding the election herein provided for shall be qualified to vote at said election." We are satisfied from a careful examination of the act that the construction given it by the county clerk is correct. The act does not require the county clerk to register voters up to a date nearer to the election than is required under the general election law, and no mode of registration different from that thus provided is to be found in the act. The county clerk is not directed to register voters up to the day of the election, nor is he directed to deviate from the directions found in the general election law, which declares that registration shall cease at the beginning of the 40-day period prior to the election. The only variation from the provision of the general election law is that all persons are entitled to vote, if otherwise legally qualified, who have resided in the territory three months before the election, omitting the requirement of residence in the precinct not less than 30 days. The commissioners are authorized to discharge the same duties as are required by law of boards of supervisors "so far as the same apply to holding elections, canvassing returns and certifying the result." Furthermore, "said election is to be conducted in every respect, except as otherwise herein provided, in accordance with the general election law for the election of county and township officers." The meaning is plain that, except as otherwise provided in the act, the election is to be held under the general election law, and the commissioners are given the same duties and the same powers as boards of supervisors acting under the general election law. We must read into the act the provisions of the general election law and give full effect thereto, except as otherwise provided in the act itself. Among the provisions of the general law is section 1094 of the Political Code, supra, which provides that registration shall cease "during the forty days immediately preceding any election." We find nothing in the act inconsistent with this provision, and every reason for embodying it in the general law applies with equal force to the act in question. The period when, before the election, registration shall cease, has been by the policy of the law made progressive towards placing impediments in the way of fraudulent colonization of voters. Formerly the period was 15 days. It was afterwards extended to 30, and in more recent years to 40 days. The period was probably extended, also, to give the county clerk more time in which to print and distribute the great register. It is within judicial cognizance that the old plan of printing the great register has been done away with, and that part of the act referring to the great register must be dealt with in view of this fact. The county clerk now binds the original affidavits into books and prepares printed indexes thereof, sending out the certified books of affidavits, with not less than five indexes to each precinct. This was done by the county clerk, showing all registrations up to the time when the law directed registrations to cease so far as concerned this particular election. The construction of the act urged at the argument, apart from what has been said, would impose upon the county clerk a duty hardly within his physical power to perform, aside from its violating the policy of the law as to preventing the stuffing of precincts by floating and irresponsible voters. Many of the precincts were so remote from the county seat as to have made it difficult, if not impossible, to have furnished the certificate mentioned in the statute covering registrations up to the morning of the election, and yet it is contended that because this was not done the commissioners were authorized to declare the election, if subsequently held, to be void and order a new election. We cannot bring ourselves to believe that any such construction can reasonably be given to the act.

But whether or not we are right in this view, we do not think the board had power to pass upon this question and make its decision the basis for refusing to canvass the returns and declaring the entire election to be void. It seems that the board reached its conclusion upon the examination of the returns of a single precinct (the Pleasant Valley precinct), and thereupon refused to make any canvass. There is no pretense that the returns were not in due form and duly authenticated. The board must have considered facts not appearing upon the face of the returns in passing upon the question, and this they could not do. Besides, if they found justifiable reason for rejecting the returns from Pleasant Valley precinct, they had no right to assume all other returns to be similarly affected and to reject them en masse without even opening or scanning them. Apparently the board proceeded upon the assumption that it had power to hear and determine, as would a court, all questions of law and fact arising out of the election, and to declare the entire election void because, in the instance noted, they differed from the county clerk as to the true construction of the statute.

It is alleged in the answer that there were upwards of 300 electors in the district who had resided therein for 90 days prior to the day of election, "who were, by the said illegal action of the clerk of Fresno county, deprived of the right to vote at said election," and that, had they been permitted to vote, "the result of said election would and might have been changed." This alleged fact could not have been determined from an inspection of the returns—certainly not from returns which concededly were not examined at all. But whether true or not, it was the function of some judicial tribunal to determine upon appropriate proceedings.

It was contended by defendants that the powers and duties of the board created by the act "were not entirely such as those conferred upon the board of supervisors of the county," sitting as a canvassing board; that there is no law providing for a contest of an election of this kind; that the action of the board of commissioners must in its nature be final, since there is no way of remedying the matter in court by contesting the election. It is true that the Code provides only for contesting the election of persons to office, but the failure to provide for a contest of such an election as we have here would not authorize the board of commissioners to exercise powers not given them by the act itself, and no such power is there given. If the law furnished no remedy in such case through the regularly constituted courts, we must look to the Legislature for relief. It would be intolerable to allow a board created with limited powers to erect itself into a court and assume to discharge all the functions of a court in an ex parte, not to say arbitrary, manner, as must necessarily be done in such a case as we have here.

But the courts are not thus impotent. The superior courts are endowed by the Constitution with general equity powers and may under its jurisdiction thus conferred inquire into frauds, mistakes, and cognate matters. If in the exercise of this jurisdiction no course of proceeding "be specially pointed out by the Code or by the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code." Code Civ. Proc. § 187. We have, too, the maxim of jurisprudence: "For every wrong there is a remedy." Civ. Code, § 3523. But that there are remedies in such case through the orderly course of proceedings in courts has been decided by our Supreme Court. Calaveras v. Brockway, 30 Cal. 325, is an example. The election there related to the removal of the county seat of Calaveras county to the town of San Andreas, and that town was duly chosen as the county seat and was so declared by the board of supervisors. The county officers refused to remove their offices to this newly chosen county seat or to recognize the legality of the act of the supervisors. The latter proceeded against these recalcitrant officers by mandamus. There was then no general law for contesting such an election, and no contest was provided for in the special act, except as to the election of some person to an office. It was held that, while the determination of the board of supervisors was prima facie evidence of the fact so determined, it was open to contradiction, "and," said the court, "if the fact be otherwise than as determined by the board, it would be an unjust denial of the rights of the electors of the county to shut the door against all remedy for the redress of the wrong."

In Gibson v. Board of Supervisors, 80 Cal. 359, 22 Pac. 225, the election was to determine whether bonds should issue to raise funds for the purpose of building certain bridges. The board of supervisors declared the proposition lost. Plaintiff then brought the action against the board, averring the true facts about said election, and praying that the order of the board be annulled, that a true result of said election be declared, and for such other relief as equity deemed meet. It was urged there, as here, that no court, by any form of action or proceeding, legal or equitable, has any jurisdiction or authority to inquire into the result of an election on the question of issuing bonds (here changing county boundary lines); that the whole matter is beyond the scope of judicial investigation; that there can be a contest over the election to an office simply because the statute provides a procedure for such a contest; but that as there is no such procedure provided for a contest about any other kind of an election, and, as the subject-matter is in its nature beyond the cognizance of the courts, therefore there is no judicial jurisdiction of any kind to determine any question arising out of such an election. Said the court, speaking through Mr. Justice McFarland: "If that position be correct, then its consequences are far-reaching and alarming. * * * Suppose that interested parties should successfully contrive to have presented to the people of a county a proposition to issue bonds for an unworthy purpose and to a ruinous extent, and that, although the people really defeated the project at the polls, certain election officers, either through intentional fraud or by a gross mistake, refused to return a large number of votes in the negative, so that the returns would show the proposition to have carried, would there be no remedy, no power to execute the real will of the people? There certainly would be no such remedy in the hands of the supervisors, for they can only estimate the votes returned, and have no power to count the ballots. The will of the people then can be carried out by the courts, with their power to compel evidence and thoroughly investigate, or not at all." It is then pointed out that the Constitution (section 18, art. 11) has specially provided for an election to determine the policy of creating a bonded indebtedness and prohibited the issuance of bonds without the consent of two-thirds of the voters of the county. Said the court: "Whenever there is such a constitutional provision, and no machinery provided by law for enforcing it, the Constitution by necessary implication confers upon the court of chancery jurisdiction to protect and enforce the will of the people by suitable and proper procedure. This principle has been declared and followed in numerous cases where Constitutions have provided for the removal of county seats, and we see no distinction, with respect to the point under discussion, between those cases and the one at bar." The Constitution (article 2) deals with the right of suffrage; the qualification of voters and elections by ballot in a way, it seems to us, to make applicable the principle discussed in the case just considered. So also does article 11, in its provisions with respect to creating new counties, removal of county seats, and the recognition of the several counties as they now exist, as legal subdivisions of this state.

Without pursuing the argument further, we are satisfied that the writ should issue, and it so ordered.

We concur: HART, J.; BURNETT, J.

7 Cal. App. 457

HUBBELL OIL CO. v. MORRISON et al.

(Civ. 429.)

(Court of Appeal, Second District, California. Jan. 23, 1908. Rehearing Denied Feb. 21, 1908.)

1. APPEAL—REVIEW—GROUNDS OF DECISION OF LOWER COURT—ORDERS GRANTING NEW TRIAL.

Where an order granting a new trial is general, it will be sustained if good on any of the grounds upon which the motion was based.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3410.]

2. SAME—QUESTIONS PRESENTED FOR REVIEW.

The sufficiency of the record to sustain an order granting a new trial, upon either the theory of errors of law occurring at the trial or surprise, will not be considered on appeal, where the matter cannot arise upon a new trial, and the order may be justified upon the ground of newly discovered evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3331, 3338, 3339.]

3. SAME—DISCRETION OF COURT—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

The determination of the effect of newly discovered evidence which is cumulative is peculiarly within the province of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3876; vol. 37, New Trial, § 228.]

4. SAME.

It will be presumed, on appeal, in support of a trial court's order granting a new trial, that its action was based upon any reason disclosed by the record on which it could have been properly founded, and hence where one of the grounds upon which the motion was based, as shown by the record, was newly discovered evidence, the order will be sustained, though the newly discovered evidence was cumulative, in the absence of a clear abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3876.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by the Hubbell Oil Company against Charles J. Morrison and others. From an order granting a new trial on motion of defendants, plaintiff appeals. Affirmed.

J. W. McKinley and F. E. Lacey, for appellant. Thomas N. Neal, D. Z. Gardner, and M. C. Hester, for respondents.

TAGGART, J. This is an action to quiet title. The appeal is from an order granting defendants' motion for a new trial after judgment in favor of plaintiff. The cause was set for trial for the 16th day of December, 1904. On the 15th day of that month defendants moved the court for a postponement of the trial on the grounds of the illness of one attorney and the inability of another attorney, but recently retained on account of the sickness of the former, to prepare defendants' case for trial from lack of time to do so. From the affidavits filed to support the motion, it appears that the original counsel in the cause had been suffering for weeks from a nervous collapse; that on December 5, 1904, he notified defendants of his illness and the improbability of his recovery in time to prepare for trial, and suggested the retaining of other counsel. In pursuance to this notice the attorney appearing to present the motion was retained December 12, 1904. His affidavit discloses the character of the preparation necessary to a proper presentation of the defense and his court engagements, all tending to show that it would be impossible for him to make such a preparation before the day set for the trial. The court made an order of continuance conditioned upon the payment by defendant to plaintiff of the sum of $100 before 2 o'clock p. m. of the day the application was made. At the time set for trial defendants renewed their motion for a postponement, and stated that they were unable to comply with the condition requiring the payment of the $100. The postponement was denied and the cause proceeded to trial, with the result that findings were filed and judgment entered in favor of plaintiff. The complaint is in the form usual in such actions, and the title of plaintiff therein pleaded was supported by evidence tending to establish three different sources: By record, by tax deed, and by adverse possession. The findings are substantially in the language of the allegations of the complaint.

Defendants moved for a new trial on the grounds: (1) Insufficiency of the evidence; (2) the decision is against law; (3) errors in law occurring at the trial; (4) newly discovered material evidence; and (5) accident and surprise. The motion was made upon statement and affidavits showing the newly discovered evidence and reason why same was not produced at the trial. The statement contained the showing made upon the application for a continuance, and it is upon the action of the court in this respect that the respondent justifies its ruling upon the motion for a new trial. It is stated in the brief of respondent that the reason given by the court for denying the motion for a new trial at the time the ruling was made was that the defendants should have been granted the continuance asked for and refused at the opening of the trial. The order granting the motion, however, is general, and must be sustained, if good, on any of the grounds upon which the motion was based.

The matter specified might be considered under either of the two heads—(3) errors of law occurring at the trial, or (5) surprise against which ordinary prudence could not have guarded—but we do not think it necessary to pass upon the sufficiency of the record to sustain the court's ruling upon either theory, as this matter cannot arise upon a new trial and the order granting the new trial may be justified on another ground, to wit, newly discovered material evidence. The affidavits showing newly discovered evidence presented additional support to defendants' case by more definitely locating certain monuments called for in the paper title introduced by defendants. While this showing was cumulative in its nature and would have had no bearing upon and constituted no defense against two of the sources of title under which the plaintiff claimed, in the form of the findings here it cannot be determined upon which of these sources of title the judgment rests. Only the trial court could determine its effect had it been produced at the trial. The determination of the effect of newly discovered evidence which is cumulative is peculiarly within the province of the trial court. Oberlander v. Fixen & Co., 129 Cal. 692, 62 Pac. 254. The discretion of a trial court exercised in favor of the granting of a new trial will not be disturbed, unless there is a clear abuse of discretion. Von Schroeder v. Spreckels, 147 Cal. 186, 81 Pac. 515. In support of the court's order, we must presume that its action was based upon any reason disclosed by the record upon which it could have been properly founded. If upon the ground of newly discovered evidence, we cannot say it abused its discretion in granting a new trial.

Order granting a new trial affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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7 Cal. App. 432

AMOS v. COHN. (Civ. 433.)

(Court of Appeal, Second District, California. Jan. 20, 1908. Rehearing Denied Feb. 19, 1908; Denied by Supreme Court March 19, 1908.)

FORCIBLE ENTRY AND DETAINER—FACTS NOT CONSTITUTING.

Under an agreement by the owner of a storeroom, divided by a board partition, to pay plaintiff, a lessee of one side of the room, for his unexpired term, plaintiff moved his shelving and part of his goods, etc., rented another room, and promised to remove the remainder of his goods a few days later. The owner removed the partition, and took possession of the entire room, and refused to vacate the part formerly occupied by plaintiff, and to pay the sum promised plaintiff on his surrender of possession. *Held* not a forcible detainer of the premises within Code Civ. Proc. § 1160, subd. 1, the arrangement to let part of the plaintiff's goods remain in the room temporarily making the owner merely a gratuitous depositary or bailee of the goods.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forcible Entry and Detainer, §§ 23-28.]

Appeal from Superior Court, Los Angeles County; J. S. Noyes, Judge.

Forcible detainer action by B. E. Amos against Arthur Cohn. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Haas, Garrett & Dunnigan, for appellant. O. B. Carter, for respondent.

SHAW, J. Action for forcible detainer. Judgment went for plaintiff in treble the amount of damages sustained. The appeal is from the judgment and an order denying defendant's motion for a new trial.

Defendant was the owner of a storeroom, one-half of which he, by a written instrument, leased to plaintiff for a term expiring April 12, 1906. Defendant occupied the other half of the storeroom, and the two parts were separated by a board partition. According to the testimony of plaintiff, he and defendant on February 8, 1906, entered into a verbal agreement, whereby defendant agreed to pay plaintiff $50 for a cash register and $50 for the unexpired term of his lease, and defendant agreed that plaintiff should have until February 18th to sell the goods he then had on hand. Pursuant to this agreement, plaintiff on February 15th took out and removed his shelving and moved his desk and other articles out of the room, and piled the remainder of his goods upon a counter or table placed in the middle of the room. Defendant took down the partition separating the two rooms, and built his shelving in the room. Plaintiff rented a new storeroom on the 17th of February, and on the evening of that day he told defendant he would remove the balance of his goods the next morning, the 18th of February. Upon plaintiff arriving at the store on the 18th of February, he demanded payment of the $100 according to his understanding of the verbal agreement. Defendant claimed that plaintiff, as a part of the agreement, was to lease from him a certain vacant yard at $20 per month, and refused to pay the $100 unless plaintiff would consummate the agreement as he understood it. Defendant refused to vacate the storeroom, but placed his goods upon the shelves, notified plaintiff to remove his goods, otherwise defendant would store them in a warehouse at plaintiff's expense, which he subsequently did. Defendant bolted the front door, but plaintiff had access to his desk and goods through another door. Defendant never forbade plaintiff entering the store, but refused to open the front door, and told plaintiff he would not permit him to do business in the storeroom. The substance of the plaintiff's testimony is that, relying upon defendant's promise to pay him $100 for the cash register and surrender of his lease, plaintiff permitted defendant to enter upon possession of the premises; that after obtaining possession defendant not only refused to pay the $100 but refused to surrender possession.

According to subdivision 1, § 1160, Code

Civ. Proc., under which defendant must be held, if plaintiff is entitled to recover, one is guilty of forcible detainer who "by force, or by menaces and threats of violence, unlawfully holds and keeps possession of any real property, whether the same was acquired peaceably or otherwise." The finding of the court upon the question of the forcible detainer is the following: "That on the 18th day of February, 1906, the defendant unlawfully took possession of the premises described in the complaint, and ever since said 18th day of February has by force unlawfully held and kept possession of said premises." This finding is attacked upon the ground that it is not supported by the evidence; and in this view we agree with appellant. There is no evidence upon which to base the inference that the defendant exercised force, menace, or threats of violence in holding possession of the property. His entry was peaceable and with the assent and approval of plaintiff. On the morning of the 18th day of February, after defendant was in possession, plaintiff refused to remove the remainder of his goods out of the store, brought his desk back, and told defendant not to put any of his goods in the store. He came back in the evening and found that defendant had placed some of his goods upon the shelves. Plaintiff instructed his employés to bring some boxes in and defendant ordered them out, and locked the back door. On plaintiff's return to the store upon the 19th of February defendant informed him that he would not permit him to do business in the storeroom, and served him with notice that unless he removed the goods immediately he would be charged with storage. The term "force," as used in subdivision 1, § 1160, Code Civ. Proc., contemplates actual force, or such conduct on the part of defendant as tends to inspire a just apprehension of violence. There is nothing in the record tending to show the slightest violence either in manner or language of defendant. Plaintiff testified that he could have gone through defendant's store. "He did not order me not to do so. Nothing was said about it." The evidence fails to show that defendant held possession of the property by force as found by the court, and it is likewise silent as to menaces or threats of violence. The cases of Hodgkins v. Jordan, 29 Cal. 578, Buel v. Frazier, 38 Cal. 693, Thompson v. Smith, 28 Cal. 528, and Fogarty v. Kelly, 24 Cal. 317, are in point in considering the question of forcible detainer under subdivision 1 of section 1160 of the Code of Civil Procedure. We think, too, that the uncontradicted evidence shows that defendant was in the peaceable possession of the premises, and, having entered with the assent of plaintiff, the provisions of said subdivision of section 1160 of the Code of Civil Procedure would not apply. Carteri v. Roberts, 140 Cal. 164, 73 Pac. 818.

Judgment and order are reversed.

TAGGART, J. I concur in the judgment on the ground that the evidence shows that the possession and right of possession both vested in the defendant on February 15th, when the partition was torn down between the two rooms theretofore occupied by plaintiff and defendant respectively. The plaintiff put the defendant in possession of the entire premises, reserving only the right to let a portion of his goods remain until February 18th. This arrangement merely made defendant a gratuitous depositary for safety, or bailee, of plaintiff's goods for the three days. Plaintiff was not in possession and was not entitled to the possession of the premises on February 18th; so that defendant did not on that day unlawfully or otherwise take possession of the premises. Neither did defendant forcibly detain possession from plaintiff, since the latter was not entitled to the possession. The finding attacked (No. 2) as framed is a mere conclusion of law, but considered as a finding of fact it is not sustained by the evidence. The violation of the agreeement of defendant to pay for the possession cannot be made the basis of an action for forcible detainer.

I concur: ALLEN, P. J.

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7 Cal. App. 429

PORTER v. DOUGLASS et al. (Civ. 440.)

(Court of Appeal, Second District, California. Jan. 20, 1908. Rehearing Denied by Supreme Court March 19, 1908.)

1. TRUSTS—ESTABLISHMENT.

Plaintiff induced decedent to leave her husband and live with him, and, while living with him, placed in her hands without any agreement as to its disposition money with which she purchased property. Other property was purchased with their joint earnings, and the title by plaintiff's request was taken in decedent's name and a note and mortgage on such property executed in their joint names. *Held*, that there was no trust established in favor of plaintiff, though Civ. Code, § 853, provides that, when a transfer of real property is made to one person and the consideration therefor is paid by another, a trust is presumed to result in favor of the person by whom such payment is made.

2. SAME—ACTIONS—EVIDENCE.

In proceedings to establish a trust in property given by plaintiff to the wife of another man whom he had induced to leave her husband and live with him, evidence that on the death of the wife he paid her burial expenses is inadmissible.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by G. S. Porter against Harry E. Douglass, administrator of Mary A. Douglass, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Jones & Drake, for appellant. Wm. Mattoon, M. C. Hester, and G. P. Adams, for respondents.

SHAW, J. Mary A. Douglass and defendant David E. Douglass were husband and wife. She died intestate on December 28, 1904, leaving as her heirs her said husband and three sons, Claude Douglass, Bert Douglass, and Harry E. Douglass, the last named of whom was appointed administrator of her estate. This estate consists of certain real estate and mortgages, the consideration for the purchase of which plaintiff claims to have furnished, and all of which property he claims the deceased held in trust for him. In this action he seeks a decree of court establishing a trust and adjudging that he is the owner of the property. As appears from the evidence and findings, the plaintiff prior to July 15, 1902, was in the employ of the defendant David E. Douglass in Omaha, Neb., and boarded with said defendant, with whom said Mary A. Douglass, deceased, was then living as his wife. Plaintiff had known both Douglass and his wife since 1886, and knew that they were living together as husband and wife with their three children. Plaintiff left the home and employ of said defendant David E. Douglass at the latter's request, and came to Los Angeles, from which place he carried on a correspondence with Mary E. Douglass and urged her to come to him. She followed plaintiff to Los Angeles, and, after going through a pretended marriage ceremony on a vessel at sea, plaintiff and said Mary A. Douglass lived together as husband and wife up to the time of her death. It was during this period that the title to the property involved in the action was acquired by said deceased. The court gave judgment for defendants. Plaintiff moved for a new trial, which was denied, and he appeals from both the judgment and the order denying his motion for a new trial.

The court found that plaintiff at all times knew that Mary A. Douglass was the wife of David E. Douglass; that plaintiff voluntarily placed in the hands of the deceased, without any agreement as to what she should do with it, the money with which she purchased a part of the property; that other property was purchased with the joint earnings of the plaintiff and Mary A. Douglass, the title to which was, at the request of plaintiff, conveyed to her and by him intended to be and was a gift; that a note and mortgage securing the payment of the same was made in the joint names of plaintiff and decedent, with the full knowledge and consent of plaintiff, and the mortgage as thus made filed by him for record; that none of the property was held by Mary A. Douglass in trust for plaintiff. Appellant contends that, as the parties were not husband and wife, the presumption of a trust in favor of the plaintiff arises by reason of the fact that he furnished at least a part of the money to make the purchase. Civ. Code, § 853. Conceding that the presumption does arise in this case, it is overcome by the evidence, which fully justifies the findings made by the court. Indeed, appellant's counsel do not attempt to point out specifically wherein the evidence fails to support the findings, but discuss the case in a general way, assigning as a reason for such course that the presentation as thus made is in a more "palatable form." Counsel's desire is commendable, and any failure in this regard is due to the facts of the case, not to a want of ability exhibited in the presentation. The language used in an opinion handed down at the present term of this court in the case of Bertelsen v. Bertelsen (No. 450) 94 Pac. 80, is applicable to this case. It was there said in discussing a case somewhat similar as to facts, but of far more merit: "We would not be inclined, even if the findings that the sums of money paid by defendant were in the nature of a gift were not entirely supported by the evidence, to disturb the judgment."

Appellant contends that the court erred in sustaining an objection to a question asked plaintiff as to whether he paid the burial expenses of deceased; his claim being that proof that he paid such expenses tends to corroborate the theory that deceased was the wife of plaintiff. His complaint shows that he and Mary A. Douglass were never married. We cannot conceive of any theory upon which such evidence would be admissible.

There is nothing in other points urged.

Judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

7 Cal. App. 436

In re JOHNSON. (Civ. 402.)

(Court of Appeal, Second District, California. Jan. 20, 1908. Rehearing Denied by Supreme Court March 19, 1908.)

1. Executors and Administrators—Sale—Vacation—Inadequacy of Price.

Under Code Civ. Proc. § 473, providing that the court may in its discretion relieve a party from judgment taken against him through his mistake, inadvertence, or excusable neglect, relief may be had in proceedings on an application by the guardian of a minor child of a decedent to be relieved from an order confirming a sale by the executrix of certain shares of stock belonging to decedent's estate, on the ground of the disproportionateness of the price received to the value of the stock.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 1549, 1550.]

2. Statutes—Construction—Remedial Statutes.

On an application under Code Civ. Proc. § 473, providing relief from a judgment taken against a party through his mistake, inadvertence, or excusable neglect, the section is to be liberally construed as a remedial statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 317.]

3. Executors and Administrators — Sale—Vacation.

The relief provided for by Code Civ. Proc. § 473, to parties against whom judgment is taken by mistake, inadvertence, or excusable neglect, may be granted on application of a decedent's heir defrauded by a judgment confirming a sale made by the executrix, since fraud or its equivalent, whether extrinsic or other fraud, and whether practiced upon the court, or a party, or one so situated as to be held in law an adversary, is sufficient to warrant relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1546.]

4. Certiorari—Persons Entitled.

Where a sale by an executrix, which was confirmed by the court, was never executed, the only attempt to do so being the entrance into a new agreement in the nature of a conditional sale, the intended purchaser having refused to comply with his agreement, and the executrix having thereupon rescinded the agreement to sell, the intended purchaser acquired no title by the transaction entitling him to invoke a review of an order granting relief to an heir against the order of confirmation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 44.]

Application by G. R. Johnson for a writ of certiorari. Writ dismissed.

Lynn Helm, for petitioner. Theodore A. Bell and Taylor & Forgy, for respondent Marie H. Vance. Page, McCutchen & Knight, for respondent Albert Vance.

ALLEN, P. J. It is disclosed by the record, the completeness of which is not questioned, and from which alone the jurisdictional question involved must be determined: That one Marie H. Vance, as executrix of the last will of S. A. Vance, deceased, entered into an agreement for the sale of certain shares of corporate stock belonging to the estate of said Vance. That under the provisions of said will authority to sell without order of court was given, but, as required by section 1561 of the Code of Civil Procedure, she reported to the court that she had entered into an agreement to sell said property for $143.216.66 cash, and had received $1,000 of such purchase price. That the balance of the cash was to be paid upon delivery of the certificates duly assigned, and upon confirmation of such sale by the court. She further reported that she had agreed that the purchase money should be left on deposit with the American National Bank at Los Angeles for a period of 60 days after confirmation, and that she had agreed to assign as a part of the transaction a certain agreement of guaranty theretofore made with reference to dividends upon said stock. She prayed the court for an order of confirmation and authority to deliver such certificates upon deposit to her credit by the purchaser of $143,216.66 in said bank. Thereafter, on March 18, 1907, the court, upon examination, made its order confirming said sale, and authorizing the executrix, upon the receipt of said money to her credit in said bank, to assign and deliver said certificates and said agreement of guaranty. That the day following the entry of such order the executrix assigned said certificates and agreement of guaranty, and deposited the same with the American National Bank in escrow, at the same time delivering to said bank certain instructions and receipts, which, being read together, amounted to a statement that the certificates were held by the bank subject to petitioner's examination as to the title of the executrix and her right to sell, and upon the agreement that, should the title or transfer of such securities be shown defective in any way, the securities were to be returned to the executrix, and the certificate of deposit issued by the bank on petitioner's account should be returned to the bank. It further appears from the record that a minor child of tender years was by the terms of the will of said Vance entitled to one-half of the estate of such testator; that on May 14, 1907, the duly appointed guardian of such minor made an application to the superior court, praying that the estate of Vance, deceased, be relieved from such order of confirmation, for the reason that said Johnson and said executrix both knew when said agreement was made and said order of confirmation applied for that the stipulated price for which said property was to be sold was disproportionate to its value, and that the sale thereof at such price was a fraud upon said estate and said minor child; that, although said executrix had ample opportunity so to do, she had neglected and refused to inform herself as to the true value of said shares of stock before entering into said contract, and alleging that in truth the market value of said shares at the date of the execution of said agreement to sell and of said application for order of confirmation was $10 per share, or $22,000 and more, in excess of said contract price. Upon the hearing of such application for relief the executrix filed her answer, alleging, among other things, that the petitioner had repudiated said sale, and had refused to comply with its terms, or to pay to said executrix any part of the purchase money, and that said executrix had elected to rescind the same, and had tendered back the $1,000 received upon the execution of said agreement for sale and the certificate of deposit theretofore issued to her. It further appears from a verified complaint signed by petitioner and before the court on said hearing that petitioner refused to accept the title to said certificates so deposited in escrow, and had sought to maintain an action for damages against the executrix on account of her default under her agreement, and in said action had caused an attachment to be issued and served upon the bank issuing such certificate of deposit, which action was still pending and undetermined at the date of the hearing of said application of the guardian. The court, upon the hearing of said application, granted relief under section 473 of the Code of Civil Procedure, and vacated the order of confirmation theretofore by it made. That said price stipulated in the agreement was grossly disproportionate to the true value is clearly established, the effect of which was to defraud the minor child out of more than $11,000.

The only question presented upon this application for a writ of review relates to the jurisdiction of the superior court to grant this relief. We are of the opinion that it was properly granted, and the court exercised a proper discretion therein. That such relief can be granted in proceedings of this character is clearly shown in Estate of Ross, 140 Cal. 286, 73 Pac. 976, and that in an application under section 473 such section is to be liberally construed as a remedial statute. Melde v. Reynolds, 129 Cal. 311, 61 Pac. 932. That such relief may be granted upon the application of defrauded heirs is manifest from the reasoning employed in the case of Campbell et al. v. Campbell et al. (Cal.) 92 Pac. 184, where it is held that equity will grant relief after the limitation imposed by section 473 upon the application of those beneficially interested where the fraud is extrinsic. In applications for relief under section 473 of the Code of Civil Procedure, made within a reasonable time, no distinction is to be made between extrinsic or other fraud. Fraud, or its equivalent, whether upon the court, or a party, or one so situated as to be held in law an adversary, is sufficient to warrant relief. In addition to all of this, the contract which was confirmed originally was never executed. The only attempt so to do was by entering into a new agreement in the nature of a conditional sale. The court was warranted in finding from the affidavits used on the hearing that the executrix, for good cause, had rescinded the original agreement to sell, and that no title to such certificates ever vested in petitioner, but remained in the estate. The petitioner having refused to comply with his agreement, the executrix possessed the right to resell the property, even without an order vacating the former confirmation, and that such order was so made is of little consequence in determining the rights of the petitioner under this application. Petitioner is shown to have no interest in the property or estate, and is in no position to invoke a review of the order or proceedings connected therewith.

Writ dismissed.

We concur: SHAW, J.; TAGGART, J.

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7 Cal. App. 440

Ex parte YUNG. (Cr. 74.)

(Court of Appeal, Second District, California. Jan. 20, 1908.)

1. COUNTIES—ORDINANCES—VALIDITY.

A recital in a county ordinance, following the enacting clause, which is in the form required by County Government Act April 1, 1897, p. 467, c. 277, § 26, for ordinances of boards of supervisors, that it was adopted according to section 13 (page 454), providing for the adoption of ordinances by popular vote, does not make the ordinance the act of the people and not that of the board, and hence void (section 13 having been held unconstitutional), where the board is authorized to adopt such an ordinance and all the formalities requisite to the passage and publication of an ordinance by a board were observed; it being permissible to treat the recital as surplusage.

2. MUNICIPAL CORPORATIONS—ORDINANCES—LEGISLATIVE MOTIVE—COURTS' RIGHT TO INQUIRE INTO.

Courts will not look into the motives of a legislative body in the exercise of its legislative powers, except in extraordinary cases where public policy imperatively demands it on the ground of palpable fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 254.]

3. SAME—AUTHORITY—NECESSITY FOR INDICATING.

An ordinance need not indicate the power in execution of which it is adopted.

4. SAME—REASON.

An ordinance need not set out the reason for its enactment, unless required to do so by statute or the Constitution.

5. SAME—MISRECITAL OF AUTHORITY—EFFECT.

A misrecital in an ordinance of the source of power to enact it does not affect the validity if the power exists.

In the matter of the application of George Yung for a writ of habeas corpus. Writ dismissed, and prisoner remanded.

C. W. Pendleton, for petitioner. S. M. Davis, Dist. Atty. of Orange county, for respondent.

TAGGART, J. Habeas corpus. Petitioner is under arrest and in the custody of a constable of Orange township, county of Orange, charged with violating the provisions of Ordinance No. 49 of said county, entitled: "An ordinance prohibiting the business of selling * * * intoxicating liquors, within the county of Orange," etc.

The illegality of his imprisonment is claimed to be because Ordinance No. 49 was passed and enacted in accordance with the provisions of section 13 of the county government act of 1897, which was declared to be unconstitutional by the Supreme Court of the state in Ex parte Anderson, 134 Cal. 69, 66 Pac. 194, 86 Am. St. Rep. 236. The return to the writ, which is not controverted, shows that Ordinance No. 49 was not only passed by vote of the electors of Orange county as provided by section 13 of the county government act, but was regularly passed and adopted by the board of supervisors of the county and duly published in the manner required by law for county ordinances. The ordinance, as adopted by the board of supervisors, shows the enacting clause in the form provided by section 26 of the act of 1897, followed by its number and title of the ordinance and the recital, "As an ordinance of the county of Orange, state of California, under and in accordance with the provisions of section 13 of an act entitled 'An act to establish a uniform system of county and township governments,' approved April 1, 1897, it is ordained as follows," before section 1 of the ordinance.

It is urged by petitioner that by this recital the board declared that it enacted the ordinance pursuant to and by reason of its passage by the people under section 13, and therefore, notwithstanding all the formalities requisite to the passage and publication of an ordinance by the board itself were observed, the ordinance must be regarded as the act of the electors, and thus within the rule declared in Ex parte Anderson. It is admitted that independent of section 13 the board is authorized to pass such an ordinance, and it is clear that the title being so placed after the enacting clause may be treated as mere surplusage, as it has been held that the provisions of the Constitution relating to the titles to legislative acts have no application to ordinances of a municipality or county, and there is no requirement of the statute that such ordinances shall have any title at all. Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527. We are also unable to sustain petitioner's contention that the recital as to section 13 makes the ordinance the act of the people and not that of the board. It is fundamental that courts will not look into the motives of a legislative body in the exercise of its legislative powers, except in extraordinary cases where public policy imperatively demands it on the ground of palpable fraud. 21 Am. & Eng. Ency. of Law (2d Ed.) p. 977. It is not essential to the validity of an ordinance that it should state or indicate the power in execution of which it was passed. Methodist P. Ch. v. Balt, 6 Gill (Md.) 391, 48 Am. Dec. 542; 21 Am. & Eng. Ency. of Law, p. 975. It is not necessary that the reason for its enactment be set out unless the legislative or constitutional authority for the passage of the ordinance expressly requires it (Mayor v. Dry Dock, 133 N. Y. 104, 30 N. E. 563, 28 Am. St. Rep. 612, citing Cronin v. People, 82 N. Y. 323, 37 Am. Rep. 564), and a misrecital in an ordinance of the source of power to enact it does not affect its validity if in point of fact the power to enact it existed (21 Am. & Eng. Ency. of Law, p. 975, citing Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43). The ordinance, then, is a valid one passed by the board of supervisors of Orange county, and as against the objection here made to it entitled to be enforced.

Writ dismissed and prisoner remanded.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 452

DAVIS v. PACIFIC IMP. CO. et al.

(Civ. 383.)

(Court of Appeal, First District, California. Jan. 23, 1908.)

1. Appeal—Determination—Remand — Effect of Decision—Law of the Case.

Where on appeal from a first trial it was held that tax deeds themselves under the statute were evidence that delinquent lists were prepared, and that copies of the lists, duly verified by the tax collector and filed with the county recorder, as required by Pol. Code, § 3769, being in evidence, such copies, in the absence of evidence to the contrary, established the existence of the original lists, such copies, together with the presumption arising from the tax deeds, establish the existence of the original lists on a second trial, in the absence of evidence that lists were not prepared, that being the law of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4358–4368.]

2. Taxation—Tax Titles—Actions to Try Title—Evidence—Sufficiency.

That delinquent tax lists could not be found in the office in which they are required to be kept on searches made at least six years after the years when the lists should have been prepared is not sufficient to show that no such lists were ever prepared, so as to render tax deeds void, in the face of the statutory presumption from the deeds themselves and the presumption of the performance of official duty.

3. Same.

Under Pol. Code, §§ 3759, 3761, 3762, 3764, 3765, providing that a delinquent list shall be prepared by the tax collector and delivered to the auditor, who shall redeliver it to the tax collector, who shall cause it to be published with his notice of sale, the fact that delinquent lists could not be found in the auditor's office by a search made at least six years after the time when the lists should have been prepared does not establish the fact that they were never made, so as to render tax deeds void, the lists not being required to be kept in the auditor's office.

4. Same.

Evidence in partition by the owner of the record title, in which the validity of tax deeds held by a defendant was assailed, examined and *held* insufficient to show that no delinquent tax lists were made for certain years.

5. Same—Tax Deeds—Effect as Evidence.

Under Pol. Code, § 3786, making a tax deed primary evidence that the taxes were levied as required by law, the burden is on the one attacking tax deeds because taxes were not levied for the years for which the premises were sold to establish that fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1561.]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Samuel Davis against the Pacific Improvement Company and others and John G. Klumpke. From a judgment for plaintiff and an order denying a new trial, defendant Klumpke appeals. Reversed.

R. H. Countryman, for appellant. Freeman & Bates, for respondent Samuel Davis. J. E. Foulds, for respondent Pacific Improvement Company. Boyd & Fifield for respondents Boyd & Cunningham.

COOPER, P. J. This action was brought to partition a block of land in San Francisco known as South Beach block 25. The appellant Klumpke claimed title in fee to three lots or parcels of said block by virtue of certain tax deeds. The case was first tried in 1898, and in November of that year an interlocutory decree was filed, based upon the findings, in which it was held that the tax deeds of appellant were void and conveyed no title to him. A motion for a new trial was made by appellant, and the same was denied. He appealed from the said interlocutory decree and from the order denying his motion for a new trial, and the decree and order were reversed by the Supreme Court. 137 Cal. 245, 70 Pac. 15.

The facts are there fully stated, and it is not necessary to repeat them here. The court there held in effect that the tax deeds of appellant were valid, and reversed the judgment and order of the trial court. It was there said as to the delinquent list: "It is next objected by the plaintiff that the assessor did not prepare a delinquent list for either of the years 1882 or 1883, and consequently there was no legal notice of the sale. The court does not find, nor was there any evidence, that the delinquent list was not prepared for either of these years, and under the provisions of the statute the deeds themselves became evidence that it was prepared. By section 3769 of the Political Code the tax collector is required to file with the county recorder a copy of his publication of the delinquent list, with his affidavit attached thereto that it is a true copy of the same, and by the same section this affidavit is made prima facie evidence of this fact. Copies of the delinquent list for the years 1882 and 1883, duly verified and filed, as thus required, were in evidence before the court, and in the absence of any direct evidence to the contrary these copies must be held to have established the existence of the originals. The inability of the auditor to produce them at the trial was not equivalent to evidence that they had never been made, nor would their loss or destruction after their function had ceased deprive the purchaser of the rights acquired by the deed. The authority of the tax collector to publish the delinquent list is given in section 3764, which provides that the list so published "must contain the names of the persons and a description of the property delinquent, and the amount of taxes and costs due opposite each name and description. The enumeration of these particulars is equivalent to a declaration that none other need be published. The provisions of sections 3759-3762 are for the guidance of the auditor and tax collector in keeping the account of taxes chargeable to the latter officer, and determining the amount for which he is to account."

Upon the remittitur going down the plaintiff insisted upon a new trial, and introduced evidence for the purpose of showing that there was no delinquent list prepared and filed with the auditor for the years 1882 and 1883. The court found "that the tax collector of said city and county did not at any time make or prepare any delinquent list for the year 1882 or 1883 of or respecting the taxes delinquent for each or either of said years, and did not, at any time, deliver to the auditor of said city and county a complete or any other delinquent list of persons or property owing taxes in or for either of such years, and the said tax collector did not, in any delinquent list, set down in numerical or alphabetical order or otherwise all or any of the matters or things contained in the assessment books for either of such years relating to delinquent persons or property," and upon this finding judgment was entered against appellant as to his lots.

It is now contended that said finding is not supported by the evidence, and this presents the only material question in the case. It was held by the Supreme Court on the former appeal (which has become the law of the case) that the deeds themselves became evidence under the statute that the delinquent list was prepared, and, further, that "copies of the delinquent list for the years 1882 and 1883, duly verified and filed, were in evidence before the court, and in the absence of any direct evidence to the contrary these copies must be held to have established the existence of the originals." These very same copies of the delinquent lists for the years 1882 and 1883, duly verified and filed in the recorder's office, were again in evidence upon the trial now under review. Under the rule of the law of the case as laid down upon the previous appeal these copies, together with the presumptions arising from the tax collector's deeds, must be held to have established the existence of the originals "in the absence of any direct evidence to the contrary." The evidence now relied upon to sustain the finding is that of the witnesses Freeman and Bates. Freeman testified that he had made examinations "commencing at and prior to the year 1889 and extending up to and including the year 1898 in the offices of the tax collector, of the auditor, and of the recorder of the city and county of San Francisco, and I have never been able to find or discover any deputy or other person who could find any delinquent list of the taxes for the city and county of San Francisco for the years named, or for any other year. I have never been able to find a delinquent list or any book which purported to be such." The witness Bates testified that he examined the auditor's office shortly before the first trial of the case, and examined the books in search of an original delinquent list for 1883 and 1884, but was unable to find any such list and that "there were none there." The evidence relates to searches made at least six years after the years 1882 and 1883, when the delinquent lists should have been made. The fact that such lists could not be found in the office in which they are required to be kept is not sufficient to show that no such lists were ever made. The deeds being themselves evidence that such lists were properly made, coupled with the presumption of law that official duty has been performed, cannot be set aside merely for the reason that the delinquent lists could not be found in the proper office several years afterwards. Under the law, as we understand it, the deeds were valid, and conveyed title to the appellant, unless it could be affirmatively shown that no delinquent lists were made by the tax collector for the years 1882 and 1883. The evidence does not show it, and therefore does not sustain the finding. The fact that the lists could not be found in the auditor's office does not establish the fact that they were never made. The lists are not required to be kept in the auditor's office. They are prepared by the tax collector, and then delivered to the auditor, who, in turn, again delivers them to the tax collector, who causes them to be published with his notice of sale. Pol. Code. §§ 3759, 3761, 3762, 3764, 3765. Not only this, but the plaintiff called one Enkle as a witness, who testified that he was an expert searcher in the tax collector's office, and that he was employed in that position during the years 1883–84; that delinquent lists were prepared during these years and sent to the printer; that the lists were sometimes used afterwards in making settlements with the auditor; that the lists showed the amount of taxes on each piece of property that was delinquent. He was asked in cross-examination and answered questions as follows: "Q. Mr. Enkle, calling your mind to the sheets, which are the delinquent tax lists—that is what you mean by the sheets, is it not, delinquent tax lists? A. Yes, sir. Q. Did or did not these sheets contain the valuations of the property? A. For that year? Q. Yes. A. I don't recollect that year, but as a general rule they were. The valuations were on the sheets."

Respondent's counsel insist that no ordinance was offered in evidence showing the levy of taxes for the years for which the sales were made. Under the statute the deeds are primary evidence that the taxes were levied as required by law. Pol. Code, § 3786. This placed the burden upon the plaintiff to show that the taxes were not levied for the years in question. When the tax deeds were offered in evidence, no such objection was made, nor does it appear to have been in any way raised in the trial court.

The judgment and order are reversed.

We concur: HALL, J.; KERRIGAN, J.

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7 Cal. App. xiii

REIS et al. v. PACIFIC IMP. CO. et al. (Civ. 461.)

(Court of Appeal, First District, California. Jan. 23, 1908.)

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Julius C. Reis, executor, etc., and others, against the Pacific Improvement Company and others and John G. Klumpke. From a judgment for plaintiffs and an order denying a new trial, defendant Klumpke appeals. Reversed.

R. H. Countryman, for appellant.

COOPER, P. J. This cause having been submitted upon the record in the case of Davis v. Pacific Improvement Co. et al., No. 383 (this day decided) 94 Pac. 595, and it having been stipulated that this case should abide the result of said cause of Davis v. Pacific Improvement Company et al., it is therefore ordered that the judgment and order be and the same are hereby reversed.

We concur: HALL, J.; KERRIGAN, J.

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7 Cal. App. 298

STATE COMMISSION IN LUNACY v. ELDRIDGE. (Civ. 409.)[*]

(Court of Appeal, Third District, California. Jan. 3, 1908.)

1. Insane Persons—Enforcement of Liability for Support—Evidence—Commitment.

In an action by the State Commission in Lunacy against the father of an insane person to recover for his maintenance in the state insane asylum, the commitment showing that he was brought before the judge who committed him for examination, and that evidence was taken as to his insanity, is admissible in evidence, although it fails to show that the son was "duly committed," or committed according to the requirements of the statute.

2. Eminent Domain—Nature of Power—Support of Insane Persons—Liability of Relatives.

Pol. Code, § 2176, imposing on certain designated relatives liability for the support and maintenance "of any insane person in a state hospital for the insane to which he has been or may hereafter be committed or transferred," is not unreasonable as taking private property for public use without compensation.

3. Taxation—Double Taxation—Support of Insane Persons—Liability of Relatives.

Pol. Code, § 2176, imposing on certain designated relatives liability for the support and maintenance "of any insane person in a state hospital for the insane to which he has been or may hereafter be committed or transferred," is not unconstitutional as imposing upon a certain class of individuals a double taxation not required to be borne by other persons.

4. Insane Persons—Support—Liability for Necessities.

At common law an insane person was liable for the reasonable value of things furnished him necessary for his support.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, §§ 106, 128–129.]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by the State Commission in Lunacy against E. D. Eldridge. Judgment for defendant, and plaintiff appeals from the order denying a new trial. Reversed.

U. S. Webb, Atty. Gen., and John W. Stetson, for appellant. Buck & Middlecoff, for respondent.

HART, J. This action was commenced by the plaintiff on the 13th day of November, 1905, for the recovery of the sum of $2,370, alleged to be due from the defendant, by virtue of the provisions of section 2176 of the Political Code, for the care, support, and maintenance of the latter's adult son, who was, the complaint alleges, at the age of 34 years duly committed on the 13th day of September, 1892, to the State Insane Asylum at Stockton. The trial resulted in a judgment for the defendant, and this appeal is from the order denying plaintiff a new trial.

There are only two questions presented and discussed by counsel. The first is as to the ruling of the court upon the objection of respondent, excluding as evidence the commitment upon which the patient, E. E. Eldridge, is held in custody by the superintendent of

[*] For opinion of Supreme Court, see 94 Pac. 600.

the State Hospital for the Insane at Stockton. The second involves an attack upon the constitutional validity of section 2176 of the Political Code, imposing upon certain designated relatives the liability for the support and maintenance "of any insane person in a state hospital for the insane to which he has been or may hereafter be committed or transferred." The answer, among other things, sets up the statute of limitations—section 338, subd. 1, Code Civ. Proc.—in bar of plaintiff's action. With reference to the special plea, counsel for the plaintiff admitted at the trial "that defendant's plea of the statute of limitations is good and valid for all but three years prior to the commencement of the action, and appellant waived judgment for any amount accruing prior to that time."

The medical superintendent of the Stockton State Hospital, Dr. Asa Clark, was called as a witness by plaintiff, and, after testifying that E. E. Eldridge had been an inmate of the hospital since 1892, "living there under the care of the institution and under my charge as medical superintendent during all of that time," he was shown the document purporting to be the commitment under the authority of which the patient was detained. Dr. Clark identified the document, and stated that it constituted his authority for the custody of said Eldridge, whereupon counsel for plaintiff offered it in evidence and the offer was rejected by the court under objection by the defendant. Thus the first question was raised and is here presented. The document which the court refused to admit in evidence consisted of an affidavit by one C. A. Eldridge, alleging the insanity of E. E. Eldridge, the medical examination of the doctors appointed by the court as the lunacy commission, and the order of commitment by the court. Said order, which follows the affidavit, reads as follows: "E. E. Eldridge, the person named in the foregoing affidavit being this day brought before me, judge of the superior court, county of San Joaquin, for examination on a charge of insanity, and having heard the testimony of C. A. Eldridge and Mrs. E. E. Eldridge, witnesses who have been acquainted with the accused during the time of the alleged insanity, and also the testimony of the examining physicians, and being myself satisfied after a personal examination that the said E. E. Eldridge is insane and is so far disordered in mind as to endanger health, person, or property, and is not a case of idiocy, imbecility, dementia, or any class of incurable and harmless insanity, nor a case of delirium tremens, and being further satisfied of the truth of all the matters set forth in said physicians' certificate, I do hereby order him to be confined in the State Insane Asylum at Stockton. I do hereby charge the sheriff of San Joaquin county with the execution of this order. And I certify that the sum of ——— dollars was found on the person of said patient at the time of h— arrest, which said ——— is ordered to deliver to the chief medical officer of said asylum. Witness my hand, this 13th day of Sept. 1892. Ansel Smith, Judge of Superior Court." The opposition to the introduction of said commitment and the proceedings leading thereto was upon the ground that the same failed to show that the patient had been "duly committed," or not committed according to the requirements of the statute. In support of this position, it was insisted at the trial and here contended that it does not appear from the proceedings before the court resulting in the commitment of the patient that the alleged incompetent was served with a warrant of arrest or given the requisite notice of the charge upon which he was to be examined. Therefore, it is urged, the proffered evidence was properly excluded because it does not show that the patient had been "duly" committed; that is, committed in the manner required by the provisions of the lunacy law. To sustain their contention upon this point counsel for respondent cite the cases of In re Lambert, 134 Cal. 630, 66 Pac. 851, 55 L. R. A. 856, 86 Am. St. Rep. 296, McGee v. Hayes, 127 Cal. 236, 59 Pac. 767, 78 Am. St. Rep. 57, and Bedell v. Scott, 126 Cal. 675, 59 Pac. 210. We are of the opinion that the refusal of the court to allow the evidence, as offered by appellant, of the proceedings and of the order of commitment following therefrom upon which the alleged incompetent was and is held in custody as an insane inmate of the state hospital constituted error, and, if error, it is obviously highly prejudicial, because the excluded evidence was of the very essence and the foundation of plaintiff's cause of action. It may be conceded that the power of the superior courts to examine or try and commit insane persons to the hospitals for the insane, maintained by the state, is derivable alone from legislative enactments, and not from the Constitution, and, while the jurisdiction over such cases is special, we are not prepared to accept the doctrine that it is so limited as to deprive proceedings had under the exercise of such power of the presumption of their regularity, particularly where they are not under direct attack. There is language in the case of In re Lambert, supra, apparently justifying the contention that there can be indulged no presumption in favor of the validity of the proceedings authorized for the purpose of an inquisition into a charge of insanity against a person, and that, consequently, every material fact requisite to give the court jurisdiction to hear and determine the issue in such case "shall be set forth in the document by virtue of which the person is to be deprived of his liberty or estate." But, if the language referred to in that case may be subject to an interpretation agreeably to the contention of counsel for respondent, we think it is virtually overruled by a later expression of the Supreme Court to be found in the case of Ex parte Dennis G. Clary (Cal.) 149 Cal. 732, 87 Pac. 580. In that case, discussing the requisites of a valid commitment under our insanity law, Associate Justice Shaw, speaking for the court, says: "* * * We do not mean to intimate, however, that upon a collateral attack the absence of the statement of a proper finding in the record would be fatal to the validity of the judgment in an insanity proceeding, where the court had jurisdiction of the person adjudged insane." Thus it will be observed it is at least intimated by the court that, where the attack upon the proceeding is not direct, it will be assumed, where it does not wholly so appear upon the face of such proceeding, that the court, in the exercise of its statutory power, did all that the statute requires to give it jurisdiction to act.

The important distinction between the commitment in the case at bar and the one in the Clary Case is that in the latter it is stated that the hearing was *duly had*, while in the former the italicized words are not employed. These words, it is said by respondent, or their equivalent in signification, should have been used in the commitment before us in order to fortify it against even collateral attack. The order of commitment shows that an affidavit charging Eldridge with insanity, was filed, and that he was brought before the judge who committed him for examination on said charge of insanity. It also appears from the commitment that witnesses were examined in addition to the testimony given by the examining physicians as to the charge. Clearly enough it appears from the commitment that a hearing or trial was had in the presence of the accused, and we know of no principle of law from which we can find any warrant for holding, under a collateral attack, that, because it does not also appear that the accused was arrested in the manner pointed out by the statute, the entire proceeding was irregularly conducted, and therefore void. In Bible v. Wisecarver (Tenn. Ch. App.) 50 S. W. 670, referring to an attack upon a proceeding resulting in the adjudication that a certain person was non compos mentis, it is said: "The main ground of objection is that he had no notice of the proceedings against him, and that no one was appointed therein to represent him. The record from the court recites that he did have notice [italics ours]; *and in this collateral attack on the proceedings we will indulge all proper presumption favorable to the regularity of the proceedings of the court*, it being a court of record, and having jurisdiction of the person and subject-matter." See, also, Moffitt v. Moffitt, 69 Ill. 644; Profst v. Meadows, 13 Ill. 157; Von Kettler v. Johnson, 57 Ill. 109. We think the commitment sufficient for the purposes of this case and should have been received in evidence.

The objection suggested, but not vigorously urged by counsel, against section 2176 of the Political Code, upon the ground that it is in violation of the constitutional inhibition against special and class legislation, is without merit. Estate of Yturburru, 134 Cal. 467, 66 Pac. 729; Watt v. Smith, 89 Cal. 602, 26 Pac. 1071. The claim is that the requirement that certain persons, having the financial ability to do so, are liable for the support of one of their indigent kindred adjudged a non compos mentis, and confined in a state hospital, imposes upon a certain class of private individuals a burden not required to be borne by other persons; that it is "an attempt to take private property for the public use without due or any compensation." If the law is obnoxious to the objection that it conflicts with the Constitution, it must be for the first and not the last stated reason, for certainly the payment of the expense or a part thereof for the care and maintenance of one's relative incapable of taking care of himself could not be the taking of private property for a public use without compensation, since for the expenditure required a substantial equivalent is given by the agents of the state having management of the institution. And, as to the proposition of the alleged unequal burden imposed upon one class, thus, as contended, discriminating in favor of another upon whom the burden is not cast, the answer is, we think, that the so-called unequal burden is only one springing from a natural duty which, as to its performance, the Legislature has recognized by positive enactment. Sections 38, 206, Civ. Code.

But we are met by the argument that, since the state has taken the responsibility of caring for and maintaining those unfortunates, and for that purpose imposes upon all property owners a tax for the support of the institutions established to attain that object, it amounts to a species of double taxation to require individuals who have relatives in said hospitals to pay for or contribute to their support. This position proceeds, we are inclined to think, from a misconception of the real, paramount purpose intended primarily by the Legislature to be achieved by the establishment of state institutions for the care and maintenance of the insane. Of course, one of the purposes is no doubt to protect the citizens against the violent acts of such insane people as may be dangerous, and who, if at large, would likely be a menace to the lives, persons, and property of the citizens. But the principal purpose was and is to care for indigent insane who in some cases may be successfully treated for the malady, or, if incurable, care for and maintain them as dependent persons, themselves without means or without relatives having means to properly care for them, being liable, if able, under the law so to do. In other words, the main object of the state in the maintenance of such institutions is much the same as that of counties in the maintenance of hospitals and poorhouses to care for and minister to the necessities of the indigent sick and others unable, through old age or other physical infirmities, to take care of themselves. If some one, having estate sufficient to defray the expense of his own care and support, or, having no estate, but relatives legally liable for his care and maintenance, with ability to provide it, were to go to a county hospital or a poorhouse for such care and maintenance, would it be a supportable proposition that, because he or his said relatives have borne their proportion of the general tax, such person could secure the benefit of such care and maintenance without paying something toward it? If such a proposition could be maintained, there would then be nothing to interfere with the filling up of county hospitals and almshouses with persons well able to pay for their own care, who would thus, without cost to themselves, be maintained at public expense—at the expense of many other taxpayers having no interest in such institutions further than approving by supporting them as a proper and necessary mode adopted by the government for taking care of those unable to take care of themselves. We can see no distinction in principle in this regard between such county institutions and state hospitals for the insane, and the argument which has been advanced that in the latter case the inmates are confined in the hospitals without their consent by the state does not answer the proposition. The liability for their support rests, as we have seen, upon a legal as well as natural duty, and their forcible detention inures as much to their benefit and to that of relatives obliged to contribute toward their care and support as to the state. As is said in the case of Estate of Yturburru, supra: "An insane person is liable for the reasonable value of things furnished to him necessary for his support. [Citing Civ. Code, § 38.] This was so at common law, when the necessaries were furnished by an individual, and we have never seen a case, and do not think any can be found, holding that this rule comes in conflict with any provision of the Constitution of this state or of any other state in the Union. We see no reason why the same rule should not apply to a state hospital for the insane, which does and furnishes for the insane person only those things required by the law of the state."

We find nothing in any of the cases cited by respondent, with the possible exception of Baldwin v. County of Douglas, 37 Neb. 283, 55 N. W. 875, 20 L. R. A. 850, in conflict with the conclusion we have here reached. There is certain language used in the case mentioned, not necessary to a decision of the point involved, and which is therefore mere dictum, indicating that the court doubted the power of the Legislature to authorize the collection by the trustees of a state hospital for the insane of a sum of money from the estate of the incompetent or from a relative liable for his support for his care and maintenance. But the facts of that case are altogether different from those of the case at bar. The Nebraska statutes require each county to pay for the care of its own insane at the state hospital, and each of the counties from which insane are sent to the hospital is authorized to and does levy a special tax for that purpose. This is in addition to the general tax for the support of the state government and its institutions. It was therefore properly held that the law requiring persons to pay for the support of their insane relatives in the hospital authorized, under such such circumstances, double taxation, and was therefore contrary to the state Constitution. The other cases cited, notably Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322, and Chicago v. O'Brien, 111 Ill. 532, 53 Am. Rep. 640, do not support the contention of respondent. In the Flaherty Case the constitutionality of the statute in question was not raised, nor was the proposition gone into. In discussing the main question in that case—as to whether the plaintiff was, under the statute, the proper party to bring the suit—the learned writer of the opinion incidentally uses a sentence from which it might be inferred that he was doubtful whether the right to exercise the power vested in the superior courts by section 2176, supra, exists. But under the decided cases and upon principle we think the requirements of the section involve only a valid exercise of legislative power.

That the patient has been and is an inmate of the hospital and insane, and is and has been cared for and maintained by the authorities of the hospital, the evidence of the medical superintendent indisputably shows, and that the defendant, his father, should pay for his maintenance at the hospital, it appearing from the complaint that the incompetent has no estate or means of his own, and it likewise appearing that the defendant is of sufficient ability to do so, we have no doubt.

The order is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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7 Cal. App. 298

STATE COMMISSION IN LUNACY v. ELDRIDGE. (Sac. 1,540.)

(Supreme Court of California. March 9, 1908.)

In Bank. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Motion for rehearing denied.

For opinion of Court of Appeal, see 94 Pac. 597.

U. S. Webb, Atty. Gen., and John W. Stetson, for appellant. Buck & Middlecoff, for respondent.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause for the reason that there is, in my opinion, a serious question as to the constitutionality of an act of the Legislature which seeks to impose the obligation of support upon the father or mother of an adult son who, at the instance of the state, has been committed to an insane asylum because he is a dangerous lunatic. The question as to the validity of the enactment (Pol. Code, § 2176) is the more worthy of fuller consideration by reason of a question of construction affecting its operation if valid. It applies only in case the father, mother, etc., is of "sufficient ability." Who determines this question of ability and by what standard? Does it lie in the discretion of the state board to sue or not to sue according to their idea of what constitutes ability, or is it a question for the court in which the action is pending? Or is it to be determined by the return to a writ of execution? In other words, does the obligation of support continue until the father or mother, or wife or child, has been stripped of all his or her possessions except property exempt from execution, or has the court or commission discretion to say how far the exaction shall be pressed? Upon the former supposition the operation of the law would in many instances result in grievous hardship, upon the latter its operation would be lax or appressive according to the idiosyncracies of the officers, executive and judicial, charged with its enforcement. In short, considering the great number of cases in which the present decision will constitute a binding precedent, I think it should have received more thorough consideration than has yet been given it before allowing the judgment to become final.

152 Cal. 746

TITLE INS. & TRUST CO. v. GRIDER et al. (L. A. 1,970.)

(Supreme Court of California. Jan. 24, 1908.)

1. Receivers—Collateral Attack on Appointment.

An order under Code Civ. Proc. § 564, authorizing a receivership in certain actions between partners, cannot be attacked in an action by the receiver except for want of jurisdiction to make it, since in such action the appointment is only collaterally involved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 103, 104.]

2. Same—Actions—Pleading—Allegation of Appointment—"Duly Made."

Under Code Civ. Proc. § 456, providing that in pleading a judgment or other determination of the court it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made, an averment that an order of appointment of a receiver was "duly made" is equivalent to an averment that all the jurisdictional prerequisites to the appointment existed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 361, 362.

For other definitions, see Words and Phrases, vol. 3, pp. 2262, 2263.]

3. Same.

The receiver appointed in an action by A. against P. sued to recover from G. and H. moneys received by them from the sale of lots under an agreement between them and P. The order appointing the receiver, pleaded in the action by him, made it receiver of all debts, moneys, etc., belonging to the firm of P. & S., and especially of all moneys and contracts arising from the sale of the lots, the title to which was in P. The receiver further alleged that the firm referred to in the order was the one alleged in the complaint in the action by A. against P. to have consisted of P. and S., and to have been formed for the purpose of dealing in the lots. *Held*, that a demurrer for uncertainty not having been made, and the answer raising the issue as to whether the contract between P. and G. and H. was an asset of the firm of P. & S., the complaint by the receiver was sufficient to show that the firm of P. & S. was formed to deal in the lots, and that therefore any contract made by either of the partners for the sale of the lots was included in the matter in litigation in the action by A. against P., and in the property directed to be taken into the receiver's possession.

4. Partnership—Evidence of Relationship—"Agency."

A contract whereby parties agreed to put in cement walks, etc., make out all papers, and manage the sale of lots, in consideration of their appointment as exclusive agents to sell, they to receive one-half the net profits, and such agency to continue six months, does not constitute the parties partners, but creates an agency to sell.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 261, 262; vol. 6, pp. 5191–5202; vol. 8, p. 7746.]

5. Brokers—Contracts—Construction.

Under a contract of appointment as exclusive agents, for six months, to sell and manage lots, agents to receive one-half the net profits, the agents are limited to one-half the net profits on sales made during the six months, and are not entitled to receive one-half the net profits on sales thereafter made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 68.]

6. Same.

Under a contract whereby parties agreed to put in cement walks, build stone pillars, and write all advertisements, in consideration of their appointment as exclusive agents to sell lots, "all of the above to be paid for by" such parties, they to receive one-half the net profits, the expense of putting in cement walks, etc., must be paid by such parties, and they are not entitled to have the same paid out of the proceeds of the sales.

Department 1. Appeal from Superior Court, Los Angeles County; W. J. James, Judge.

Action by the Title Insurance & Trust Company, as receiver in the action of H. G. Harvey against Thomas McDaniels Potter, etc., against L. M. Grider and E. E. Hamilton, copartners. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Stephens & Stephens, for appellants. J. Wiseman Macdonald, for respondent.

SLOSS, J. The plaintiff, as receiver appointed by the superior court in an action brought by H. G. Harvey against T. McD. Potter, commenced this action to recover from Grider and Hamilton moneys received by them from the sale of lots under an agreement between them and Potter. The court found that the defendants had in their hands, as the proceeds of sales under said agreement, the sum of $3,461.55 over and above all credits due them, and gave the plaintiff judgment for this amount. The defendants appeal from the judgment and from an order denying their motion for a new trial.

On the appeal from the judgment it is contended that the complaint fails to state facts sufficient to constitute a cause of action, and in this connection several points are made. It is urged that the complaint is defective in that it does not aver the existence of a partnership between the parties to the action of Harvey v. Potter, in which the receiver was appointed. Assuming that the appointment was based upon the Code provision authorizing a receivership in certain actions between partners (Code Civ. Proc. § 564), the question whether Harvey and Potter were in fact partners cannot be material here. The order appointing the plaintiff receiver was not made in this action, and is only collaterally involved. It cannot, therefore, be attacked upon any ground except a want of jurisdiction to make it. 23 Am. & Eng. Ency. of Law (2d Ed.) 1126; Chetwood v. Cal. Nat. Bank, 113 Cal. 649, 45 Pac. 854. The complaint alleges that the order of appointment was "duly made" by the superior court. This is, under the rule of pleading declared in section 456 of the Code of Civil Procedure, equivalent to an averment that all the jurisdictional prerequisites to the appointment of a receiver existed. If the court had jurisdiction to make the appointment, the only questions affecting the defendants are whether the fund in controversy was by the terms of the order placed within the control of the receiver, and whether, as between themselves and Potter, he was entitled to demand that fund from them. Potter was a party to the action in which that order was made, and for the purposes of this action the plaintiff stands in his shoes. A payment to the receiver by the defendants in this action will fully protect them against any claim of Potter as to the ownership of the fund. The ownership of the money as between Harvey and Potter is a question for determination in the main action in which the receiver was appointed. If, upon the trial of that action, it should turn out that there never was any partnership relation between the parties, and that Potter is, in his individual capacity, entitled to the whole of the fund, his rights would there be preserved. But in this question the defendants here have no concern. The receivership was created merely for the purpose of preserving the assets involved in the controversy between Harvey and Potter, and all that these defendants are interested in is that they shall have the benefit of any defense to which they might be entitled as against Potter. If they have no such defense, it can make no difference to them how the fund is ultimately disposed of as between Harvey and Potter.

A second point urged against the sufficiency of the complaint is that the order of appointment, which is pleaded in full, did not by its terms include the property here involved. The complaint alleges that Potter became the owner of certain property situated in Hollywood in Los Angeles county; that shortly before acquiring title he entered into a written agreement with Grider & Hamilton by which they were to sell the tract (which was to be known as "Grant Place") upon certain terms. The order appointing the receiver reads in part as follows: "It is therefore ordered that the Title Insurance and Trust Company * * * be, and is hereby appointed receiver of all the debts, moneys, properties, equitable interest and things in action belonging to said firm (referred to in the complaint) and especially of all moneys and contracts arising from the sale or agreement of sale for lots in Grider & Hamilton's Grant Place * * * the title to which said lots was or is in said Thomas McDaniels Potter, and also of all lots in said Grant Place remaining unsold. That said receiver upon being duly qualified may sell said property and shall proceed to collect the debts of said firm and do the other things hereinbefore required of him, and the said parties herein, and all other persons having any of said property in their possession or under their control are hereby ordered to deliver the same, and all persons owning any money belonging to said firm, and especially money arising from the sale of lots in said Grant Place, are hereby ordered to pay over the same to the Title Insurance and Trust Company, as such receiver, upon its demands." There are further allegations to the effect that the firm referred to in said order is the one alleged in the complaint in Harvey v. Potter to have consisted of one Simmons and Potter and to have been formed for the purpose of purchasing the property described. It is argued that the order appointing the receiver covers only property belonging to the firm referred to in the complaint in Harvey v. Potter, and that the complaint in this action does not allege that the contract with Grider & Hamilton was an asset of that firm. But the order appointing the plaintiff specifically covers "all moneys and contracts arising from the sale or agreement for sale of lots in Grider & Hamilton's Grant Place." Even if this is to be read as meaning only such moneys and contracts as belonged to the firm referred to in the complaint in Harvey v. Potter, the complaint in this action alleges that the complaint in the former action had averred that such a firm had been formed for the purpose of purchasing this very property. It is true that it is not definitely averred that in the complaint of Harvey v. Potter the agreement between Potter and Grider & Hamilton was alleged to be an asset of the partnership there involved. A demurrer for uncertainty in this particular would probably have been good. But no demurrer was interposed, and the answer raised no issue as to whether or not the contract in question was one of the assets of the firm alleged in Harvey v. Potter to exist. Under these circumstances, we think the allegations of the complaint, read as a whole, are sufficient to show that the partnership alleged in Harvey v. Potter to exist was formed for the purpose of dealing in these lands, and that, therefore, any contract made by either of the alleged partners for the sale of such lands was included in the matter in litigation in Harvey v. Potter and in the property directed to be taken into the possession of the receiver.

The contention is made that the action is brought against the defendants as agents of Potter, and that, inasmuch as Potter was a partner, no suit could be brought against him (or his agents) unless it appeared that all of the other assets of the partnership had first been exhausted. Whatever merit the point might possess in a suit between partners, it is not applicable here. This is not a bill for an accounting against Potter as a partner, nor is the judgment a judgment against Potter as a partner. The court, by its receiver, is merely taking into its possession a fund claimed to belong to the partnership. Whether upon a final accounting those assets should be applied to the uses of the partnership or should be returned to Potter is, as has already been stated in another connection, a matter to be determined in the action of Harvey v. Potter. The judgment in this action is not an adjudication of the ultimate rights of the contending parties in this fund, and the defendants here are in no position to assert a defense which Potter may have against Harvey's claims.

The contract of sale between Potter on the one hand and Grider & Hamilton on the other is set out in full in the complaint. It is in the form of a letter, and reads as follows:

"Los Angeles, California, Oct. 13, 1904.

"Grider & Hamilton, 225 W. Second Street,
Los Angeles, California:

"Gentlemen: In consideration of Grider and Hamilton putting in cement walks on the east side of Warner avenue from Prospect boulevard, also trees on other streets and palms on each side of Warner avenue; building four stone pillars—two on Prospect boulevard, and two on Sunset boulevard, cornering on Warner avenue; writing all advertisements and all advertising; making out all papers, and managing the sales of what is now known as the Warner tract (all the above to be paid for by Grider & Hamilton), I hereby appoint you, gentlemen, exclusive agents to sell and manage the above tract for which you are to receive one-half the net profits. Property to be sold one-third cash, the balance in six, twelve, and eighteen months; or monthly payments where above terms cannot be obtained.

"I also agree to have same subdivided on such plans as you may direct, and change the name to 'Grant Place.' Property to be placed on sale not later than November 14th, 1904. Prices to be agreed upon and made a part of this agreement. Books showing sales and expenditures to be open for my inspection at any and all times.

"It is further agreed and understood that the length of this agency shall be for a period of six months.

"Yours truly, Thos. McD. Potter.
"Approved: Grider & Hamilton."

It is argued by the appellants that this agreement constituted a partnership between Potter and Grider & Hamilton, and certain objections to the complaint are based on this premise. It is unnecessary to state what these objections are, since we think there is no merit in the underlying position that the agreement above quoted created a partnership between the parties to it. While, of course, the question whether or not a partnership exists is to be determined from the nature of the relation agreed upon, rather than the name which the parties have given to it, some weight must be allowed to the language of the parties themselves. The agreement states that by it Potter appoints Grider & Hamilton "exclusive agents to sell and manage the above tract," and it further provides that the "agency" shall continue for six months. There is nothing in the agreement in question that indicates that Grider & Hamilton were to pay any part of the losses that might be suffered in the venture, nor is either party given power to make contracts binding all. Certain expenses of the sale are to be borne by Grider & Hamilton, and their compensation for their services is to be determined by the net profits, rather than by a commission upon the amounts realized. Neither of these features is in any degree inconsistent with the existence of an agency, which, on the face of their agreement, the parties were creating. Without entering into any discussion of authorities, it will be sufficient, in support of the conclusion that a partnership was not formed, to refer to the following cases: Hanna v. Flint, 14 Cal. 73; Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087; Salinas City Bank v. De Witt, 97 Cal. 78, 31 Pac. 744; Coward v. Clanton, 122 Cal. 451, 55 Pac. 147; Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425.

It is claimed that the trial court erred in admitting in evidence a statement showing the sales made by Grider & Hamilton, together with their expenditures and the profits made upon the sales. Certain of the findings are also assailed as unsupported by the evidence. Most of the points made in these connections are the same as those already discussed in considering the sufficiency of the complaint. Two additional contentions are advanced.

It is urged that the court erred in limiting the allowance of profits claimed by Grider & Hamilton to those realized on sales made during the six months following the date of the agreement. It is claimed that, while the contract limited their agency to six months, they were entitled to receive one-half of the net profits upon sales made by others thereafter. This is an entirely unreasonable construction of the contract. Grider & Hamilton were employed as agents to sell and manage the tract, and for their services they were to receive one-half of the net profits. Their agency was to last for the period of six months. Their share of the profits was the compensation provided for their services in making sales. When their duty to render service ended, their right to compensation ended with it.

Nor is there greater merit in the contention that the expense of putting in cement walks, building stone pillars, and advertising was to be paid out of the proceeds of the sales. The contract reads: "In consideration of Grider & Hamilton putting in cement walks, * * * building four stone pillars, * * * writing all advertisements and all advertising; making out all papers, and managing the sales of what is now known as the Warner tract (all of the above to be paid for by Grider & Hamilton), I hereby appoint you exclusive agents," etc. This language is so plain that there is no room for construction. The appointment as agents is made in consideration of the payment of these expenses by Grider & Hamilton. Any possible doubt that these payments were to be borne by them is removed by the further language, "all the above to be paid for by Grider & Hamilton." To give to the contract the construction contended for by appellants would be to say that the provision requiring them to pay certain expenses is to be read as if they were merely to advance these expenses.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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153 Cal. 97

MacLEOD v. MORAN et al. (Sac. 1,588.)

(Supreme Court of California. Feb. 24, 1908. Rehearing Denied March 23, 1908.)

1. HOMESTEAD—"ABANDONMENT"—MORTGAGE AS WAIVER OF RIGHT.

Where a husband and wife, to secure a debt, conveyed a homestead by a trust deed providing for reconveyance if the debt was paid at maturity, and that the grantors expressly abandoned the homestead right to the premises, it is not such a grant of the homestead within the meaning of Civ. Code, § 1243, providing how a homestead may be abandoned, as will deprive the wife of her right to such homestead where it is reconveyed to the husband alone, and by him conveyed to a third party, since a payment of the debt devested the trustee of title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 338.

For other definitions, see Words and Phrases, vol. 1, p. 8; vol. 8, p. 7559.]

2. APPEAL—DETERMINATION—REVERSAL—NEW TRIAL—NECESSITY.

Where the findings in the trial court showed an abandonment of plaintiff's homestead rights, and the court on appeal holds that the facts did not show such abandonment, the order of reversal cannot direct a judgment to be entered below in plaintiff's favor on the findings, but there must be a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4583-4599.]

In Bank. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Action by Emma J. MacLeod against Joe Moran and others. From a judgment for defendants, plaintiff appeals. Reversed.

Plummer & Dunlap, for appellant. O. B. Parkinson and Jacobs & Flack, for respondents.

ANGELLOTTI, J. The only question presented by this appeal is whether a certain trust deed executed by plaintiff and her husband, A. K. MacLeod, for the purpose of securing the payment of a debt, constituted an abandonment of a homestead theretofore regularly selected by the plaintiff in accord with the provisions of the Civil Code relative to the selection of homesteads. The trial court held that such was the effect of the trust deed, and gave judgment against plaintiff, and this is an appeal by plaintiff from such judgment.

The real property involved was community property, having been acquired by plaintiff's husband, A. K. MacLeod, after their marriage and by their joint efforts, and was their family home. It was regularly selected as a homestead by plaintiff on May 3, 1902. In January, 1904, the deed of trust was executed and acknowledged by plaintiff and her husband, and recorded in the office of the county recorder. By this instrument, the husband and wife purported to grant, bargain, sell, etc., the land in question to M. L. Sims and C. L. Flack, in trust, as security for the payment of $450 with interest, to one Mary E. Sims. The trust deed was in the form ordinarily used for such instruments when given as security for the payment of a debt, authorizing the trustees, among other things, to sell the property at public auction in the event of default in the payment of principal or interest, to execute and deliver a deed on such sale, and to appropriate such portion of the proceeds of sale as was necessary to the payment of the debt and costs. It was provided therein that if the makers of the deed paid at maturity all sums secured thereby the trustees "shall reconvey all the estate in the premises aforesaid to them by this instrument granted unto the said A. K. MacLeod, or his assigns, at his request and cost." Immediately following the description by metes and bounds of the property conveyed was the following: "And also all the estate, interest, claim and demand, as well in law as in equity, which the said parties of the first part may have or may hereafter acquire of in and to the said premises, with the appurtenances, hereby expressly abandoning all right of homestead in and to said premises." On March 23, 1904, there was executed and acknowledged by the trustees, and recorded, a reconveyance of the property to said A. K. MacLeod, it being recited therein that all the indebtedness secured by the deed of trust had been paid. On the same day said A. K. MacLeod executed and delivered a deed of conveyance purporting to convey the property to one Edward Studivan, but plaintiff did not join therein. Subsequently, Studivan executed and delivered to defendant Joe Moran a quitclaim deed of the property. Plaintiff's claim in this action is that the property is still subject to the homestead claim, and that the deed from A. K. MacLeod to Studivan was consequently ineffectual for any purpose.

Section 1243 of the Civil Code provides: "A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged: 1. By the husband and wife, if the claimant is married." While a deed of trust given simply as security for the payment of a debt is in a certain sense a "grant," it cannot be held to be a grant within the meaning of that word as used in section 1243 of the Civil Code. It is settled that the execution of a deed absolute on its face, and purporting to grant the property therein described, is not an abandonment of a homestead where it is, in fact, given solely as security for the payment of money. Merced Bank v. Rosenthal, 99 Cal. 39, 48, 31 Pac. 849, 33 Pac. 732; Kennedy v. Gloster, 98 Cal. 143, 147, 32 Pac. 941; Mabury v. Ruiz, 58 Cal. 11; Porter v. Chapman, 65 Cal. 365, 4 Pac. 237. These decisions are based upon the fact that such a deed, though in form a grant, is really only a mortgage, and does not convey the fee. A trust deed of the kind here involved differs from such a deed only in that it conveys the legal title to the trustees so far as may be necessary to the execution of the trust. It carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal titles passes thereunder, and the trustees cannot be held to hold a mere "lien" on the property, it is practically and substantially only a mortgage with power of sale. See Sacramento Bank v. Alcorn, 121 Cal. 379, 383, 53 Pac. 813; Tyler v. Currier, 147 Cal. 31, 36, 81 Pac. 319; Weber v. McCleverty, 149 Cal. 316, 320, 86 Pac. 706. The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them. Sections 865, 866, Civ. Code. Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title. King v. Gotz, 70 Cal. 236, 11 Pac. 656. The legal estate thus left in the trustor or his successors entitles them to the possession of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership, in regard to the property, subject always, of course, to the execution of the trust. This estate is a sufficient basis for a valid claim of homestead. It was expressly held in King v. Gotz, supra, that the trustor may select as a homestead property covered by such a trust deed. The estate of the trustees absolutely ceases upon the payment of the debt (Civ. Code, § 871), leaving the whole title in the grantor in whom it was vested at the execution of the trust deed, or his successors, and leaving nothing in the trustees except the bare legal title of record, which they can be compelled to reconvey to the owner simply to make the record title clear. Tyler v. Currier, supra. We think it is apparent that the "grant" referred to in section 1243 of the Civil Code does not include a deed given solely as security for the payment of money.

Of course, the homestead is by the execution and acknowledgment by both husband and wife of such a conveyance in trust subjected to the lawful execution of the trust, and a subsequent conveyance by the trustees in such lawful execution would convey to the purchaser the absolute title to the property, free of all claim of homestead. Section 1242, Civ. Code. No such effect, however, can be given to a reconveyance of the legal title by the trustees to the owner after payment of the debt. Such a reconveyance is no part of the execution of the trust. The estate of the trustees, as we have seen, is absolutely divested by the payment of the debt, leaving the full title in the trustor and his successors, and the reconveyance to the owner or his successor is simply for the purpose of making the record title clear. Tyler v. Currier, supra. Defendants rely upon the provisions in the trust deed which we have hereinbefore quoted, as showing an express abandonment of the homestead, under section 1243 of the Civil Code.

The provision for the reconveyance by the trustees to A. K. MacLeod, or his assigns, at his request and cost, in the event of the payment of the debt, is of no importance in this regard. It is simply the provision ordinarily inserted in such instruments for a reconveyance to the owner, or his successors, upon the payment of the debt, and the consequent termination of the trustees' interest in the property. The testimony of Mrs. MacLeod sufficiently shows that, at the time of the execution of this trust deed, the title to this community property was in the husband. It had been acquired by him, she said, by their joint effort, and necessarily the reconveyance, if it was to be stipulated for at all, was stipulated to be made to the grantor in whom title was vested at the time the trust deed was given (Tyler v. Currier, supra), or to any person to whom such grantor may have assigned it by a valid deed, which, the property being subject to the homestead claim, could only be a deed executed and acknowledged by the wife as well as by the husband.

The provision "hereby expressly abandoning all right of homestead in and to said premises," considered in connection with the immediate context, and the object of the instrument, amounted to nothing more than an express abandonment to the trustees, for the purposes of the trust, of all claim of homestead. It is true that no such express abandonment to the trustees was necessary to enable them to convey the whole property, free of claim of homestead, to a purchaser at a trustees' sale had in execution of the trust. But this is also true of the whole paragraph of which the provision relied on forms a part. It was entirely unnecessary to set forth that the parties granted, etc., "also all the estate, interest, claim and demand as well in law as in equity, which the said parties of the first part may have or may hereafter acquire in and to the said premises, with the appurtenances." All this was subjected to the trust by the conveyance by the husband and wife of the property by metes and bounds, just as was the homestead claim. Considering the instrument as a whole, it is obvious that the only object of this paragraph was to completely transfer and abandon to the purposes of the trust all possible claims of the parties to the property. While we do not doubt that a general abandonment of a homestead may be contained in another instrument, the provision under discussion cannot reasonably be construed as such an abandonment.

Plaintiff urges that direction be given by this court for entry of judgment, upon the findings, in favor of plaintiff. This cannot be done, in view of the fact that the findings show an abandonment of the homestead. These findings are attacked by proper specification of insufficiency of evidence to support them, and, in accord with the views we have expressed, it must be held that the attack is well founded. This conclusion necessitates a new trial.

The judgment is reversed.

We concur: BEATTY, C. J.; SHAW, J.; McFARLAND, J.; LORIGAN, J.; HENSHAW, J.; SLOSS, J.

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153 Cal. 118

WALKER v. CHANSLOR et al. (L. A. 1,894.)

(Supreme Court of California. Feb. 27, 1908.)

1. Assault and Battery—Civil Liability—Actions—Evidence—Intent.

In a civil action for assault and battery, where it appeared that plaintiff was an employé of an oil company, which took possession of land claimed by another oil company, by whom defendants were employed, and that the assault was committed in an attempt to dispossess plaintiff's employer, evidence as to the title of defendants' employer, taking advice of counsel, and defendants' intentions was admissible on the question of exemplary damages as showing motive and intent of defendants in entering on the land in controversy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 41.]

2. Same.

Such evidence was admissible on the issue of actual damages since, under the common law, in force in the absence of a statute, a party wrongfully in possession of land, or his employé, has no right of action for assault sustained while resisting the owner's attempt to regain possession without the use of more force than was reasonably necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, §§ 41, 44, 47.]

3. Appeal — Review — Theory of Lower Court—Evidence.

Where a case is tried on an erroneous theory, the verdict, though correct on the evidence, will be reversed for erroneously excluding evidence which cuts off a substantial defense on the merits.

4. Assault and Battery — Actions — Evidence.

In a civil action for assault and battery, where it appeared that plaintiff was an employé of an oil company, which was in possession of land claimed by another oil company, by whom defendants were employed, and that the assault was committed in an attempt to dispossess plaintiff's employer, evidence that the employés of the company holding the land entered into possession armed, and remained armed, is admissible to show whether defendants acted reasonably and without malice in appearing armed, and whether they used only reasonable force.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, §§ 37–41.]

In Bank. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by J. T. Walker against Joseph Chanslor and others. On appeal by defendants, the District Court of Appeal affirmed a judgment for plaintiff on condition of remittitur. On petition for hearing in the Supreme Court. Reversed, and new trial ordered.

Byron Waters, for appellants. A. D. Warner, Thos. Carroll, John Leo, and W. W. Kaye, for respondent.

LORIGAN, J. This action was brought to recover damages for an assault and battery alleged to have been committed by defendants upon plaintiff. The evidence discloses that the assault and consequent injuries to plaintiff occurred in a contest between two oil companies for the possession of a quarter section of land. Trial was had before the court without a jury, and from the findings of the court it appears that on April 14, 1901, an oil corporation known as the "Superior Sunset Oil Company" went into the possession of said quarter section—the northwest quarter of section 26, township 32 south, range 23 east M. D. M., in Kern county—and was in occupation thereof on April 20, 1901, and continued to occupy it until some time thereafter; that on the 19th day of April, 1901, plaintiff went into the service of said corporation, and at the time the injuries complained of by him were sustained was upon said premises, together with certain officers and other employés of said corporation; that about the hour of 12:30 a. m. of April 20, 1901, these defendants (appellants herein), who were either officers, directors, or stockholders of another oil company known as the "Mt. Diablo Mining & Development Company," together with the employés of said company, all armed with rifles, guns, and pistols, went upon said land with the intention of driving all persons connected with the Superior Sunset Oil Company therefrom; that, upon the entry of defendants and such employés upon the said land, an employé of the Superior Sunset Oil Company—Cornell—went out to meet them in order to ascertain their reason for coming on the land; that when he came up to them defendants commanded him to throw up his hands, and, upon his refusal to do so, began shooting at him; that when the shooting commenced plaintiff and others connected with the Superior Sunset Oil Company ran out to where the defendants were to ascertain what was going on; that these defendants and those with them immediately began shooting at plaintiff and those who accompanied him, firing some 75 or 100 shots; that plaintiff was shot through the body and received several other gunshot wounds at the hands of defendants and those with them, resulting in great suffering to plaintiff, and in his permanent disfigurement and injury, to such an extent as to incapacitate him from doing any physical work.

The court further found that at the time of the shooting the Superior Sunset Oil Company was in possession and occupation of said quarter section, claiming it as its own, as lands chiefly valuable for petroleum oils, under oil mining locations thereof, and that when defendants entered thereon they had no right or business on said land, and were there in violation of law; that the shooting of plaintiff by said defendants was willful and deliberate, the result of an unlawful conspiracy by defendants to violently and by force of arms drive the officers and employés of the Superior Sunset Oil Company and plaintiff off said lands, and that such shooting by defendants was wanton and done with malice and deliberate intent to harm the plaintiff and the other parties who were with plaintiff on the land. The court rendered judgment in favor of plaintiff against nine of the defendants for the sum of $8,500, $5,000 thereof being for actual damages and $3,500 for exemplary damages. These nine defendants appeal from the judgment, and from the order of the court denying their motion for a new trial.

Before proceeding to consider the merits of these appeals it is proper, as bearing on the points presented here for consideration, to say that there was testimony in the case, introduced on behalf of defendants, that when the officers and employés of the Superior Sunset Oil Company were about to enter and take possession of said quarter section on April 14, 1901, they were met by the superintendent of the Mt. Diablo Oil Company (of which the defendants were officers, directors, and stockholders) who was then upon the section, and who told them that the land belonged to the Mt. Diablo Mining & Development Company, that the company had an oil derrick on it, that he was superintendent, managing the property for it, and were forbidden to enter, but they nevertheless did so. There was evidence also offered by defendants that, after they entered on the property on the night of the shooting, their spokesman stated to the person representing the Superior Sunset Oil Company, who came to meet them, that they (defendants) were representatives of the Mt. Diablo Company and were there to notify the Superior Sunset Oil people to get off the land—that the land belonged to the Mt. Diablo Company; that the Superior Sunset Oil Company not only refused to vacate, but notified defendants to immediately withdraw or take the consequences; that this declaration and notice was immediately followed by shots being fired at defendants by persons representing and in the employ of the Superior Sunset Oil people, who were in the background; that the defendants returned the fire and the shooting then became general on both sides, resulting in the wounding of plaintiff and other employés of the Superior Sunset Oil Company; that thereupon the firing ceased, and the defendants withdrew from the premises.

The principal points urged on the appeal for a reversal are as to the rejection of evidence by the trial court, offered by the defendants under their amended answer. In that answer defendants set up that the Mt. Diablo Mining & Development Company was the owner of the lands in question and on the 14th day of April, 1901, was in the possession thereof, and that defendants were employés, officers, and directors of that corporation; that on the 14th day of April, 1901, the Superior Sunset Company forcibly dispossessed said Mt. Diablo Company, and thereafter maintained possession of said lands; that on April 19, 1901, defendants, at the instance of the Mt. Diablo Company, and on its behalf, went on the said lands to protect the interest of said corporation, and while thereon were shot at by plaintiff and the other employés of the Superior Sunset Oil Company without cause or provocation, and only returned the fire of said parties in defense of their lives; and that any gunshot wounds received by plaintiff was by reason of said unlawful attack of the Superior Company's employés upon the defendants.

While many exceptions were reserved to the rulings of the court in the admission and rejection of testimony, the points relied on on this appeal relate only to the rejection by the court of evidence tendered by the defendants to show the title of the Mt. Diablo Oil Company to the quarter section in question and the refusal of the court to allow the witnesses of defendants to testify as to their intentions in going upon said land, and to the taking of the advice of counsel relative to their contemplated action in doing so; also, as to the refusal of the court to permit defendants to show that the officers and employés of the Superior Sunset Oil Company were armed with deadly weapons when, on April 14, 1901, they came upon the quarter section where plaintiff was subsequently injured, and that they were armed from that time up to the occurrence out of which plaintiff's injuries were sustained.

Upon the trial of the cause the plaintiff was permitted to show that the quarter section in question was on April 19, 1901, unoccupied public land, and that the Superior Sunset Oil Company on that day took possession of and occupied it; that it built a bunkhouse and cookhouse on the land for its officers and employés, and had been, up to the time of the entry by defendants, engaged in constructing a derrick and placing the necessary machinery for oil-drilling purposes, and the court, as we have heretofore stated, found that said Superior Sunset Oil Company was, at the time of the injury of plaintiff, in the possession and occupancy of said land, claiming it as its own.

When the defendants tendered their evidence to show title in the Mt. Diablo Mining & Development Company to the land, as set up in their amended answer, an objection interposed by counsel for plaintiff that "any question of title is irrelevant and immaterial for any purposes of the case" was sustained, the court stating, "I don't think if they had a United States patent they would have any right to go there and force parties who were there wrongfully off the premises. I am not going to try any question of title." Subsequently, the whole deraignment of title of the Mt. Diablo Mining & Development Company to this quarter section was deemed offered by defendants, objected to and the objection sustained. Under exceptions taken by defendants to both these rulings, the question as to the correctness of such rulings is presented for review.

This appeal was originally heard by the District Court of Appeal for the Second appellate district, and in deciding it, it was held by that court that the rulings of the trial court, rejecting the offer of proof of title, as far as it was interposed as a defense against the claim of plaintiff for actual damages was correct; that the matter of title of the Mt. Diablo Company was not a material issue in the case. The appellate court, however, held that while evidence relative to the title of the Mt. Diablo Company was inadmissible to prove title, as a defense to the claim for actual damages, it was admissible as bearing upon the claim of plaintiff for exemplary damages; that for this latter purpose it was admissible, and was one link in defendants' chain of defense, namely, that the Mt. Diablo Company had rights in the land, which defendants, as officers and stockholders of that company, were endeavoring to protect; that the other links in this chain of defense were to be found in the other evidence sought to be introduced relative to the taking by defendants of the advice of counsel and their intentions in entering upon the land where the shooting took place. In harmony with these views, the appellate court held that it was error to exclude the evidence tendered on all these matters—the title of the Mt. Diablo Company, the taking of advice of counsel and the intentions of defendants—solely, however, because they were admissible as bearing on the question of exemplary damages, and directed that the judgment and order appealed from should be reversed for this error, unless the plaintiff would, within a given time, elect to accept the judgment for actual damages alone, and release that portion of the judgment awarding him exemplary damages. A petition of appellants that the cause be heard and determined by this court, having been granted, the matter is now before us for disposition.

There can be no question but that the District Court of Appeal was right in holding that the evidence offered by the defendants of title in the Mt. Diablo Company to this land, the taking of advice of counsel by defendants as to their contemplated action with reference to entering upon the property in question, and their intentions in doing so, were admissible on the question of exemplary damages. Damages of an exemplary character could only be assessed against the defendants upon a showing of malice in fact as distinguished from malice in law. Under the claim made by plaintiff for exemplary or punitive damages, the good faith and motives of the defendants were directly in issue. And, as bearing on that issue, any facts which tended to show their motive and intent in entering upon the premises in question were admissible. As was properly said by the District Court of Appeal on that subject: "In some forms of action certain facts being shown, a cause of action for actual damages is conclusively established. Even in such cases the evidence so held to be conclusive as to actual damages is at most prima facie evidence only of the right to exemplary damages. Childers v. Mercury, 105 Cal. 289, 38 Pac. 903, 45 Am. St. Rep. 40; Taylor v. Hearst, 107 Cal. 269, 40 Pac. 392. Malice in fact is defined in the former case to be a 'spiteful or rancorous dispositon which causes an act to be done for mischief.' Malice in fact is always a question for the jury. Badostain v. Grazide, 115 Cal. 429, 47 Pac. 118. Under our system, where all persons may testify, a witness may be examined as to the intent with which he did a certain act, where that intent is a material thing in the action. Even in a criminal case a defendant may testify as to the intent with which he entered a building or killed a human being, although, of course, a jury is not bound to believe the witness either in a criminal or civil action. But such testimony is competent and relevant, and not immaterial. Barnhart v. Fulkerth, 93 Cal. 497, 29 Pac. 50; People v. Morton, 72 Cal. 62, 13 Pac. 150; Kyle v. Craig, 125 Cal. 114, 57 Pac. 791." Upon this point it is unnecessary to engage in any further discussion because the claim of appellants that this testimony offered by them was admissible upon the question of exemplary damages is not contested by respondent in his original brief. The claim of error in this respect is not there discussed by counsel for respondent, or authority advanced by him in support of the ruling of the trial court in his briefs. Nor in the supplemental brief of respondent filed on rehearing here is it undertaken to defend the rulings in this regard. All that is insisted on here is that some evidence offered as to the good motives and intentions of the defendants in making entry on the land did not sustain them. But this is beside the point urged here. The question is not what was the effect of the evidence on these points which was admitted, but whether it was error to reject other and additional evidence offered on this subject, and we make no question but that it was. But while we agree with the District Court of Appeal in its views as to the admissibility of all this evidence offered, as far as it went, we are of the opinion that that court took too restricted and constrained a view as to the extent to which proof of title in the Mt. Diablo Company, offered by appellants, was available to them, when it held that such evidence was admissible upon the question of exemplary damages alone.

The amended answer set up that the Mt. Diablo Mining & Development Company was the owner of the land in question on April 14, 1901, and had been forcibly dispossessed therefrom by the Superior Sunset Company on that day; that the defendants as officers, directors, and employés of the Mt. Diablo Company, at its instance and on its behalf, went on said premises on the 19th of that month to protect the interest of the latter company; that while there they were attacked by the employés of the Superior Sunset Company and defended themselves against said attack, and that any injuries sustained by plaintiff were received while defendants were repelling such attack in self-defense. In order words, that the Mt. Diablo Company, at all such dates, as owner of the land, was entitled to the possession of it; that the defendants, as officers thereof, entered only in the exercise of the right of entry possessed by said company as owner of the property, and only used such force against those wrongfully in possession as was necessary to protect them in the exercise and assertion of such right. The view of the District Court of Appeal was that this defense could not be asserted against a claim for actual damages; that although one was the owner and entitled to the immediate possession of property, yet if he attempted to obtain possession of his property by force, and, in doing so, injury was sustained by a trespasser thereon, proof of such right of entry which the owner attempted to exercise, employing no more force than was necessary to expel the trespasser, would be available to him in defense of a claim for exemplary damages only; that the existence of such right, and its exercise, without unnecessary force, would be no defense against a claim of the trespasser for actual damages sustained by him while the owner was asserting his right of entry.

This view, however, is incorrect. The rule obtaining in this state is subject to no such limitation. It is broader and is the rule of the common law. At common law the owner of real estate had the right to enter upon his property to expel by force an intruder, and in doing so was entitled to use all the force necessary to secure possession. Having the right of entry and exercising it, he would not be subject to an action for tort for damages resulting either from his entry or from any assault upon or physical injury sustained by one in wrongful possession, provided he used no more force than was necessary to dispossess him. The trespasser could only maintain an action for damages against the owner, provided an excessive use of force was employed in making the entry or dispossessing him, and then only for that excess. The rule of the common law is the rule which obtains in this state, except in so far as it has been changed by the provisions of the Code relative to the summary remedy provided therein for a forcible entry made upon real property. Under these provisions a right of action is given to one wrongfully in actual possession of property where a forcible entry is made, even by the owner, in which action damages occasioned through the forcible entry may be recovered, and judgment for the restitution of the property had. But the Code prescribes a method of procedure and the extent of the remedy for such forcible entry, and that remedy is exclusive. A person wrongfully in possession, dispossessed by the owner of the property having a right of entry, and no excessive force being used in asserting it, is not entitled to maintain any other action than is afforded for a forcible entry under the Code. He was not entitled to maintain under such circumstances, any action whatever under the common law, and the common law rule has only been changed in this state to the extent, and no further, that the Code affords him a remedy under its provisions referred to which he otherwise would not have.

Having these principles in mind, it will be observed that this action is not brought under the provisions of the Code relative to forcible entry. It is an action brought purely for assault and battery, and is subject to the common-law rule as to such actions, which is that it is a complete defense to their maintenance, either for exemplary or actual damages, if it be shown that the injuries claimed to have been sustained by one wrongfully in possession were sustained while the owner of the property was exercising a right to the possession of his land, although using force to obtain such possession, if no more force was employed than was necessary to accomplish it.

We have said that this rule of the common law applies in this state to actions of this character, and we proceed now to refer to the authorities so declaring. This entire matter—the rule of the common law and the extent to which it has been changed by the summary proceeding for forcible entry under the Code—is so thoroughly considered in the cases to be referred to as to make some quotations from them suffice for any further discussion of the subject.

Referring first to the case of Canavan v. Gray, 64 Cal. 5, 27 Pac. 788, the facts there presented this situation: The defendant Gray, who was the owner of a certain house in which plaintiff was wrongfully in the possession of certain rooms, caused the house to be unroofed and in so doing damaged the personal property of the plaintiff, who brought an action for the injury and obtained a verdict in her favor. The motion of the defendant for a new trial upon the ground of insufficiency of the evidence to sustain the verdict being denied, he appealed. In disposing of the appeal this court said: "The vital question is, can the plaintiff, upon these facts, maintain an action of trespass against the defendant? * * * All agree that at common law the plaintiff could not, upon the facts disclosed by this record, maintain any action whatever against the defendants. It is also conceded that the only change which has been made in the law relating to this subject is that made by the statute which, in this state, as in many others, provides a summary remedy for forcible entry upon or into any real property. It is only as to the extent of the change wrought by this statute that there is any difference of opinion. * * * The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the Code of Civil Procedure, but it establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice. Code Civ. Proc. § 4. An action of forcible entry would be a proceeding under the Code, and its provisions relating to that subject, in such a proceeding, would have to be liberally construed. The Code has established the law of the state respecting that subject. It had provided a remedy and prescribed a course of procedure in cases of forcible entry. And all statutes, laws, or rules on that subject heretofore in force in this state, whether consistent or not with the provisions of the Code on the same subject, are repealed and abrogated. * * * The Legislature has provided a remedy for forcible entry, no matter by whom made. But it has provided only one remedy. Before there was any legislation on the subject a person in the actual rightful or wrongful possession of real estate could maintain trespass against any one, not having a right to enter, for a forcible entry upon it. A person in the wrongful possession could not maintain an action against the owner, having a right to enter, for a forcible entry. But the statute gives a person even in the wrongful possession a right of action, and prescribes its form, against the owner having a right to enter, if he makes a forcible entry. Neither expressly nor by necessary implication does the statute give to a person in the wrongful possession the right to maintain any other than the action of forcible entry when such entry is made by the owner, having the right to enter. The Legislature has provided a particular remedy for a forcible entry made under such circumstances, but we are unable to see upon what principle it can be held that another and different remedy, and one which did not exist at common law, and is not given by statute, is equally available in such a case. * * * As the evidence shows that the premises upon which the alleged trespass was committed were owned by the defendant H. W. Gray, and that he was entitled to the immediate possession of the same, and that the plaintiff was in the wrongful possession thereof, the defendants' motion for a new trial should have been granted on the ground that the evidence was insufficient to justify the verdict."

The other case to which we refer, and which reaffirms the doctrine of Canavan v. Gray, is the case of Burnham v. Stone, 101 Cal. 165, 35 Pac. 627. There, an action was brought by plaintiff against a number of defendants to recover damages for the alleged killing of the wife of plaintiff, Jenny Burnham. Epitomizing the facts as much as possible, it appears that one of the defendants, Levi P. Stone, was the owner of several tracts, according to the government survey, of a section of land in San Diego county, upon one subdivision of which a dwelling house and other buildings were situated. In his absence certain persons named Goings took possession of that portion of the land on which the buildings were located. Stone brought an action against them in the justice's court for forcible entry and detainer, but the complaint did not correctly state the subdivision of the section on which the buildings were located. They were on an entirely different subdivision. He had judgment for the restitution of the premises as described in the complaint, and a writ of restitution was issued and delivered to a constable for service. The constable went to the premises upon which the buildings were situated and demanded that the Goings vacate them, which they refused to do. The constable returned later in the day with the defendants Levi P. Stone and James Stone, and found Mrs. Burnham, the Goings, and others, in the house with the doors barred, and they still refused to vacate. The day following, the constable, the Stones, and others returned, and in an effort to execute the writ, or obtain possession, one of the constable's posse and one of the Goings, Mrs. Burnham, and another, were killed or mortally wounded. The jury returned a verdict against all the defendants, and James Stone appealed.

It appears that the court instructed the jury, at the request of plaintiff, that in going upon the land for the purpose of obtaining possession by force, or show of force, that all the defendants were trespassers, and their entry unlawful, and because thereof, each defendant was liable for the killing of Mrs. Burnham, although the killing was not intended, contemplated, aided, abetted, or advised by him; that if he aided, abetted, or encouraged the unlawful entry upon the premises it was sufficient to fix his liability, and that such entry was unlawful unless the writ of possession covered or included the premises where the homicide occurred.

In passing upon the correctness of this instruction, this court said: "In view of a new trial and of the possibility that the writ does not refer to the buildings as a part of the description of the land, it becomes necessary to consider the instructions upon the supposition that the writ did not cover the premises from which it was attempted to evict the defendants in the writ. In such case the instructions were also erroneous. It is conceded that Levi P. Stone was the owner of the buildings and premises where the homicide occurred, and that he had a right to the possession at that time. Mrs. Burnham made no claim that she was entitled to the possession. Her mother and brother were in possession, and the record shows that when the constable, after demanding that they vacate the premises the morning of the day before the homicide, and being met with a refusal, returned in the afternoon, he found Mrs. Burnham there with the others in the house and the doors barred. She was also there when the constable and owner of the premises returned the next day with the posse, and at least aided and abetted her mother and brother in retaining possession. Under these circumstances, if she had survived, she could not have maintained an action for assault and battery, or for any injury she might have sustained in an endeavor of the owner to obtain possession, even if the effort were forcible. In Canavan v. Gray, 64 Cal. 5, 27 Pac. 788, it was held that where the owner of real property having the right of possession makes a forcible entry, the person in wrongful possession cannot maintain an action of trespass, that the remedy provided by statute for a forcible entry is exclusive. * * * 'And the law, as generally adopted in the United States, may be assumed to be substantially as laid down by Baron Parke. If the owner of land wrongfully held by another enter and expel the occupant, but make use of no more force than is reasonably necessary to accomplish this, he will not be liable to an action of trespass quare clausum, nor for assault and battery, nor for injury to the occupant's goods, although, in order to effect such expulsion and removal, it becomes necessary to use so much force and violence as to subject him to indictment at common law for a breach of the peace, or under the statute for making forcible entry.' * * * The general ground upon which these authorities are based is that at common law trespass would not lie against the owner if he were entitled to the possession, as in such case the person in possession, being in wrongfully, could maintain no action against the owner, unless unnecessary force was used, and that the statutes of forcible entry and detainer having provided a remedy in such cases that remedy is exclusive so far as the wrongful possessor is concerned; but the public being interested in preserving the peace may punish the owner for resorting to force. Canavan v. Gray, 64 Cal. 5, 27 Pac. 788, proceeds upon this ground."

After citing a number of authorities from different jurisdictions in support of this rule, including Sterling v. Warden, 51 N. H. 252, 12 Am. Rep. 80, where it is said: "It is clearly the English law, and as we believe the strongly preponderating opinion of the American courts, that no civil action lies against a landlord for regaining with force the possession of the demised premises, unless there is an excess of force, and then only for such excess"—our court then proceeds to an examination of the instructions referred to, and says: "In the light of these authorities, the instruction that the entry upon the premises by force, or show of force, was unlawful, and that if appellant aided and abetted such entry that he was liable for the death of Mrs. Burnham, though he did not aid, abet, advise, or encourage the actual killing, is erroneous. No liability for damages was created against any of the defendants for the entry upon the land, nor for the expulsion, or attempted expulsion, of the occupants by force, unless more force or violence was used than was reasonably necessary, and no such qualification appears in the instructions given to the jury. It is quite true that appellant did not, in his answer, plead the ownership and right of entry of Levi P. Stone. The case was tried, however, without any apparent reference to the issues made by appellant's answer, and all the facts were given in evidence without objection or limitation. The court stated to the jury the substance of the complaint, that all the defendants, except Freeman, had answered denying the allegations of the complaint, and alleging that Mrs. Burnham and others acting with her first assaulted them; that they used no more force than was necessary to protect themselves from injury, and also alleged facts tending to justify themselves under the writ of restitution. The jury were expressly instructed that the question of the title to the land was not before them; that 'admitting that Stone was the owner of the land, and that Mrs. Goings was wrongfully in possession of it, this gave Stone, or any one acting with or for him, no right to enter upon the land by force, or show of force, and take possession of it, or exclude or remove Mrs. Goings or any one else from the land; and if you find that the defendants went upon the land in the manner and for the purpose mentioned, their entry was unlawful, unless justified for other reasons, and the defendants would be liable for the consequences resulting therefrom.' Counsel for respondents suggest that, the verdict being right upon the evidence, the judgment should not be reversed because of an erroneous instruction. That there are cases where the judgment should stand notwithstanding an erroneous instruction is not questioned; but where the erroneous instruction is such as to cut off a substantial defense on the merits the rule suggested can have no application. The case was not tried upon a theory which would justify this court in looking at the evidence to determine whether unnecessary force was used by defendants, and that became a vital question, assuming that the writ did not cover the premises upon which the entry was made by them."

It is clear from these authorities that one who is in possession of real property without right cannot maintain an action of trespass on his person—assault and battery—against the owner of the property, having a right to its possession, or against those, acting at his instance or in his behalf, who make a forcible entry thereon to dispossess him, where no more force than is necessary is used to make the entry effective.

The defense interposed by the defendants here was that the Mt. Diablo Company had a right of entry upon the property in question as the owner thereof and that they entered upon it on behalf of such owner in the exercise of such right. In support of the existence of this alleged right of entry and as a basis for its exercise, they were entitled to prove ownership of the property in the Mt. Diablo Company if they could do so, and the trial court, in refusing to permit them to do it, prevented them from making a defense which they had pleaded and which, if proven as pleaded, would have been a valid defense to the recovery of any damages by the plaintiff, either exemplary or actual.

It is claimed by the respondent that the principle of law declared by the authorities to apply to actions for assault and battery for injuries growing out of the exercise of the right of entry by the owner of land to dispossess those who are trespassers upon it, applies only between conflicting claimants to land; that the rule can have no application in a case where a mere employé (such as it is claimed respondent was) who had no interest in a contest between the rival claimants to the possession of land, and is simply on the premises by virtue of his employment, is injured by the owner in exercising the right of entry against his trespassing employer. We perceive no force in this contention. If the Mt. Diablo Company had the right of entry on the lands in question, the defendants, acting for it, in the exercise of that right were entitled to dispossess all persons who were on the premises, whether officers or employés of the Superior Sunset Company, and to exercise all necessary force to do so. They owed no different duty to the employés of the Superior Sunset Company who were upon the premises than they did to the officers of the company who were there. Their sole duty as to all occupants was to use no more force than was necessary to effectuate their removal and obtain full possession, and their responsibility to any of them injured thereby was only for any excessive use of force employed in doing so.

It is further insisted on behalf of respondent, as we understand his brief on rehearing, that the judgment should not be disturbed, as far as it awarded actual damages, for any error in the admission of evidence of ownership of the land by the Mt. Diablo Company, because it clearly appears from the evidence that the force and violence used by defendants in making the entry upon the premises, and as a result of which plaintiff was injured, was so excessive, unnecessary, and unreasonable that the judgment would have had to be the same whether evidence of ownership had been admitted or not. This proposition is doubtless made upon the theory that this court might make the same alternative order on this appeal as did the district court of appeal. Undoubtedly this court could do so if a proper case was presented for such action. But, as was said in Burnham v. Stone (as to a similar suggestion that the judgment there should be affirmed notwithstanding the error committed by the trial court), when the effect of the action of the trial court is to cut off a substantial defense upon the merits, the rule invoked has no application. The case at bar was tried on an erroneous theory which, as in the Burnham Case, would not justify this court in looking into the evidence to determine whether unnecessary force was used by defendants. Whether unnecessary force was used was a vital question under the pleadings in the case, and its solution depended largely on whether the Mt. Diablo Company had a right of entry upon the premises or not. The defendants, acting for it, could only employ force to eject those in possession of it if it had. The court not only refused to permit defendants to show that the Mt. Diablo Company was the owner of the property with a right of entry thereon, but, while refusing to permit the proof, actually made a finding against defendants on these matters. The court further found that the defendants were trespassers ab initio on the property on the night of the conflict; that the "said defendants had no right or business on said lands and were there in violation of law." Of course, under such a view, the trial court must necessarily have concluded that the use of any force employed by the defendants was entirely unwarranted and illegal; that the question as to the degree of force used by the defendants was a false quantity in the case, as the defendants had no right to be upon the land at all or employ any force whatever against those in possession. It is apparent that under these circumstances the case was tried upon an entirely erroneous theory under which the defendants were precluded from making a defense whereby it could be properly determined by the court whether the force employed by them was necessary only or excessive.

As to the last point made by appellants relative to the exclusion by the court of evidence that the Superior Sunset people were armed with deadly weapons when they came upon the property in question, and were so armed while in possession and up to the night of the entry by defendants: We think such evidence should have been admitted in connection with all the other circumstances attending the dispute over the possession of the property. Under the authorities cited, even if the Mt. Diablo Company had a right of entry to dispossess the Sunset people as trespassers, still the defendants, acting in its behalf, would be justified in using only necessary force for that purpose, and liable for any damages the result of the use of excessive force. If the officers and the employés of the Superior Sunset Company entered into possession of the property armed, and remained armed, this fact would be proper to be taken into consideration in determining whether the defendants acted reasonably and in good faith and without malice in making their entry upon the premises also armed, and as bearing upon the question whether they were using only reasonable force in doing so. This disposes of the only points on the appeal made before the District Court of Appeal or on rehearing here.

As the trial court erred in rejecting the evidence offered by the defendants on the matters we have discussed, the judgment and order appealed from are reversed, and a new trial ordered.

We concur: SLOSS, J.; SHAW, J.; ANGELLOTTI, J.; McFARLAND, J.; HENSHAW, J.

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153 Cal. 152

ANAHEIM UNION WATER CO. et al. v. ASHCROFT et al. (L. A. 1,932.)

(Supreme Court of California. Feb. 29, 1908.)

1. PARTITION — WATERS—EASEMENTS—OPERATION OF DECREE.

Tenants in common of land bordering on a stream and severally in possession of particular tracts thereof, subsequently allotted to them by a partition decree, jointly constructed a ditch from the stream across one of the tracts, and diverted water on their tracts for irrigation. The partition decree did not mention the ditch nor refer to water rights. *Held*, that under Civ. Code, § 1104, providing that a transfer of real property passes all easements attached thereto, etc., an easement in the tract over which the ditch was constructed for the benefit of the other tracts passed under the decree as appurtenant to the latter tracts to the extent that the ditch was at the time of the decree obviously and permanently used to irrigate the tracts, and to such part of the tracts as had been actually irrigated from it.

2. WATERS—PRESCRIPTION—EVIDENCE—SUFFICIENCY.

On the issue whether a right by prescription to use on tracts of land the water of a ditch across another tract, was acquired, evidence *held* not to show a continuous use of the water for five years necessary to the acquisition of a prescriptive right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 156.]

3. SAME.

Satisfactory proof of a continuous, open, notorious, and uninterrupted use of waters on lands for irrigation for five years, when the use is of such a character as to indicate that the same is being exercised in hostility to the right of any person to interfere with the exercise, is sufficient proof of a claim of right to use it, sufficient to ripen into a right by prescription.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, §§ 149–151.]

4. SAME.

On the issue whether a right by prescription to use on tracts of land the water of a ditch across another tract was acquired, evidence *held* to show that the use of the water for five years was sufficiently open to warrant a finding of a prescriptive right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 156.]

Department 2. Appeal from Superior Court, Riverside County; J. S. Noyes, Judge.

Action by the Anaheim Union Water Company and others against Theodore Ashcroft and others. From a judgment for defendants, plaintiffs appeal. Affirmed in part and reversed in part.

Richard Melrose and E. E. Keech, for appellants. Gill & Densmore, Lafayette Gill, and G. R. Freeman, for respondents.

LORIGAN, J. The Santa Ana river flows along and forms the southeasterly boundary of the Rancho el Rincon in Riverside county. In 1870 the defendant Antonio Aros, one of the parties to this action, and Vicente Fernandez, J. J. Alvarado, and Ynez Yorba de Cota, the predecessors in title of the other parties, were tenants in common of a large portion of said rancho, and severally in possession of particular tracts thereof, which were subsequently allotted to them in partition, and are referred to in this action as the

Cota, Fernandez, Alvarado, and Aros tracts. In the year referred to all said co-tenants entered upon the said Santa Ana river and jointly constructed a main ditch, and diverted water from said stream down across the lands of the Cota tract. From this ditch Fernandez, Alvarado, and Aros severally constructed branches and diverted water upon their several tracts of land. These tracts in possession of Fernandez, Alvarado, and Aros lay upon Chino creek, which flowed southerly through them, and constituted a tributary of said Santa Ana river. The Fernandez tract lay south of the Aros tract, and the Alvarado tract north of it. The Cota tract lay to the east of the lands in possession of these other tenants in common and along the Santa Ana river, and portions thereof were irrigated from such ditch constructed through said land. Portions of the lands of Fernandez, Alvarado, and Aros lying east of the Chino creek were also irrigated by the use of said ditch and the branches therefrom conducting the waters of said Santa Ana river on to their lands. This use of said water continued until the year 1873, when, by a final decree of partition, the several tracts of land in possession of said co-tenants were allotted to each of them in severalty. No mention whatever was made in the partition decree as to the ditch or ditches constructed over the lands, nor was reference made to any water or water right. The plaintiffs in this action are the successors in interest of J. J. Alvarado and Ynez Yorba de Cota to the Alvarado and Cota tracts. The defendant Aros is one of the original co-tenants, the Aros tract of which he was in possession when the ditch was constructed and the water brought on his land having been allotted to him under the partition decree. The defendants Ashcroft succeeded to the interest of Vicente Fernandez, to whom the Fernandez tract was allotted. The ditch referred to was variously known as the "Fernandez ditch," the "Durkee and Cota ditch," and the "Durkee ditch." On the trial it was usually spoken of as the "Durkee ditch," and we shall refer to it by that name.

The amended complaint in the action, filed September 10, 1904, alleged the ownership of plaintiffs of their lands, the existence and use of the ditch over them, with branches extending upon the lands of the defendants Ashcroft and Aros; that the Ashcrofts were entitled to use said ditch for the purpose of conveying the waters of the river, in a reasonably prudent manner, for the irrigation of 27 acres of their land, and that the defendant Aros was entitled to use said ditch in like manner for the use of 40 acres of the Aros tract; that the Ashcrofts claimed the right to use, and without plaintiffs' consent had used, the ditch and its waters for the irrigation of all their land, and that the defendant Aros claimed the right, and without the consent of plaintiffs had used, the ditch for irrigating 80 acres of his land; that all the defendants intended and threatened to continue such use until they would acquire a right by prescription. The prayer of the complaint was that the defendants should be enjoined from irrigating more land than they were entitled to. Both defendants answered, taking issue upon the amount of land they were entitled to irrigate from said ditch, the Ashcrofts alleging that they were entitled to irrigate their entire tract of land, and the defendant Aros that he was entitled to irrigate 120 acres of the Aros tract. Defendants set up also that they had acquired against the plaintiffs by adverse use for the statutory period, the right to water all their said lands, as alleged in their answers.

Findings and judgment were made and entered in favor of the defendants, the court finding that by adverse user the Ashcrofts were entitled to water from said ditch 98.78 acres of their land, and the defendant Aros had acquired, in the same manner, a right to irrigate from said ditch 100 acres of his said land. The court further found that the defendants were the joint owners of an interest or easement in the premises of the plaintiff, consisting of a right of way for the water of the ditch across the lands of plaintiffs in its usual carrying capacity, and of the right to conduct across the land of plaintiffs by means of such ditch upon the lands of the defendants such quantities of water as were reasonably necessary to prudently and properly irrigate 98.78 acres of the lands of the Ashcrofts and 100 acres of the lands of Aros; that said easement or servitude was attached to the several lots of land owned by the defendants, and the defendants were entitled to a decree quieting and establishing their right and title to said easement against the plaintiffs to that extent. Plaintiffs appeal from the judgment and from an order denying their motion for a new trial, their motion having been based on the insufficiency of the evidence to sustain the findings, and that the decision was against law.

Preliminary to a consideration of the merits of the appeal it may be said that, according to maps used on the trial it appears that the lands of Ashcroft and Aros lay on either side of the Chino creek, which runs southerly through them; that by far the largest portion of their lands lay to the east of said creek and nearest to the main ditch from the Cota tract constructed by the co-tenants jointly, and from which the branches onto these lands to the east side of the creek were originally constructed by the co-tenants severally in possession of them. The entire tract belonging to the defendant Aros involved in this action and lying on either side of said creek contains 144.96 acres. The entire tract of the defendants Ashcroft, similarly located, consists of 98.78 acres. The land of Aros west of the Chino creek, which he claimed he had the right to irrigate from the Durkee ditch, and which claim the trial court sustained, consists of 15.60 acres. The lands of Ashcroft on that side of said creek, which he also asserted he had the right to irrigate from said Durkee ditch, and which the findings of the court sustained, consisted of several pieces or fields. All the other lands of the defendants which the court found they were entitled to irrigate lay east of said Chino creek. We refer to the particular situation of the lands of defendant Aros east and west of said creek, because in our opinion the findings of the court relative to them must be treated separately under the evidence as we have examined it.

This brings us to the merits of the appeal, and the contention of appellants thereon may be stated briefly. It is that by the decree in partition there vested in Fernandez and Aros an easement to use the Cota tract now belonging to plaintiffs over which the Durkee ditch had been constructed and passed in the same manner and to the same extent only as such property was obviously used for the benefit of their lands at the time they were allotted to them in severalty under such partition decree; that at that time the evidence shows Fernandez was using said Durkee ditch to irrigate, at most, but 27 acres of land on the east side of said Chino creek, and Aros 80 acres of his land on the same side; and that no additional enlargement of the easement in favor of any lands of either has been acquired by prescription or otherwise. The legal proposition asserted by appellants is undoubtedly correct. The co-tenants, Cota, Alvarado, Aros, and Fernandez, before the partition, having by the joint construction of the Durkee ditch created an easement in the Cota tract for the benefit of the Aros and Fernandez tracts, such easement passed under the decree of partition, vesting these tracts in Fernandez and Aros, respectively, in severalty as appurtenant thereto. But the extent of the easement in the ditch over the Cota tract which passed under the decree of partition as appurtenant to the Fernandez and Aros tracts is to be determined as of the time of said partition decree. The Cota tract was only impressed with an easement in favor of the other tracts to the extent that the ditch across it was, at the time of said decree, obviously and permanently used to irrigate lands of said tracts. It attached as an easement appurtenant only to such lands of the tract as had been actually irrigated from it. Civ. Code, 1104; Cave v. Crafts, 53 Cal. 135. Applying this rule here, as it is quite apparent from the evidence, as contended by appellants, that at the time of the partition decree not more than 27 acres of the Fernandez tract now owned by the Ashcrofts and not more than 80 acres of the Aros tract was being irrigated from the Durkee ditch, the easement appurtenant to these tracts extended at the time of the partition decree to those quantities of land only upon which the water was being actually used. If a more extended easement than was appurtenant to these specific quantities of land in the tracts has been created and become appurtenant to other lands therein, it must have been created, as the court found, by prescription. And this brings us to a consideration of the main point made by appellant, that the evidence does not support the finding of the court that an easement as to such additional lands had been acquired by prescription.

Examining the evidence on this claim of appellants, first, as far as it affects the finding in favor of the defendant Aros, while in the complaint it is alleged that Aros had used the Durkee ditch to irrigate 40 acres of his tract at the time of the partition decree, the appellants now admit that at the date the evidence shows that he was actually irrigating 80 acres east of the Chino creek, and concede that a finding of the court of an easement appurtenant to said 80 acres would have been unobjectionable. The finding of the court is a general one as to the acreage in favor of Aros—that he had acquired a prescriptive right to irrigate 100 acres of his land without mention as to the location of said lands with respect to the Chino creek. This finding, however, necessarily embraced within the land he was entitled to irrigate from said Durkee ditch the lands owned by him on the west side of the Chino creek. This tract on the west was estimated by some of the witnesses as containing 20 acres of land which had been irrigated by Aros, and the court must have concluded that it contained that acreage because, as Aros only claimed to have irrigated 80 acres on the east side, in order to warrant the general finding that he was entitled to irrigate 100 acres of land, the court must have found that he was entitled to irrigate 20 acres on the west side of the creek. It is apparent, however, that the statements of the witnesses that 20 acres on the west side of the creek was irrigated were but estimates simply as an actual survey made at the instance of defendants, and the accuracy of which was not questioned on the trial clearly shows that but 15.60 acres could be, or were, irrigated from the line of the originally constructed ditch as it then showed on the ground. This, however, in the view we take of the finding of the court, in as far as it includes any of the land of Aros west of the Chino creek within the 100 acres he is entitled to irrigate from said Durkee ditch, is unimportant. While, as we have said, the finding is conceded by appellants to be sustained by the evidence as to the 80 acres east of the Chino creek, it is strenuously contended that it is not sustained by the evidence as to any land included in it to the west, and we are satisfied that their claim in that respect is correct.

The original complaint in the action was filed in August, 1904. It is not claimed that Aros ever used any water from the Durkee ditch to irrigate his land west of the Chino creek until 1897 or 1898, and the finding in his favor could only be sustained on evidence showing that prior to the commencement of the action he had acquired a right by adverse user of the waters of the ditch for the statutory period of five years. The evidence falls far short of any such showing. It is doubtful whether it was in 1897 or 1898 that he and others undertook to convey the waters of the Durkee ditch to the west side of Chino creek. But assuming, as we must, in favor of the finding that it was in 1897, it then appears that in that year Daniel Durkee, predecessor in interest of plaintiffs to the Alvarado tract, and John Main, predecessor in title of the Ashcrofts to the Fernandez tract, and Francisco Serrano, a tenant of Aros, put a flume across the Chino creek near the north line of the Alvarado tract (then owned by Durkee) for the purpose of carrying water from the Durkee ditch to the lands of the Alvarado, Aros, and Fernandez tracts on the west side, and a portion of the lands of Aros on that side were irrigated therefrom that year. This flume was not a success, and was taken out the next year, and Serrano and the Ashcrofts, who had then purchased from Main, took their portions of the flume, and with them constructed another flume across the Chino creek, near the boundary line between the Ashcroft and Aros properties. This flume, when they undertook to use it, they found was not constructed high enough to convey the waters from the ditch, and the following year they raised the flume and brought the waters across, and Aros irrigated his lands therefrom. This was in 1899. This tract was again irrigated in 1901, and in that year the flume was destroyed by a flood occurring prior to August, 1901, and the tract not thereafter irrigated.

It is quite apparent from this evidence that no right by prescription to the use of the water of the Durkee ditch was acquired for the benefit of the lands of Aros to the west of Chino creek. A continuous irrigation of this land for five years could not be found from the evidence. Assuming that the first flume above the Alvarado property was put in in January, 1897, which is the earliest date at which any witness places its construction, it was washed out in August, 1901, and never replaced. There were therefore not five years between those dates. There were at most something over four. And even during that time a flume had not been so constructed whereby Aros could have brought the water into the Durkee ditch to his land on the west side. Nor, even while the flume was capable of conducting water to the tract, was there a continuous use of it from said ditch for the irrigation of said lands during the period it could have been used. The flume constructed in 1898 was incapable of carrying the water across in that year, and during the period when the water could be carried on the lands its use there did not exceed three years —1897, 1899, and 1901.

From these considerations, while we are satisfied that the evidence sustains the finding of the court and is conceded in favor of Aros as to an easement appurtenant to the 80 acres of his land east of the Chino creek, it does not sustain the finding as to a similar right in favor of the lands west of Chino creek. Now as to the Fernandez tract owned by the defendants Ashcroft. This tract was rented from John Main, heretofore referred to, by the Ashcrofts in 1898, and purchased by them from him in 1899. The evidence showed that from 1898 at least and up to the commencement of this action the Ashcrofts had irrigated their entire tract, as found by the court, both east and west of the Chino creek from the waters of the Durkee ditch. The appellants admit that the evidence was sufficient to support the finding as to the area irrigated and the time for which it was used. Their claim is that the evidence does not sustain the finding that the use was open, notorious, or adverse, or under claim of right, and it is further insisted that the irrigation of said lands was not all had from the Durkee ditch. As to the claim that there was no evidence of a claim of right to the use of the waters. There was some evidence of an express declaration by the Ashcrofts when using the waters that they were taking them to irrigate all their lands, and that they had a right to do so. Appellants, however, question the efficacy of the evidence in that regard. But, assuming there was no express declaration, it was not essential to support a right by prescription that there should be. Satisfactory proof of a continuous, open, notorious, and uninterrupted use of the waters on their lands for the statutory period, and of such a character as to unquestionably indicate that the use was being exercised in hostility to the right of any person to interfere with its exercise, was sufficient proof that they claimed a right to use it. It was not necessary to declare such right any further than their conduct indicated it. And that the evidence shows that they irrigated all their lands continuously through the statutory period of five years from the Durkee ditch, and did so openly, notoriously, and uninterruptedly, and under a claim of right, is so obviously apparent from the evidence that it would serve no useful purpose to discuss it.

While, as we have said, it is conceded by appellants that the finding of the court as to the area irrigated and the time for which the water was used is supported by the evidence, it is claimed that such irrigation was not entirely had from the Durkee ditch, and that such irrigation from it as was had was not open and notorious. This point is made under the evidence which discloses that for the entire statutory period during which the Ashcrofts were irrigating their land, in addition to the laterals run from the branch Durkee ditch, they also took the water from such branch near the northeast corner of their lands and ran it through a low place between their lands and the lands of Aros, conducting it into the Chino creek above a dam which they had constructed across said creek. Having impounded the waters there, they then conducted part of them, by a gravity ditch having its intake above the dam, southerly along and across their lands on the east side of Chino creek, and by means of a pump also pumped the water from said dam into a ditch on the west side of the creek and irrigated their lands situated thereon. It is insisted by appellants that such taking was not open and notorious, but clandestine. We think not. If the Ashcrofts had constructed a ditch from the main branch ditch to the dam in Chino creek and conducted the waters thereto, it could not be claimed that such a taking was not open and notorious. That they took the water directly from the branch ditch was entirely obvious. And if the trend of the land therefrom—the swale sloping towards Chino creek—furnished a natural channel through which the waters could be conducted to the dam in the creek, there was no necessity to construct an artificial one. Nor can it be said that the impounding by the dam of the waters in the Chino creek and their conduct over the lands on the east by means of the ditch therefrom, and their distribution to the lands on the west from the pumping plant, was not equally open and notorious. The contention is that, as the Ashcrofts were riparian owners along both sides of the Chino creek, their action in pumping and running water from the dam by means of the ditch would only indicate the exercise of a riparian right to the waters of the Chino creek. But, aside from the fact that they were turning the water for all these years from the main branch ditch into the dam during the irrigation season, and were taking water out of it for irrigation purposes, the evidence shows that during the irrigation season there is no water in the Chino creek which can be utilized for practical irrigation. The evidence shows that all the water which would accumulate in the Chino creek above the dam during the night in the irrigation period could be pumped out in an hour—at the most in an hour and a half; that it would not furnish anywhere near the amount of water plainly used by the Ashcrofts in irrigating their land from the dam during the irrigation season. The Ashcrofts could have done nothing further than was done by them, which would indicate to the plaintiffs that they were asserting a right to use the waters of the Durkee ditch by means of the impounding dam in the Chino creek. And what was done was sufficiently open, as the court found, to meet the requirement of the statute of proof of that element in establishing a prescriptive right.

There is nothing further in the case requiring discussion. The judgment and order as to the defendants Ashcroft are affirmed, with costs. For the reason that the finding of the court that the defendant Aros was entitled to use the water of said Durkee ditch as an easement appurtenant to 100 acres of his land is not sustained by the evidence, the order denying appellants' motion for a new trial as to him and his tenant Serrano, who is jointly sued with him, is reversed, as is also the judgment in their favor; appellants to recover their costs.

We concur: HENSHAW, J.; SLOSS. J.

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153 Cal. 146

PHILLIPS v. PRICE et al. (L. A. 1,626.)

(Supreme Court of California. Feb. 29, 1908.)

1. EQUITY—ADEQUACY OF LEGAL REMEDY.

Equitable relief cannot be had except where plaintiff is without a plain, speedy, and adequate remedy at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 151–163.]

2. CREDITORS' SUIT—CONDITIONS PRECEDENT—EXHAUSTION OF LEGAL REMEDIES.

A judgment creditor garnished the sums due to debtor from a third person in possession, as executor, of money belonging to the debtor, no part of which had been paid to him. The third person refused to make any statement to the sheriff of the money in his possession, or to pay any part of it to the sheriff on the execution. The judgment creditor proceeded under Code Civ. Proc. § 717 et seq., to obtain an order requiring the third person to appear and answer concerning his indebtedness to the debtor. He appeared and denied any indebtedness, testifying that the debtor's distributive share had been paid before the making of the decree of distribution. The judgment creditor caused the execution to be returned unsatisfied. On the hearing the justice ordered the third person to pay into court, within a specified time, a designated sum to be applied toward the satisfaction of the judgment. The third person obtained an injunction against the enforcement of the order. *Held*, that the judgment creditor was entitled to maintain a creditors' bill against the third person without first obtaining, as provided by section 720, an order authorizing an action.

3. SAME.

Where it does not appear whether or not the person alleged to hold property or to be indebted to the judgment debtor will claim the property or deny the debt, proceedings supplementary to execution may afford relief, and a judgment creditors' bill does not lie; but, where such person claims title to the property or denies the debt, a judgment creditors' bill lies, without first pursuing the statutory proceedings under Code Civ. Proc. § 720, which can merely give a right to sue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Creditors' Suit, §§ 67–72.]

4. SAME.

Code Civ. Proc. § 720, directing the court to authorize a judgment creditor to institute an action against a person having property of the judgment debtor or being indebted to him on such person claiming an interest in the property or denying the debt, makes no distinction between tangible property claimed to be held by one for the debtor and a debt claimed to be due to the debtor, and the Code makes the same provisions for both cases.

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by A. Phillips against Andrea Price and others. From a judgment for defendants, after sustaining a demurrer to the amended complaint, plaintiff appeals. Reversed.

F. A. Dorn, for appellant. McD. R. Venable and C. P. Kaetzee, for respondents.

SLOSS, J. The demurrer to plaintiff's second amended complaint was sustained. Plaintiff declined to further amend, and appeals from the resulting judgment against him.

The complaint is in two counts, and the question is whether either states a cause of action. The first count alleges the following facts material to the point to be discussed: In 1898 a judgment was obtained in a justice's court against W. B. Price for $253.43. This judgment, now amounting to $340.65, no part of which has been paid, has been assigned to the plaintiff. After such assignment plaintiff caused an execution to be levied by garnishing all sums of money due the judgment debtor from the defendants herein. It is alleged that at the time of such levy the defendants, as executrix and executors of the will of one John M. Price, deceased, were in possession of $1,063.58 belonging to such judgment debtor; such sum having been, by a decree of distribution in the estate of said John M. Price, determined to be due to W. B. Price as a legatee under the will. At the time of the levy no part of said sum of $1,063.58 had in fact been expended by the defendants. Said defendants refused to make any statement to the sheriff of the money in their possession, or to pay any portion of it to the sheriff on the execution. The plaintiff thereupon proceeded, under section 717 et seq. of the Code of Civil Procedure to obtain an order requiring defendants to appear before the justice to answer concerning their indebtedness to W. B. Price. They appeared and denied any indebtedness, testifying that W. B. Price's distributive share had been paid to him more than 10 days before the making of the decree of distribution. The plaintiff thereupon caused the execution to be returned unsatisfied. On the hearing the justice ordered the defendants to pay into court within 10 days the sum of $340.66, to be applied toward the satisfaction of the judgment. The defendants obtained from the superior court an injunction restraining the justice from enforcing this order. It is further alleged that since the levy of the execution the defendants, with attempt to delay the judgment of the debtor's creditors, have paid to him his said distributive share. In all essential respects the second count is the same, except that it sets out a judgment for a different amount against Carlota Vidal, another beneficiary under the will of John M. Price. The steps taken to enforce the collection of this judgment were the same as those taken in the case of W. B. Price. Both counts may therefore be discussed together.

It is conceded by the respondents that, if there were no statutory provisions for proceedings supplementary to execution, the complaint would be sufficient as a "creditors' bill," that is, it would state a case for relief by a court of equity to subject to the satisfaction of the judgment creditor's claim assets which could not be reached by execution. But it is contended—and such is undoubtedly the settled law of this state—that, since our statutes have provided a method of reaching such assets by supplementary proceedings, there is no longer, in cases where the statutory method is adequate, any ground for the interposition of equity. In Herrlich v. Kaufmann, 99 Cal. 271, 33 Pac. 857, 37 Am. St. Rep. 50, the court said: "Formerly assets of a judgment debtor which could not be effectively seized by the sheriff under an execution, such as a debt owing to the defendant, could be reached, upon a proper showing, through a court of equity by means of a creditors' bill or suit; but in this state, and in most of the other states, a legal remedy is afforded by statutes providing for proceedings supplementary to execution, and the general rule is that, when there are such statutory proceedings, they must be pursued." See, also, Adams v. Hackett, 7 Cal. 201; Pacific Bank v. Robinson, 57 Cal. 522, 40 Am. Rep. 120; Habenicht v. Lissak, 78 Cal. 357, 20 Pac. 874, 5 L. R. A. 713, 12 Am. St. Rep. 63; Matteson, etc., Co. v. Conley, 144 Cal. 483, 77 Pac. 1042. It was accordingly held in Herrlich v. Kaufmann that a judgment creditor who has served a notice of garnishment upon a person indebted to the judgment debtor, without having taken any of the statutory steps provided by sections 717 to 720 of the Code of Civil Procedure, cannot maintain a creditors' bill in equity against the garnishee to reach the indebtedness. And this rests upon the doctrine, applicable generally to proceedings in courts of chancery, that equitable relief cannot be had except where the plaintiff appears to be without a plain, speedy, and adequate remedy at law.

On the other hand, where the statutory proceedings supplementary to execution do not for any reason afford an adequate remedy, relief by creditors' bill may still be had. Lewis v. Chamberlain, 108 Cal. 525, 41 Pac. 413; Rapp v. Whittier, 113 Cal. 429, 45 Pac. 703. In Lewis v. Chamberlain, where the judgment creditor sought, by proceedings supplementary to execution, to reach property alleged to have been fraudulently transferred by the judgment debtor, it was held that the court had no jurisdiction to compel the transferee who claimed title to the property to surrender it, or subject it to the satisfaction of the judgment. In answering the argument that the proceeding, being a substitute for a creditors' bill, should be given the same scope as such bill, the court said that the Code provisions "could not take the place of a creditors' bill, where, as here, the judgment debtor had conveyed the property to a third person who claimed title under such conveyance." In Rapp v. Whittier, where there had been a void transfer of the personal property of the judgment debtor and the transferee claimed title, a creditors' bill was sustained, although no proceedings supplementary to execution had been taken. The court said: "Since appellant asserted title under the transfer from Robbers (the judgment debtor), and adversely to him, it would have profited plaintiffs nothing to pursue the course provided by the statute. In the face of that claim they could not, by supplementary proceedings, reach the fund held by appellant. In such a case those proceedings do not supersede the remedy by action, for the reason that they are not adequate to accomplish the purpose of the action."

The present case seems to present the same situation as that considered in Rapp v. Whittier. There the defendant denied that he had any property belonging to the judgment debtor, asserting title in himself. Here the defendants denied that they owed anything to the judgment debtor, claiming that the debt had been paid before the levy of the execution. The same reason exists here that existed in the former case for holding that proceedings supplementary to execution would not have been of avail to the plaintiff. Such proceedings could not, in view of the denial of liability, have enabled the plaintiff to reach the fund without an action. The plaintiff here did indeed attempt to pursue the statutory method, and obtained an order for the payment by defendants of the amount due. But the enforcement of such order was stayed by judgment of the superior court, doubtless for the reason that the denial of liability, at least in the absence of bad faith (Parker v. Page, 38 Cal. 526), deprived the justice of power to order the payment. Upon such denial of liability the only order that could be made was one authorizing the plaintiff to institute an action to recover the debt. Code Civ. Proc. § 720. It is urged that plaintiff was bound to obtain such order before commencing any suit; that until he had done so he had not exhausted his legal remedies. But the same argument would have required the denial of relief in Rapp v. Whittier. Section 720 provides for an order authorizing suit, where it appears that the person alleged to have property belonging to the judgment debtor, or to be indebted to him, "claims an interest in the property adverse to him, or denies the debt." Yet the plaintiff in the Rapp Case was permitted to maintain his bill without obtaining leave to sue. The true ground of the decision in Rapp v. Whittier was that proceedings supplementary to execution are not an adequate remedy whenever they cannot, in themselves without the aid of an independent action, result in subjecting the property—whether tangible or a mere chose in action—to the payment of plaintiff's claim. Such condition exists wherever it appears that the person who is charged with holding property belonging to the judgment debtor, or with being indebted to him, claims title to the property, or denies the debt. In either case an action is necessary, and the plaintiff may proceed by creditors' bill, without first pursuing statutory proceedings, which could not give him anything more than a right to sue. On the other hand, where it does not appear whether or not the person alleged to hold property or to be indebted will claim the property or deny the debt, proceedings supplementary to execution may afford all the relief required and they must be pursued. Herrlich v. Kaufmann and Matteson, etc., Co. v. Conley, are such cases.

We can see no ground for distinguishing between the case of tangible real or personal property claimed to be held by a third party for the debtor, as in Rapp v. Whittier, and that of a debt claimed to be due the debtor. The Code section (720) makes the same provision for both cases.

For these reasons we think that each count of the complaint stated a cause of action, and that the demurrer should have been overruled.

The judgment is reversed.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

BEATTY, C. J. I concur in the judgment of reversal, but not in the view that a judgment creditor may neglect compliance with the provisions of section 717 et seq., Code Civ. Proc., merely because a garnishee has denied any indebtedness to the judgment debtor. I think he must still apply for a citation to the garnishee to answer under oath before the court or judge as provided in section 717, and do everything required of him to secure an admission of the indebtedness, for such an admission will entitle him to an order for payment without action—the main object of the summary proceeding prescribed by the statute. But if he fails to secure such admission, it then becomes the imperative duty of the court or judge to make an order authorizing him to institute an action. If the court or judge refuses or fails to make such order, the statutory proceeding has failed to afford him relief, and he is remitted to his remedy as it existed before the statute. In this case it appears from the allegations of the complaint that the plaintiff did everything required of him to secure an order authorizing him to sue, and that it was not granted. It is wholly immaterial that the complaint does not show a specific request for, and express denial of, such an order. A case was presented which made it the duty of the justice to make the order, but instead of doing so he made a wholly different order—one unwarranted by the facts, and one which he had no power to enforce. This may be regarded as a refusal to make the proper order, and allowed the same effect. The defendants are in no position to complain of this construction, for the order authorizing suit in any case in which the garnishee denies the alleged indebtedness is a mere form. Whether it is granted or denied, a right of action immediately accrues to the judgment creditor; and whether it is in form an action under the statute, or in equity, because the statute has failed to afford relief, the issues are precisely the same.

I concur: ANGELLOTTI, J.

(153 Cal. 162)

FLEMING v. HANCE, City Treasurer.

(L. A. 2,159.)

(Supreme Court of California. Feb. 29, 1908.)

1. Constitutional Law—Retroactive Operation—Amendment—Validating Unconstitutional Law.

An unconstitutional provision in a freeholder's charter establishing a police court is not validated by a subsequent amendment to the Constitution authorizing the creation of police courts by freeholders' charters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 27–29.]

2. Courts—Establishment—Courts of Inferior Jurisdiction—Constitutional Provisions—Municipal Courts.

Const. art. 11, § 8½, authorized a provision in freeholders' charters establishing police courts. Article 6, § 1, vested the judicial power of the state in certain specified courts "and such inferior courts as the Legislature may establish in any incorporated city or town. * * *" Amendment of article 11, § 6, of 1896 (St. 1897, p. 641, c. 25), exempts charter cities from legislative interference in "municipal affairs." *Held*, that section 8½ is permissive merely, and where no charter provision has been adopted the Legislature retains the authority to establish a police court and provide that the city must pay the salary of the judges.

3. District and Prosecuting Attorneys—Nature of Office—"Public Officer."

A prosecuting attorney is a public officer, because he represents the sovereign power of the people of the state by whose authority and in whose name, under Const. art 6, § 20, all prosecutions must be conducted, and not because of his relation to the court.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 4933–4951; vol. 8, pp. 7772–7773.]

4. Same—Compensation.

The authority of a Legislature to establish a police court and place the burden of its support on the city does not authorize imposing on the city the obligation to pay the salary of the prosecuting attorney.

5. Same.

St. 1901, p. 95, c. 81, as amended by St. 1907, p. 850, c. 465, provides for the appointment of prosecuting attorneys for police courts, and makes it the duty of such prosecuting attorneys to attend the sessions of the police courts and conduct all prosecutions for public offenses. *Held*, that the statute conflicts with Const. art. 11, § 5, requiring the Legislature to provide by general laws for the election or appointment of district attorneys and to prescribe their duties, Pol. Code, § 4256 (County Government Act 1897, p. 488, c. 277, § 132), making it the duty of district attorneys to "conduct on behalf of the people all prosecutions for public offenses, and St. 1889, p. 472, c. 1, § 49, making it the duty of a city attorney to prosecute all criminal cases arising upon violations of the charter or ordinances, and Const. art. 11, § 6, exempting charters from legislative control in municipal affairs, and is invalid so far as it imposes on the city the duty of paying the salary of prosecuting attorneys for prosecuting offenses either under the statute generally or under the charter or ordinances, and its invalidity is not affected by St. 1901, p. 96, c. 81, providing that the fines imposed by the police courts shall be paid into the city treasury.

In Bank. Application for writ of mandate by E. J. Fleming against C. H. Hance, city treasurer of the city of Los Angeles. Transferred to Supreme Court. Writ denied, and proceeding dismissed.

Hartley Shaw and E. J. Fleming, for petitioner. Leslie R. Hewitt, City Atty., Lewis R. Works, Asst. City Atty., and Emmet H. Wilson, Chief Deputy, for respondent.

SLOSS, J. The petitioner applied to the district court of appeal for a writ of mandate directing the treasurer of the city of Los Angeles to pay the petitioner's demand for salary as prosecuting attorney of the police court of said city. The court of appeal, after a hearing following the issuance of an alternative writ, granted a peremptory writ, whereupon the matter was by this court ordered to be transferred here for hearing and determination.

No issue of fact is raised by the respondent, the only question being whether the facts alleged by the petitioner entitle him to the relief sought. The Legislature passed in 1901 an act creating, in cities of the first and one-half class (to which the city of Los Angeles belongs), a police court, with jurisdiction over all misdemeanors committed in the city, as well as all proceedings for violation of any city ordinance and actions for the collection of licenses required by city ordinances. St. 1901, p. 95, c. 81. Section 7 of the act provided for the appointment by the city attorney of a prosecuting attorney and an assistant prosecuting attorney of said police court, each to receive a salary payable out of the treasury of the city. It is made the duty of these attorneys to attend the sessions of the police court, and conduct, on behalf of the people, all prosecutions for public offenses. In 1907 this section was amended, the changes consisting in increasing the number of prosecuting attorneys from two to four, increasing their salaries, and giving the power of appointment to the district attorney of the county instead of the city attorney. The designation of the duties of the prosecuting attorneys was also changed in a manner to be mentioned hereafter. St. 1907, p. 850, c. 465. The petitioner was, pursuant to the provisions of this amendment, appointed by the district attorney of Los Angeles county as prosecuting attorney of the police court of the city, and performed services as such. It is conceded that he is entitled to receive the salary which he seeks by this proceeding to collect, if the statute making such salary payable out of the city treasury is not in conflict with the Constitution. Pursuant to the provisions of article 11, § 8, of the Constitution, the city of Los Angeles framed and adopted a freeholders' charter, which was ratified by the Legislature in January, 1889. St. 1889, p. 456, c. 1. This charter made provision for the establishment of a police court (article 10, St. 1889, p. 486, c. 1), but inasmuch as section 8½, art. 11, of the Constitution, authorizing the creation of police courts by freeholders' charters, had not then been adopted, this provision was held to be inoperative. People v. Toal, 85 Cal. 333, 24 Pac. 603. And the fact that the Constitution was subsequently amended by the addition of section 8½ did not operate to revive or validate the charter provision which was void from its inception. Ex parte Sparks, 120 Cal. 395, 52 Pac. 715. The grant contained in section 8½ is permissive merely. Where a freeholders' charter has, pursuant to the authorization of that section, created a police court, the power of the Legislature to create, within the city, another police court, maintainable at the expense of the city, is, as is held in Graham v. Mayor, etc., of Fresno (Cal.) 91 Pac. 147, at an end. But where, as is the case here, the city has not taken advantage of the permission extended by section 8½ to include in its charter a valid provision for the organization of a police court, the Legislature still has, under article 6, § 1, of the Constitution, power to create police or other "inferior courts" in any incorporated city or town. In cities which have not assumed control of the subject-matter of such courts the scope of legislative control remains, notwithstanding the adoption of section 8½, as broad as it was before. Nor is the legislative power as to such cities limited by the constitutional amendment of 1896 (St. 1897, p. 641, c. 25), to section 6 of article 11, exempting charter cities from legislative interference in "municipal affairs." The theory of the Graham Case is that where a city, pursuant to section 8½, does provide in its charter for a police court, the subject-matter of such provision becomes a municipal affair. But it has never been held, and there is no reason for holding, that the mere adoption of section 8½ makes the creation and organization of police courts a municipal affair as to a city governed by a freeholders' charter, where such charter has not dealt with the subject of police courts. In the absence of charter provision, the Legislature retains the power originally vested in it with reference to inferior courts throughout the state.

It is thoroughly settled by the decisions of this court that the Legislature had the power, prior to the constitutional amendments in question, not only to establish police or other inferior courts in municipalities, but to provide for the payment of the salaries and office rent of the judges or justices of such courts out of the city treasury. Jenks v. Council, 58 Cal. 576; Bishop v. Council, 58 Cal. 572; Coggins v. City of Sacramento, 59 Cal. 599. It would seem to follow, from the views above expressed, that in cities governed by charters which have made no provision for police courts (or other inferior courts exercising similar functions) the Legislature may still, notwithstanding the adoption of section 8½ and the amendment of section 6 of article 11 of the Constitution, provide that the city must pay the salaries of police judges or city justices created by general law. It might be difficult, if it were a new question, to reconcile the imposition upon the city of the burden of maintaining a "part of the judicial system of the state" (People v. Cobb, 133 Cal. 74, 65 Pac. 325) with the well-established principle that, under our system, municipal funds can be appropriated only for municipal purposes (Conlin v. Board of Supervisors, 114 Cal. 404, 46 Pac. 279, 33 L. R. A. 752; Graham v. Fresno, supra). It is said in the majority opinion in Graham v. Fresno, supra, that "the only ground upon which the decisions heretofore cited upholding the provision for the payment of salaries and office expenses of city justices by municipalities can be sustained is that such justices, under the law then in force, in addition to being justices of the peace with the same jurisdiction as township justices, were also police judges performing municipal functions." Whatever view may be taken regarding these decisions, we feel that they express the settled doctrine of this court, and that the power of the Legislature to charge upon the city treasury the expense resulting from the establishment of police or other inferior courts (except in cities which have provided by charter for a police court) is no longer open to question.

If the Legislature has, under article 6, § 1, of the Constitution, power to establish this court, and to make its cost a charge upon the city treasury, is the prosecuting attorney a part of that court, the burden of maintaining which may, as we have seen, be imposed upon the city? If he is, his salary may, under the rule just stated, be made payable out of the city treasury. On the other hand, if he is not a part of the court, the question arises whether the prosecution of criminal causes in the police court is so far a duty of the municipality as to justify the Legislature in imposing its cost upon the city. We think it cannot be said that the prosecuting attorney is in any sense material to this inquiry a part of the court. No doubt the presence of attorneys to aid the court is a usual, if not an indispensable, condition to the disposition of judicial business. Attorneys are frequently said to be officers of the court, in the sense that they have the privilege of presenting the causes of their clients before the court, and are subject to its control in the performance of their duties. Cohen v. Wright, 22 Cal. 315. To this extent all attorneys practising before a court are its officers, but they are not, merely by reason of being licensed to practice in the courts, public officers. Cohen v. Wright, supra. In criminal cases the attorney representing the defendant is as much an officer of the court as is the attorney conducting the prosecution. Each represents a party to a controversy to be determined by the court. In the determination of this controversy the court is impartial. It is not concerned in the success of either party. The prosecuting attorney is, it is true, a public officer, but the public nature of his employment results from the fact that he represents the sovereign power of the people of the state, by whose authority and in whose name all prosecutions must be conducted. Const. art. 6, § 20. It is his relation to his client, not to the court, that makes him a public officer. He does not perform a function of the court to any greater extent than his adversary does. In Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109, a court is defined as "a tribunal presided over by one or more judges, for the exercise of such judicial power as has been conferred upon it by law." The attorneys who appear and represent parties in litigation are not a part of such tribunal, and the mere fact that the cost of maintaining the tribunal is a proper municipal charge does not authorize the Legislature to impose upon the city the obligation of paying such attorneys.

It remains to be considered whether, without regarding the prosecuting attorney as a constituent part of the police court, the duties imposed upon him are so far municipal in their nature that their cost may be made a charge upon the municipal treasury. By the provisions of section 7 of the act under consideration, as amended in 1907, it is made the duty of "said prosecuting attorney and said assistant prosecuting attorneys to attend the sessions of said police court and conduct, on behalf of the people, all prosecutions of public offenses, both misdemeanors and felonies, of which said court has jurisdiction, except criminal cases arising upon violation of the provisions of the city charter or ordinances, which shall be prosecuted by said prosecuting attorney and assistants when requested by the city attorney of said city, who may deputize said prosecutors for said purpose." Here are two classes of cases which it is, or may become, the duty of the prosecuting attorneys to conduct on behalf of the people: First, those involving a violation of the state law or a county ordinance; second, those involving a violation of the city law (charter or ordinance). The prosecution of the first class of offenses cannot be said to be any part of the duty of the municipality. The offenses are created by general state law or county ordinance, and are punishable under such law or ordinance whether committed within or without the limits of a municipality. The burden of so prosecuting is to be assumed by the state or the counties into which the state is, for governmental purposes, subdivided, and it has, in fact, always been so assumed in this state. The state has provided a general system of inferior courts, operating throughout every portion of each county, and having jurisdiction over offenses of this class. Code Civ. Proc. §§ 103, 115. The Constitution (article 11, § 5) requires the Legislature to provide, by general and uniform laws, for the election or appointment in the several counties of district attorneys, and to prescribe their duties. By general law it is made the duty of the several district attorneys to "conduct, on behalf of the people, all prosecutions for public offenses" in their respective counties. Pol. Code, § 4256; County Government Act, § 132; St. 1897, p. 488, c. 277. The duties thus uniformly imposed upon county officers do not become municipal in character merely because they are to be exercised within the limits of a city. The prosecution of offenses against the state law or a county ordinance not being, then, a municipal duty, the Legislature cannot impose the cost of performing this function upon the city. "We are not aware," said this court, in Conlin v. Supervisors, supra, "that it has been held * * * that the Legislature has power to appropriate the funds of a municipality to the discharge of an obligation against the entire state, or to direct the payment of such funds for any other purpose than pertains to the municipality itself." See, also, Sinton v. Ashbury, 41 Cal. 525; Hoagland v. Sacramento, 52 Cal. 142; Graham v. Fresno, supra.

The qualified duty of prosecuting for violation of the charter or city ordinances, imposed upon the prosecuting attorney by the act in question, presents a different question. It may well be said that prosecutions of this character, i. e., for offenses which are punishable solely by reason of the organic act or the legislative action of the city itself, may properly be regarded as included within the functions of the city, and so to be paid for by it. But the city has, in its charter, assumed and provided for this duty. By section 49 of the Los Angeles charter (St. 1889, p. 472, c. 1) it is made the "duty of the city attorney to prosecute in behalf of the people all criminal cases arising upon violations of the provisions of this charter and city ordinances." If the prosecution of such offenses is a part of the duty of the city, in other words, if it is a "municipal affair," this provision of the charter must control as against an act of the Legislature, by reason of the constitutional amendment exempting charters from legislative control in municipal affairs. Const. art. 11, § 6. The two provisions, that of the charter and that of the statute, are necessarily inconsistent, and cannot both be operative. If the city attorney is to prosecute all cases of this character, none can remain which are to be conducted by the prosecuting attorneys. It is suggested that the prosecutors, when acting at the request of the city attorney, become his deputies, and therefore act for him. But the charter certainly does not contemplate that any officer shall have power to appoint assistants or deputies who shall receive salaries out of the city funds, unless provision for such appointments and salaries has been made either by the charter itself or by ordinance. Sections 16, 66.

It follows that as no municipal function is to be performed by the prosecuting attorneys appointed under this act their salaries cannot be made a charge on the city treasury, and that the act, in so far as it attempts to so direct the payment of such salaries, is inoperative and void. This conclusion is in no way affected by the fact that the fines imposed by the police court are, under section 6 of the act establishing the court (St. 1901, p. 96, c. 81), paid into the city treasury. The Legislature was not bound to turn this source of revenue over to the city; but its doing so did not authorize it to compel the city to pay expenses not properly chargeable to it. The salaries in question are not payable out of the fines collected, nor is the obligation to pay them made contingent upon the presence in the treasury of enough money, derived from fines, to pay them. It is therefore immaterial that in the past year the amount of fines collected may have exceeded the total of all salaries payable under the act.

The views expressed make it unnecessary to consider further points urged in opposition to the granting of the relief here sought.

The writ is denied, and the proceeding is dismissed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

SHAW, J., deeming himself disqualified, does not participate in the foregoing.

(153 Cal. 100)

PACIFIC ELECTRIC RY. CO. v. CAMPBELL-JOHNSTON et al. (L. A. 1,903.)

(Supreme Court of California. Feb. 27, 1908.)

1. SPECIFIC PERFORMANCE — CONTRACTS ENFORCEABLE — CONTRACTS FOR CONSTRUCTION OF RAILROAD—MUTUALITY OF REMEDY.

Since under general equity principles, and under Civ. Code, § 3386, providing that neither party to an obligation can be compelled specifically to perform it unless the other party thereto has performed, or is compellable specifically to perform its obligations, the remedy of specific performance must be mutual, and since a contract to construct and operate a railroad cannot be specifically enforced, a contract by defendant to convey a right of way in consideration of plaintiffs constructing and operating a railroad across the land could not be specifically enforced by plaintiff, there being no mutuality of remedy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 9–11.]

2. SAME—CONTRACTS FOR CONTINUOUS ACTS DURING LONG PERIOD.

Equity will only decree specific performance where the subject-matter of the decree is capable of being embraced in one order and is immediately enforceable, and will not decree specific performance when the duty to be performed is a continuous one, extending possibly over a long period of time, and which, in order that the performance may be made effectual, will necessarily require the constant personal supervision and oversight of it by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 210.]

3. SAME—PART PERFORMANCE.

Where plaintiff agreed to construct an electric railroad extending from one city across defendants' lands and thence to another city, about one-third of the road to be on defendants' land, in consideration whereof defendants agreed to grant plaintiff a right of way over their lands, and also deeded certain land as a bonus, the construction of the other two-thirds of the road only was not such substantial performance on plaintiff's part as entitled it to enforce specific performance of the contract by defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 125–139.]

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the Pacific Electric Railway Company against A. Campbell-Johnston and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Bicknell, Gibson, Trask, Dunn & Crutcher (Edward E. Bacon, of counsel), for appellant. Borden & Carhart and Hunsaker & Britt, for respondents.

LORIGAN, J. This action was brought to compel the specific performance of a contract. The contract, which is made the basis of the claim of plaintiff for a specific performance, is set forth in full in the complaint. It was executed by all the parties to the action on February 2, 1903, and its preliminary recitals disclose that the San Rafael Ranch Company was the owner of a large body of land lying between the cities of Los Angeles and Pasadena, a portion thereof, on the northeasterly boundary, being within the limits of the latter city, and the company was also the owner of a bridge across the Arroyo Seco near such northeastern boundary, and within said city limits; that the Campbell-Johnstons had acquired franchises from the city of Los Angeles and from the county of Los Angeles to construct and operate street railroads from the city of Los Angeles to the western boundary of the land of said San Rafael Company, and also contemplated purchasing a franchise then offered for sale on February 3, 1903, by the city of Pasadena for a street railroad over the streets of the said city within and near the northeast boundary of the land of said company; that the said San Rafael Land Company owned land on both sides of portions of the streets and lines of the right of way mentioned in the Pasadena franchise, and was interested in the construction and operation of a street railroad upon the lines so indicated; that all the parties of the second part were interested in having a single or double track electric railway operated over the lines described in said ordinances across said bridge, and also over the lands of the parties of the second part upon the lines of the street railway as heretofore surveyed; and that the Pacific Electric Railway Company was willing to construct and operate such railway over the lines aforesaid under the terms and conditions hereafter expressed.

Following the recitals, it is then provided that the said parties of the second part, in consideration of the agreements, covenants, and conditions hereinafter contained, agreed to be kept and performed by the party of the first part, do hereby agree, if so requested to do, "to assign, transfer and set over to the party of the first part those certain ordinances, hereinbefore mentioned, granted by the city of Los Angeles, and by the board of supervisors of Los Angeles county, and to assign, transfer and set over to the party of the first part that certain ordinance hereinbefore mentioned, to be offered for sale in the city of Pasadena on the third day of February, 1903, if they, or either of them, acquire the same; and also to grant to the party of the first part the right to construct its railroad track over the bridge hereinbefore mentioned * * * and operate its cars thereover. * * * And the said parties of the second part further agree for the consideration aforesaid to convey to the Los Angeles Land Company, or such other person or corporation as the party aforesaid may direct, that certain tract of land containing forty acres" (describing it). The contract then declares that "in consideration therefor the party of the first part agrees that upon obtaining the franchise from the city of Pasadena hereinbefore mentioned, and securing the rights of way over the lines as above indicated, such right of way to be not less than forty feet in width on the surface, with such additional width as may be required for the slopes in the fills and excavations necessary in the construction of said roadbed; and the 40-acre tract of land hereinbefore referred to, it will proceed and construct, and operate a railroad, the cars thereon to be propelled by electricity, over the lines above mentioned"; and "in the event that the parties of the second part fail to acquire the rights of way and franchise necessary for the construction and operation of the railroad upon the lines indicated in the ordinance granted by the city of Los Angeles, and the ordinance granted by the board of supervisors of Los Angeles county; and such other rights of way over private property as herein contemplated; and to convey the forty acres of land hereinbefore mentioned, and the right to operate its cars over the bridge hereinbefore mentioned—then the party of the first part shall be released from all obligations in law or equity to construct or operate a road upon the lines hereinbefore mentioned." The contract then declares that "the intention and purpose of the parties hereto is that the parties of the second part are to furnish a free right of way from the junction of Marmion way and Pasadena avenue, upon the line of the railroad heretofore surveyed crossing the Arroyo Seco at or near the bridge now constructed, hereinbefore referred to, and extending the same to and over the line described in that certain ordinance granted by the trustees of the city of Pasadena, to be sold on the 3rd instant, as hereinbefore mentioned; and the acquiring by the party of the first part of said franchise to be granted by the trustees of the city of Pasadena as hereinbefore provided. And in the event that the said party of the first part acquires such right of way and said franchises, and the forty acres of land hereinbefore mentioned to be conveyed to the Los Angeles Land Company, then the party of the first part is to proceed as soon as practicable, to construct said railroad and continue the construction thereof in good faith until the same is completed, and thereafter to operate cars thereover, and said deed conveying said forty acres is to be placed in escrow with a bank to be agreed upon and to be delivered upon the completion and the operation of said road." These are the material portions of the contract.

Having set forth the terms of the contract and the description of the right of way, conveyance of which is sought, the amended complaint then alleges that plaintiff constructed an electric railroad according to the provisions of the franchise granted by the city of Pasadena, referred to in the agreement, through the streets of said city to the northeastern boundary of said tract of land belonging to defendants, and under the franchises granted by the city of Los Angeles and by the county of Los Angeles, constructed its electric road from the city of Los Angeles to the western boundary of said land of defendants, and ever since the construction of said electric railways plaintiff has maintained and operated the same as an electric railroad, with well-equipped cars for the carriage of passengers thereon; that the defendants purchased the franchise of the city of Pasadena, referred to in the contract, and, subsequently, assigned it to plaintiff; that, though demanded to do so, defendants have refused to transfer and convey to plaintiff the franchises granted by the board of supervisors of the county of Los Angeles and by the city council of the city of Los Angeles; that about September 8, 1904, plaintiff caused to be surveyed through said tract of land belonging to defendants a right of way from the connection of its electric railway at the said northeasterly boundary of said tract of land, and from this to the connection with plaintiff's railway at the western boundary thereof, which said right of way for an electric railway to connect with plaintiff's line as aforesaid is over the same general route as the prior survey of the lines of a street railway through said lands mentioned and referred to in said contract of February 2, 1903, and is the one which is described in the complaint; that said survey referred to in the contract was a preliminary survey only in order to determine the feasibility of constructing an electric railway through the said land of defendants; that said preliminary survey formed the basis of the survey for the final location of the right of way described in the complaint, and was so surveyed and located by the plaintiff under the direction and with the consent of the defendants, and the defendants accepted the said final location of said right of way and survey, and platted their lands in lots and blocks with reference to, and in conformity with, said final location of said right of way; that the defendants, though requested, have refused to transfer and convey and deliver the possession of said right of way to plaintiff to enable it to construct its railroad thereon and thereover in accordance with the terms of said contract; that, though demanded, defendants have refused to execute a deed conveying said 40-acre tract of land, specified in said contract, to the Los Angeles Land Company, and to place the same in escrow, to be delivered to said Los Angeles Land Company upon the completion and operation of said road; that, expecting and believing the said promises and agreements of defendants would be fully performed in accordance with said contract, plaintiff constructed the portions of said electric railway alleged to have been constructed; that said portions of said railway were constructed by plaintiff at great expense, and as a part of the continuous line of railway contemplated to be constructed in accordance with said contract, and for the purpose of connecting the said lands of the defendants with, and to furnish transportation between, the same and the said city of Los Angeles and the said city of Pasadena; that the total length of said continuous line of railway is approximately 3.83 miles; that the length of the portion already constructed is approximately 2.78 miles; that the length of the portion remaining unconstructed, to wit, the portion extending across the said lands of defendants, is approximately 1.05 miles; that plaintiff has been ready and willing, and is still willing, to fully perform the contract on its part, and now offers to construct its railroad through said tract of land in connection with the portions of said line of railway theretofore constructed, and to continue the operation of the whole of said line of railway in accordance with the terms of the agreement. Other allegations of the complaint we omit as not bearing on the points presented on this appeal.

The prayer of the amended complaint is for a decree requiring defendants to execute conveyances to plaintiff of the right of way through the land of the San Rafael Company described in the complaint, and of the rights and franchises acquired from the city of Los Angeles and the county of Los Angeles; that defendants execute a deed of the 40-acre tract described in the complaint to the Los Angeles Land Company, and that it be placed in escrow, and on completion of the line of railroad of plaintiff over said right of way and along the line described in said franchises, referred to in the agreement, and operating the same, the said deed be delivered to said Los Angeles Land Company. A demurrer, general and special, interposed to the amended complaint, was sustained, and, plaintiff declining to further amend, judgment was entered against it. This appeal is from the judgment, and the only point involved in it is as to the correctness of the ruling of the court in sustaining the demurrer.

It is conceded by both parties to this appeal that the demurrer was sustained on the general ground that the amended complaint did not state facts sufficient to constitute a cause of action, the principal reason stated by the court in sustaining it being that the contract relied on was not capable of specific performance, for want of mutuality of remedy to both parties to it. Respondents, while so conceding and relying on that ground here in support of the ruling of the lower court based on it, insist that, the demurrer being sustained generally, the ruling is supported, not only for the principal reason given by the lower court, but upon the further ground that the contract relied on is too vague and uncertain in its material terms to entitle plaintiff to specific performance.

While this latter point is pressed here by respondents with as much earnestness as the point upon which it is conceded the ruling was based, we think it unnecessary to burden this opinion with a discussion of it. If the court was right in holding that the plaintiff was not entitled to such specific performance for lack of mutuality of remedy under the contract sued on, that is the end of the action as far as this appeal is concerned, and we think the ruling of the court below in sustaining the demurrer on that ground was correct.

It is well-settled general doctrine that specific performance of a contract at the instance of one of the parties to it will not be enforced in equity, unless the contract is of such obligatory nature upon both parties that, at the suit of either against the other, the court would decree specific performance. This is equally the rule under the Code, which provides: "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation either completely or nearly so, together with full compensation for any want of entire performance." Civ. Code, § 3386.

The remedy of specific performance must

be mutual, and the test of mutuality of remedy is applied by considering whether the agreement under which the remedy is asserted is of such a character that, at the suit of either, a court of equity would decree specific performance against the other. In applying this test, if it appears that the right to this remedy is not reciprocal, it is not available to either party to the contract. When there is no such mutuality of remedy equity refuses to interfere, and leaves the parties to assert their rights under the contract in a court of law.

As declared in the leading case in this state on this subject—Cooper v. Pena, 21 Cal. 404—"the remedy must be mutual, as well as the obligation, and when the contract is of such nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other." And reiterating and sustaining the doctrine of Cooper v. Pena in its application to different contracts where specific performance was sought, but denied for want of mutuality of remedy, are Anson v. Townsend, 73 Cal. 418, 15 Pac. 49; Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; Los Angeles, etc., Co. v. Occidental Oil Co., 144 Cal. 533, 78 Pac. 25.

Having in mind this doctrine, that there must exist a mutuality of remedy in order to warrant specific enforcement of their contract by either party against the other, it is quite clear that no such mutuality exists under the contract upon which this action is based. When we examine that contract, it appears therefrom that the agreement on the part of plaintiff is to "build and operate" a railroad, and as appears from the complaint, in advance of construction of any part of its railroad over the lands of the defendants, it is seeking to compel them to convey a right of way to plaintiff over such lands, and a further conveyance of what is apparently a bonus of 40 acres of land.

Now, if a court of equity at the suit of the defendants could not decree specific performance against plaintiff of the agreement on its part to construct and operate the railroad, then plaintiff cannot enforce specific performance against defendants to convey the right of way and the 40-acre bonus because there is a lack of mutuality of remedy.

It will be observed, as we have said, that the contract on the part of plaintiff is "to construct and operate" a railroad, and under the authorities a court of equity cannot decree specific performance of a contract of that character. In Wood on Railroads, vol. 1, § 210, p. 708, on the subject of Actions for the Specific Performance of Contracts to Convey Rights of Way, it is said: "It (equity) will not decree specific performance of contracts which by their terms stipulate for a succession of acts; * * * such as agreements to repair or build, to construct works, to build or carry on railways, mines, quarries, and other analogous undertakings." In Pomeroy on Specific Performance of Contracts the author says (section 312), while discussing the right to specific performance of contracts: "Finally, contracts which by their terms stipulate for a succession of acts, whose performance cannot be consummated by one transaction, but will be continuous, and require protracted supervision and direction, with the exercise of special knowledge, skill, and judgment in such foresight—such as agreements to repair or build, to construct works, to build or carry on railways, mines, quarries, and other analogous undertakings—are not as a general rule specifically enforced." While the contract of plaintiff is both to "construct and operate" a railroad, the authorities hold that a contract providing either for the building or the operation of a railroad cannot be specifically enforced. Strang v. Richmond, P. & C. R. R. Co., 101 Fed. 511, 41 C. C. A. 474; Texas, etc., Ry. Co. v. Marshall, 136 U. S. 407, 10 Sup. Ct. 846, 34 L. Ed. 385; Oregonian Ry. Co. v. Oregon Ry. & Nav. Co. (C. C.) 37 Fed. 733; Wharton v. Stoutenburg, 35 N. J. Eq. 266; Ewing v. Litchfield, 91 Va. 575, 22 S. E. 362; Suburban Con. Co. v. Naugle, 70 Ill. App. 384. Of course, if a contract which provides either for the building only or for the operation only of a railroad cannot be specifically enforced, a covenant providing for both the construction and operation could not be.

Aside from these authorities in other jurisdictions the case of Lattin v. Hazard, 91 Cal. 87, 27 Pac. 515, appears to be decisive to the effect that the contract here in question is of such a nature as not to be enforceable specifically. In that case it appears that suit was brought to compel specific performance of a contract to convey lands in consideration of the building of a railroad and its operation for a period of not less than 10 years. The road was built, but had not been operated for the required period when the action was brought. This court held that specific performance of the contract to convey could not be enforced at the suit of plaintiff; that there was a want of mutuality of remedy under the contract, as the operation of the road for the stipulated period was a substantial and important part of the obligation of plaintiff which had not been performed, and of which specific performance could not be decreed at the suit of defendant. This conclusion of the court, stated generally in the case cited, that specific performance of the stipulation in the contract to operate the road for 10 years could not be enforced by defendant against plaintiff, was undoubtedly based (though there was no particular discussion of the point) on the general rule we have adverted to—that equity cannot enforce the specific performance of a contract to build or operate railroads. And it is of no moment to the application of the rule that the stipulation is for the operation of such roads for a stipulated period or generally. Equity cannot specifically decree their operation at all.

The case of Stanton v. Singleton, 126 Cal. 657, 56 Pac. 146, 47 L. R. A. 334, which was an action to compel specific performance of a contract for the erection of a quartz mill and opening and developing a quartz mine, is also in point, this being one of the undertakings as to which, with the building and operating of a railroad, Pomeroy states equity will not decree specific performance. The case last cited, and the reasoning applied there in denying specific performance, is equally applicable here. We pursue the consideration of this point no further. We have been cited to no authority in the briefs of appellant, and our own examination has failed to disclose any, where it has been held that specific performance may be decreed to enforce a contract such as the one involved here. The rule, as we have seen, is to the contrary, and as defendants would be precluded under its application from obtaining a decree for specific performance against plaintiff to enforce the construction and operation of the railroad provided for had they sued to obtain such a decree, the plaintiff is equally precluded from maintaining an action to compel specific performance on the part of defendants. As both parties to the contract are not entitled to have it specifically enforced, there is a want of mutuality of remedy, and neither one is entitled to the aid of equity to enforce its specific performance against the other. Whatever rights they have must be enforced in an action at law.

It is, however, insisted by appellant that the general rule requiring mutuality of remedy is subject to the exception that when a party has substantially performed his part of the contract he may compel specific performance by the other party. And, in this regard, it is insisted that as it is apparent from the contract that the parties contemplated the construction of an interurban line, extending from the city of Pasadena across the lands of defendants and thence into the city of Los Angeles, there to connect with the railway system of plaintiff already in operation there, and as plaintiff has performed the major part of its obligation by constructing and operating its line from said cities to the boundaries on either side of said lands of defendants, this constitutes a substantial compliance with the contract on its part, which removed the want of mutuality of remedy existing at the inception of the contract between the parties, and now entitles plaintiff to a decree of specific performance.

Undoubtedly the want of mutuality in the right to specific performance existing at the inception of the contract may be removed, and is removed, when there has been had a full or substantial performance of the contract. And, in the matter at bar, if the construction and operation of the railroad to the extent that it is alleged to have been done can be said to constitute a substantial performance of the agreement to construct and operate it in its entirety, then plaintiff would be entitled to specific performance. The substantial execution by plaintiff of its obligation would give present mutuality to the contract, although in its inception the contract lacked it. Spiers v. Urbahn, 124 Cal. 110, 56 Pac. 794. But it is quite evident from the allegations of the complaint that the agreement on the part of plaintiff relative to the railroad has not been substantially complied with. Conceding that, in contemplation of the parties under the contract, the road was to be constructed and operated from Pasadena to Los Angeles over the lands of the defendants, it is admitted that it has not been constructed over such lands. There is still nearly one-third of the road to be constructed and operated. The most that can be said is that the road has been largely constructed, but it certainly cannot be said that if nearly one-third of it is still to be constructed and operated that the contract on the part of the plaintiff has been substantially complied with. The fact is that the road has only been constructed and operated as far as plaintiff can construct it in view of the alleged refusal of defendants to convey the right of way, a conveyance of which, with other conveyances, plaintiff seeks now to specifically enforce. And it is also true that plaintiff offers in its complaint to perform its part of the contract, and complete and operate the road over the lands of defendants. But neither the refusal of the defendants to permit the construction over their lands, nor the willingness of plaintiff to do so, have any bearing in the application of the equitable principle that where there is no mutuality of remedy there can be no decree for specific performance. Every action for specific performance is predicated upon the refusal of the defendants to perform the terms of a contract which the plaintiff considers equity should compel him to perform. So that refusal to do so is of no moment as far as the right to such specific performance is concerned. Neither does the willingness or offer of the plaintiff to do, what otherwise it could not be specifically required to do, confer the right to compel it from the other party. If this were true then in the present instance the plaintiff could, by expressing its willingness and offering to complete the road from Pasadena to Los Angeles over the lands of defendants, have demanded of defendants conveyances of the right of way and the 40-acre bonus involved here, and on their refusal to make them and without having completed any part of such road, but reiterating in the complaint its offer and willingness to do so, have demanded specific performance of the defendants. The application of the equitable rule that equity will not specifically enforce a contract to complete or operate a railroad, or other analogous undertakings, is not based upon the inclination or disposition of the parties to the contract. Equity cannot specifically enforce a contract for the performance of service; and the construction and operation of a railroad comes within this category. The rule is applied because such undertakings are not of the character that a court of equity will undertake to enforce. Courts of equity only decree specific performance where the subject-matter of the decree is capable of being embraced in one order and is immediately enforceable. It will not decree specific performance when the duty to be performed is a continuous one, extending possibly over a long period of time and which, in order that the performance may be made effectual, will necessarily require the constant personal supervision and oversight of it by the court. Particularly is this true with reference to the construction and operation of railroads, which are enumerated by Pomeroy as among the undertakings concerning which specific performance will not be decreed, because, among other things, they require protracted supervision and direction of the court, with the exercise of special knowledge, skill, or judgment in their oversight. So that, in those special and exceptional contracts mentioned by him, including the one under consideration here, as it is impracticable, if not impossible, to supervise and control any decree which the court might make relative to them, it will not undertake to specifically enforce them at all.

Now, as there is a large and substantial part of the road still to be constructed and operated by the plaintiff, it cannot be said that there has been such a performance of the contract so as to bring plaintiff within the exception to the general rule. The reason of the rule still applies, and, under the principle of the decisions, a court of equity could no more effectually decree a specific performance on the part of plaintiff as to this portion of the road still to be constructed and operated than it could as to the entire road, the construction of which it is claimed was in the contemplation of the parties. The want of mutuality of remedy originally existing under the contract, and which precluded plaintiff from asserting a right to specific performance, could only be removed by a full or substantial performance on its part, and, as the contract is far from being so substantially performed, the want of mutuality still exists, and specific performance cannot be decreed.

There are many other reasons urged by appellant why a court of equity should decree specific performance under the facts alleged in the complaint. They commend themselves to us as general, equitable principles, but cannot be applied here, because the rule of equity, that specific performance of contracts of the special character involved here will not be enforced for want of mutuality of remedy, is so well established that it may not be departed from, and the parties must be left to assert such remedies as they have under the contract in an action at law.

For the reasons given, the demurrer was properly sustained, and the judgment appealed from is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

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153 Cal. 136

ORENA et al. v. NEWLOVE et al. (L. A. 1,926.)

(Supreme Court of California. Feb. 27, 1908. Rehearing Denied March 26, 1908.)

1. Boundaries—Deeds—Construction.

Under Code Civ. Proc. § 2077, prescribing rules for construing the description in a deed when the construction is doubtful and there are no other sufficient circumstances to determine it, and providing in subdivision 2 that when permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount, where the northwestern boundary of a tract was a real boundary defined by a straight line between permanent monuments, the position of which was known to both parties, a call in a deed conveying land out of the tract for a round price for that boundary prevailed over erroneous calls for courses, distances, and quantity based on an erroneous subdivision survey of the tract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 42-46.]

2. Deeds—Construction Against Grantor.

Grants of land from the state are construed most strongly against the grantee, but as between private parties grants are construed most strongly against the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 235.]

In Bank. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by Dario Orena and others, as executors, etc., against Joseph H. Newlove and others, as executors, etc. From a judgment for defendants, and from an order refusing a new trial, plaintiffs appeal. Affirmed.

Bishop, Wheeler & Hoefler, and Charles S. Wheeler (J. F. Bowie, of counsel), for appellants. B. F. Thomas and Richards & Carrier, for respondents.

BEATTY, C. J. This is an action to quiet title, the complaint containing the usual allegations of ownership by plaintiffs, and of assertion by defendants of an invalid adverse claim of an estate and interest in the demanded premises. The land in dispute is a portion of the Los Alamos Rancho in Santa Barbara county, which was patented by the United States to Jose Antonio de la Guerra —the Mexican grantee—in September, 1872, in conformity to the plat and field notes of a survey made by a United States surveyor in 1860. The plaintiffs deraign title by devise and mesne conveyances from the devisee of De la Guerra. The defendants, at the commencement of the action, were in possession of the land, claiming under mesne conveyances from Jose Antonio Feliz, to whom De la Guerra made a conveyance by bargain and sale deed in August, 1867, of a portion of the grant as surveyed in 1860, and afterwards patented. If this deed described the disputed tract, it belongs to the defendants. The superior court found in favor of the defendants upon this point, and also sustained their pleas of laches and title by prescription. From the judgment entered upon these findings, and from an order denying their motion for a new trial, the plaintiffs have appealed.

In view of our conclusion that the trial judge correctly construed the deed from De la Guerra to Feliz, as including in its description the tract in dispute, we shall not have occasion here to consider the elaborate argument of counsel upon the questions of laches and limitations. Los Alamos was a grant of 11 leagues, containing, according to the field notes and plat of the patent survey, 48,803 acres. It was laid off in the general form of a pentagon, with a southern side bounded by a line approximately east and west, and with the apex of the opposite salient angle pointing to the north. Three of its five sides (the south, the west, and the northwest) were defined by straight lines, the other two by broken lines. The initial point of the survey was at the southeast corner, and the first course was north, 2½ degrees east, 231.38 chains. The station at the end of each course was marked by a post, and the posts were lettered and numbered consecutively A. 1, A. 2, A. 3, and so on to the point of beginning. The post at the northern apex was marked A. 15 (Alamos 15), and the straight line connecting that station with post A. 16 at the northern end of the west side of the grant constituted, and has always constituted, the northwestern boundary of the rancho. But there was a mistake in the field notes and plat of the survey as returned and approved in 1860 as to the length and true course of this northwestern boundary, and to that mistake all the uncertainty in the deed from De la Guerra to Feliz is due. The course given in the field notes and marked on the plat of the patent survey is south, 50¾ degrees west, whereas it is in fact south 55 degrees, 51 minutes west, and the real distance is 387 chains instead of 380.15 chains, as stated in the field notes. The field notes nevertheless do correctly place the posts A. 15 and A. 16 as they were set and as they have since remained, so that there has never been any real uncertainty as to the true location of the northwestern boundary of the rancho. The land in controversy is an elongated triangle containing 446 acres, having its apex at post A. 15, and lying between the true northwestern boundary of the rancho and the mistaken course given in the field notes (south, 50¾ degrees west) of the line from post A. 15 to post A. 16. The grounds of the controversy arise out of the terms employed in the deed from De la Guerra to Feliz to describe the tract conveyed, which, while they call for the western (meaning the northwestern) boundary of the rancho as the northwestern boundary of said tract, give a course to that boundary and a length to the southern boundary, which leave out the tract in controversy, and include the exact number of acres (2,945) mentioned in the deed, which is less by 446 acres than the quantity included, if we disregard the calls for courses, distances, and quantity in favor of the call for the western boundary of the rancho. This was done by the superior court in construing the deed, and this is the error alleged by the plaintiffs in support of their appeal.

We do not think that the superior court erred in its construction of the deed. We are convinced to begin with, aside from any considerations based upon technical rules of construction, that the real intention of both grantor and grantee was that the northwestern boundary of the rancho should be the northwestern boundary of the tract conveyed; or, in other words, that the grantor had no intention of reserving to himself a narrow strip of worthless land in the shape of the outline of a church spire between the land conveyed to Feliz on one side and government land on the other. The circumstances of the transaction and the situation of the parties afford a perfect explanation of the employment in the deed of terms of description, which, if literally followed, would defeat their real intention. The description contained in the deed was based upon a so-called survey of the tract to be conveyed, made by the county surveyor of Santa Barbara for the grantee, Feliz, which was one of a series of similar surveys made and recorded in the surveyor's office, by which the northern and eastern portion of the Alamos Rancho was subdivided for the same purpose, it may be presumed, as that disclosed in the present instance—for the purpose, that is to say, of furnishing a convenient description of the tracts to be conveyed. They were, in fact, not surveys at all, but mere subdivisions marked by lines drawn to scale on a plat of the rancho made in conformity to the field notes of the patent survey, including the erroneous calls for course and distance of the northwestern boundary—the line from A. 15 to A. 16. They were numbered on the plat from east to west as surveys Nos. 357, 358, 359, and 360, the last being the Feliz survey. To make this so-called survey No. 360, nothing was done except by applying a scale to the plat of the rancho, to mark a point on the western boundary of survey No. 359 135 chains south of post A. 13 of the patent survey, and to draw a line due west from this point to the straight line connecting the posts A. 15 and A. 16. The area included within these lines and the lines connecting A. 13 and A. 14, A. 14 and A. 15, and the line marking the western boundary of county survey 359, became county survey 360. The length and direction of all these lines except those extending from the initial point to the intersection of the northwestern boundary and from that point to post A. 15 were correctly given, but these two being computed upon the false datum of the course of the line A. 15–A. 16 were too short to include the land in controversy. To be specific, the length of the south line as marked on the plat was 273.72 chains to the intersection of the platted boundary; whereas the actual distance on that line to the true boundary is 321.14 chains. The length of the line from said intersection to post A. 15 is given as 301.31 chains, while from the intersection of the south line and the true boundary the distance is 330.08 chains.

With this misleading plat to guide them, the deed to Feliz was drawn, containing the following description: "All that portion of the 'Rancho de los Alamos' situate in the Third township of the said county of Santa Barbara, containing 2,945 acres, embraced in county survey No. 360, made the 7th day of June, 1867, bounded and described as follows: Commencing at a point on the western line of county survey No. 359 and 135 chains south of post A. No. 13 of the official survey of said rancho, and running thence west (273.72 chains) two hundred and seventy-three chains, seventy-two links to station No. 2 of said county survey No. 360 on the western boundary line of said rancho; thence N., 50¾ deg. E., along the western boundary line of said rancho 301.31 chains to the third station of said survey; thence S., 59¼ deg. E., along the northern boundary line of said rancho 47 chains to station No. 4 of said county survey; thence south 166.6 chains to the place of beginning." The use of the word "station" in this description is a pure fiction. The map shows no numbered stations. The third station means post A. 15, and station No. 4 means post A. 14, of the official survey of the rancho.

It is easy to see from the facts here stated what was the real intention of the parties to this deed with respect to the northwestern boundary of the tract conveyed. De la Guerra was intending to sell, and Feliz to buy, the triangular area lying between county survey No. 359 and the line extending from post A. 15 to post A. 16, comprising all the remaining portion of the rancho north of a line drawn due west from a point 135 chains south of post A. 13. The northwestern boundary of the rancho was a real boundary, defined by a straight line between permanent monuments standing on the ground, the position of which both parties must be presumed to have known. The call in the deed for that boundary was therefore a call for the real boundary as defined by the terminal monuments, and the erroneous calls for courses, distances, and quantity must give way in accordance with the rule prescribed by subdivision 2 of section 2077 of the Code of Civil Procedure.

The fact that the description in the deed refers to county survey No. 360 does not bring the case within the authority of Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48, in which a call for the eastern boundary of the Orestimba Rancho was denied controlling force in a patent issued by state officers for state lands.

The differences between that case and this are numerous and material. Aside from the rule that grants from the state are construed most strongly against the grantee, while as between private parties grants are construed most strongly against the grantor, the facts of this case are sufficient to distinguish it from the Miller-Grunsky Case. There the county survey, which was the sole and exclusive guide to the state officers issuing the patent, represented the eastern boundary of the Orestimba Rancho as 6½ chains west of a government subdivision, and that was the distance called for in the patent. The state officers, charged with the issuance of the patent for the precise number of acres that had been paid for by the purchaser, knew nothing of any monuments on the ground marking the eastern boundary of the Orestimba Rancho. They did, by the calls for courses and distances inserted in the patent, describe a tract containing precisely the number of acres that Miller had paid for, and they inserted the boundary of the Orestimba Rancho only because it was one of the calls of the county survey. In fact, this call in the survey was correct at the time it was made in the field, for at that time the monuments of the first survey of the Orestimba Rancho stood 6½ chains west of the "point noted," but that survey had been set aside and a new survey approved before the issuance of the state patent to Miller, which placed the eastern boundary of the rancho at 20 chains west of the "point noted," and the attempt of the grantee was to stretch his grant over the whole 20 chains so as to include more than three times the land originally surveyed and paid for, thereby depriving a subsequent purchaser from the state of what he had paid for. In this case the land was not sold by the acre, or by a person who could sell in no other way, and the grantor knew the actual boundary mentioned in his deed. The circumstances of the case show that he intended to sell all the land north of the line drawn due east and west through a point 135 chains south of post A. 13 and west of survey 359. It was a lumping sale of that corner of the rancho. The area, owing to a mistake in the plat of the rancho, was computed at 2,945 acres instead of 3,391 acres, but the round figure of $1,000 agreed upon as the purchase price shows that if acreage had anything to do with the estimate of value it was a very minor consideration. It is at least a plausible hypothesis that as the computation showed an area of about 3,000 acres the price of $1,000 was agreed upon because the land was valued at about 33⅓ cents an acre. The evidence is that the land along the northwestern boundary was mountainous, rocky, and barren—much of it unfit even for pasturage. If the mistake as to the area had not been made, the difference in the purchase price on this supposition would have been less than $100, reckoning the land in controversy at the average value of the whole tract.

In short, the difference between this case and the Miller-Grunsky Case is this: That there the officers issuing the patent framed their description with exclusive reference to a map or survey which showed the number of acres paid for by the grantee, and they had no authority to convey more. The map was entirely inconsistent with a construction of the patent which would have more than trebled the quantity of land intended to be conveyed—a capital consideration in that case. The only evidence that the eastern boundary of the Orestimba Rancho was 20 chains west of the "point noted" was a map which the state officers had never seen, and which they could not have taken as a guide if they had seen it; and, besides, the evidence aliunde showed that the map relied upon by Miller was based upon a new survey of a corrected boundary of the rancho, by which it was changed from the position stated in the county survey to the position claimed at the date of the patent. Here the grantor could convey any designated portion of the Alamos Rancho without regard to acreage or price. The description in his deed does, it is true, refer to a map, but that map calls as loudly for the boundary mentioned in the deed as it does for the course of that boundary or the length of the line. The boundary was a fixed boundary defined by monuments, the position of which must have been known to the parties. The map, while inconsistent in minor particulars with the calls of the deed, is consistent with it in a more important particular, for it shows the boundary and the monuments which define it. In this particular it is corroborated by all the surrounding circumstances, while as to the courses and distances it is wholly at variance with those circumstances.

The deed and map are consistent as to a main and controlling fact within the knowledge of both parties. The inconsistency is only with respect to minor particulars as to which both parties were mistaken. The call for the boundary must therefore be held to mean the actual boundary, and to include the land in controversy.

The judgment and order of the superior court are affirmed.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.

153 Cal. 170

CASSERLY v. ALAMEDA COUNTY.

(S. F. 4,527.)

(Supreme Court of California. March 5, 1908. Rehearing Denied April 4, 1908.)

1. DEDICATION—MAPS.

Where the original owners of land in controversy adopted a town map designating such land as public parks or squares in the execution of partition deeds to adjoining property, and such land was thereafter continuously used for public purposes, the adoption of such map was equivalent to a formal dedication of the land to public use, or, at least, to an abandonment to such use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 34–47.]

2. QUIETING TITLE—LIMITATIONS—LACHES.

Where certain city blocks had been laid off on the map of a town as public parks, and had been used with the acquiescence of plaintiff's predecessors in title as such by the town until 1874, when they were conveyed to the county under a legislative act to be used for the erection of county buildings, and were so used for more than 29 years before plaintiff commenced her action to quiet her title thereto, and for more than 26 years after a federal patent had been issued under which plaintiff claimed, plaintiff's claim was barred both by limitations and laches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 63.]

3. TENANCY IN COMMON—LIMITATIONS—ADVERSE POSSESSION.

Limitations will run in favor of tenants in adverse possession, even against their co-tenants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, §§ 42–52.]

Department 2. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Theresa Casserly against the county of Alameda. From a judgment for defendant, and from an order denying plaintiff's motion for a new trial, plaintiff appeals. Affirmed.

James T. Boyd (John B. Casserly, of counsel), for appellant. U. S. Webb, Atty. Gen., Geo. A. Sturtevant, Deputy Atty. Gen., and J. J. Allen, Dist. Atty., for respondent.

McFARLAND, J. Plaintiff brought an action to quiet her title to one thirty-sixth interest in two blocks of land in the city of Oakland. The defendant set forth its claim of title, and pleaded special defenses of the statute of limitations, adverse possession, dedication of the property to the town of Oakland, estoppel in pais, and laches. Judgment was in favor of the county of Alameda, and plaintiff appeals.

The land in controversy was originally a part of the Rancho San Antonio granted by Spain to Luis Peralta. Through the Peraltas, Eugene Casserly (through whom plaintiff claims as devisee), John C. Hays, Joseph K. Irving, and others obtained title. The lands in controversy were two blocks in the town of Oakland as laid off on Kellersberger's map thereof. Casserly, Irving, Hays, and others as tenants in common of these lands effected by agreement a partition thereof. They adopted Kellersberger's map of the town of Oakland as a part of the confirmatory deeds which they exchanged. In dividing the land, as shown upon this map, they drew the blocks by lot. The blocks on Kellersberger's map were numbered, saving certain ones which were designated as public parks or squares. The blocks in controversy were not drawn for partition, and were not named in the confirmatory deeds. Upon Kellersberger's map the blocks were designated, respectively, as Washington and Franklin Squares. The apparent and sufficient reason why these lots were not mentioned in the confirmatory deeds was that at and before this time the town of Oakland was using these blocks as public squares, and continued to use them, fencing them and treating them in all respects as property of the city from 1852 until February, 1874, when the Legislature passed an act enabling the board of supervisors of the county of Alameda to erect county buildings on Washington and Franklin Plazas. St. 1873, pp. 58, 59, c. 59. The act provided for the grant of Washington and Franklin Plazas by the city of Oakland to the county of Alameda. The city then executed its deed to the county which was duly recorded, and in March, 1874, the county of Alameda went into the actual occupation of all of this land, and has openly, notoriously, under claim of right, and adversely to all the world continued in the full and complete occupation of it ever since. Upon it are erected its county buildings, courthouse, jail, recorder's and county clerk's offices, etc. The partition deeds were executed in August, 1853. From that date until the commencement of this action the county of Alameda and its predecessors in interest, the town and city of Oakland, have always exercised full and complete ownership and dominion over this property. As public property, it has never been assessed for the payment of taxes. Thus, for a period of more than 50 years, it has been held and used under claim of ownership adverse to plaintiff's title. These two blocks were not embraced in the partition deeds, and much force attaches to the argument that the failure to do this, coupled with the adoption of the Kellersberger map indicating these blocks as public squares, was the equivalent either of a formal dedication of the land to public use, or at least to an abandonment to such use. Thus in People v. Blake, 60 Cal. 497, this court, speaking in reference to this map, said: "Now, when the original owners of the land made the Kellersberger map, or which was equivalent to the same thing, adopted and had recorded the map made by the original squatters, they thereby dedicated to the public use all the streets and public squares to the extent as designated upon the map." But we need not be at pains to elaborate on the question of dedication, for indisputably the claim of plaintiff is barred by the statute of limitations, and is a stale demand in equity. The use of the town of Oakland of these blocks as public squares, antedating the exchange of the partition deeds, the designation upon the map of these blocks as public squares, the acquiescence and acceptance of the partitioners in this as shown by their adoption of the Kellersberger map, and of their failure to include the blocks in controversy in their deeds, the continued exclusive use and holding by the town of Oakland and subsequently by the city of Oakland of these blocks as public property of the city, the subsequent legislative enactment empowering the city to convey to the county, the conveyance to the county, the erection of the public buildings upon the land, one and all were open and notorious acts of ownership, conveying to all the world information of the good faith of the municipal corporations and of their claim of exclusive ownership and their exercise of absolute dominion over the property. So far as the county of Alameda is concerned, it has exercised these acts of ownership for a period of more than 29 years before plaintiff commenced her action, and for 26 years after the patent of the United States was issued to Don Vicente Peralta. In fact and in law it cannot be contended that the city's possession, and subsequently the county's, was that of a tenant in common with the plaintiff. Every act was in hostility to such a contention, and the statute of limitations will run in favor of tenants in adverse possession, even against their co-tenants. Gregory v. Gregory, 102 Cal. 53, 36 Pac. 364. It is concluded, therefore, that appellant's action was undoubtedly barred by the statute of limitations. Civ. Code Proc. §§ 318, 319, 323, 324, 325. The commencement of such an action as this after such a lapse of time, irrespective of the statute of limitations, is the presentation of a stale demand. Seculovich v. Morton, 101 Cal. 676, 36 Pac. 387, 40 Am. St. Rep. 106.

For which reasons, the judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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153 Cal. 174

BEEBE v. COFFIN et al. (S. F. 4,717.)

(Supreme Court of California. March 5, 1908.)

1. GIFTS—DEFINITION—EXECUTION—"GIFT."

Under the express provisions of Civ. Code, §§ 1146, 1147, a gift is a voluntary transfer of personal property, and is not valid unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 29, 37.

For other definitions, see Words and Phrases, vol. 4, pp. 3084-3087; vol. 8, p. 7670.]

2. SAME—SUFFICIENCY OF DELIVERY.

Delivery in order to constitute a valid gift whether inter vivos or causa mortis must be such that the donor, not only parts with his possesssion of the property, but relinquishes to the donee all dominion and control over it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 29, 34, 122-132.]

3. SAME—GIFTS CAUSA MORTIS AND INTER VIVOS—DISTINCTION.

The vital distinction between a gift causa mortis and a gift inter vivos is that the former is subject to the donor's revocation while he lives; but, if there is no unconditional delivery or the control of the property by the donee is postponed to a future date, the transaction is an unexecuted and unenforceable promise to make a gift.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, § 120.]

4. SAME.

Decedent, owning a mortgage on C.'s property, executed a release thereof, placed it in a sealed envelope which was placed in a safe deposit box rented in the joint names of deceased and C. Decedent directed C. to bring the contents of the box, when decedent was about to die, took the envelope, handed it to C., told him that he, decedent, would not want it any more, and that C. should put it in the safe deposit with his other things, and when decedent died have the release recorded, C. being required in the meantime to pay interest on the debt to deceased's sister. *Held* that, C. having no actual knowledge of the contents of the envelope prior to deceased's death, there was no sufficient surrender of control of the release by deceased prior to his death as to constitute a valid gift.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 122–132.]

Department 2. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Ann M. Beebe against Oliver C. Coffin and others. From an order denying a motion for a new trial, filed by defendants Oliver C. Coffin and Ella F. Coffin, they appeal. Affirmed.

J. C. Coogan, for appellants. Campbell, Metson & Campbell, Robert B. Gaylord, and Campbell, Metson, Drew, Oatman & Mackenzie, for respondent.

McFARLAND, J. This is an appeal taken by Oliver C. Coffin and Ella F. Coffin, his wife, from the order of the court denying their motion for a new trial. The action was commenced by Ann M. Beebe to foreclose a mortgage given by the Coffins to secure their promissory note for $1,800. Henry W. Beebe, as administrator of the estate of William S. Beebe, deceased, filed his answer and cross-complaint, setting up an assignment by Ann Beebe to his intestate of the note and mortgage. The Coffins answered, likewise setting up an assignment of the note and mortgage by Ann Beebe to William S. Beebe, deceased, and further pleaded a satisfaction and release executed by William S. Beebe. The court found that Ann Beebe had assigned the note and mortgage to William S. Beebe, but further found that the release and satisfaction, execution of which had been pleaded by the Coffins, had not been delivered by William S. Beebe to them or either of them, and ordered judgment in foreclosure in favor of Henry W. Beebe, administrator of William S. Beebe's estate. The case is one turning upon the completeness of the execution of an attempted gift causa mortis by William S. Beebe to the Coffins. The case is free from the slightest doubt or taint of fraud. It may not be gainsaid from the evidence that William S. Beebe did attempt to give to the Coffins, or to Oliver C. Coffin, a release of the debt, and the single question in the case is whether the court erred in holding that the attempted gift was incomplete and therefore nugatory.

The facts, concerning which there is no controversy, are: That the Coffins executed a note and mortgage to Ann Beebe. William Beebe took an assignment of the note and mortgage to himself. Oliver Coffin was the trusted friend and business agent of William Beebe. Beebe procured a safe deposit box in the joint name of Coffin and himself, and therein were placed valuable personal property of Beebe. Coffin was given the keys to the box. Whenever Beebe wanted any of his valuables he would so inform Coffin, and Coffin would open the box and bring them to him. The rent of the box was paid by Beebe. The Coffins, by direction of Beebe, paid the interest on the note and mortgage to Ann Beebe after William Beebe had taken the assignment of the note and mortgage. Beebe was in ill health, and seemed to be making provision for the disposition of his properties in the event of his death. He would make separate packages of the contents of the box, and give Oliver instructions as to the dispositions to be made of them. From time to time he would instruct Oliver to bring him the contents of the box, and, after examination, he would make changes in his dispositions and directions. Upon one of these occasions he handed to Coffin a sealed envelope bearing Coffin's name, saying: "Here, Oliver, you take this. I shan't want it any more. You take it and take care of it and put it in the safe deposit with your other things, and when the end comes you follow my instructions." Up to the time of Beebe's death Coffin had no positive knowledge of the contents of the envelope, but by inference gathered from statements of Beebe he believed that the envelope contained a release of the note and mortgage. After Beebe's death he opened the envelope and found in fact that it did contain such release, together with a note signed by Beebe and reading as follows: "Oliver C. Coffin: This document is to be placed on record immediately after my death, which cancels all claims from any source, either principal or interest." After Beebe had given Coffin this sealed envelope Coffin continued to pay the interest upon the note as theretofore to Ann Beebe, and so continued to do until the death of William Beebe. He testifies that he did this under William Beebe's instructions, William Beebe at the same time cautioning him not to pay any of the principal. Beebe never told Oliver that he had executed to him a release.

A gift is but the transfer of personal property made voluntarily and without consideration, and a verbal gift is not valid unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery. Civ. Code, 1146, 1147. And the delivery must be absolute; that is, the donor must not only part with the possession of the property, but must relinquish to the donee all dominion and control over it. 14 Am. & Eng. Ency. of Law, p. 1019; 20 Cyc. of Law and Proc. p. 1195. This holds true of all gifts, whether they be gifts inter vivos or gifts causa mortis. As is pointed out in

Knight v. Tripp, 121 Cal. 674, 54 Pac. 267, all gifts are necessarily inter vivos, since a living donor and a living donee are indispensable to a valid gift; but when the gift is made in contemplation of impending death, and as a provision for the donee in the event of such death, it is called a gift "causa mortis." "This designation of its character does not, however, change the elements requisite for rendering the gift complete. There can be no gift without an intention to give, and a delivery either actual or constructive of the thing given." Knight v. Tripp, supra. Thus it cannot be too clearly borne in mind that the single vital distinction between a gift causa mortis and a gift inter vivos is that the former, being in its nature testamentary, is subject to the donor's revocation while he lives. But the essential of delivery of the immediate surrender of all dominion and control over the subject of the gift is as absolutely necessary in the one class of gifts as in the other. Falling short of such unconditional delivery, a gift is incomplete. If the transfer of such dominion and control is postponed to some future date, as until the date of the death of the donor, it becomes thereby no more than an unexecuted and unenforceable promise to make a future gift. Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726; Daniel v. Smith, 64 Cal. 346, 30 Pac. 575; Zellar v. Jordan, 105 Cal. 143, 38 Pac. 640; Hart v. Ketchum, 121 Cal. 426, 53 Pac. 931; Pullen v. Placer Co. Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19. In illustration of the important fact that immediate and complete dominion over the thing given must be surrendered by the donor and accepted by the donee, the cases of Pullen v. Placer Co. Bank, supra, and Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500, are instructive. In Pullen v. Placer Co. Bank a father had given his son a check for $1,000, upon the understanding that the son should not present the check to the bank for payment until after the death of the father. The son retained possession of the check, and did present it according to instructions after the father's death. This court held the transaction invalid as a gift, citing Knight v. Tripp above referred to, and saying: "A gift vests the donee with the absolute property in the thing given, and is no longer subject to the control of the donor. If, on the other hand, the thing given remains under the control of the donor, or, except in the case of a gift causa mortis, is subject to his revocation, his gift is not complete. There is no difference, however, in this particular between a gift inter vivos and a gift causa mortis. In either case it is not complete unless there is an actual or symbolical delivery to the donee of the thing to be given. In the present case the gift was verbal, and the property which the father intended to give to his son was money on deposit in the bank. The check was not itself the property which the father intended to give, but was merely a direction to the defendant to pay $1,000 to the son. * * * The check was not a symbolic delivery of the money, but it was a delivery of the means by which the son could obtain possession of the money. It was, however, subject to revocation by the father at any time before its presentation to the bank, and was in fact revoked by his death." In Basket v. Hassell, supra, it is said: "The instrument or document must be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, * * * and a delivery which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation according to its terms will not suffice."

Measured by these indisputable standards, the conclusion is irresistible that the attempted gift in this instance fell short of completeness. The release was in a sealed envelope. The donee had no actual knowledge as to what the envelope contained. Still less did he have any present and absolute right to such dominion and control over the release as would have justified him in placing it of record during the lifetime of Beebe. Both parties to it concurred in the understanding that the transaction, whatever it was, evidenced by the sealed envelope, was not to take effect until after Beebe's death, and the sealed envelope remained in Beebe's box with Beebe's other personal effects, subject to his call, and subject also to such change in disposition as he might decide to make of it, and as in fact he did make of other of his personal effects therein contained.

Under circumstances thus shown, the finding of the court against the completeness and delivery of the attempted gift may not here be disturbed, for which reason the order appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

153 Cal. 179

RICKEY LAND & CATTLE CO. v. GLADER.

(Sac. 1,586.)

(Supreme Court of California. March 6, 1908.)

1. Appeal—Time—Review of Evidence.

A judgment of dismissal without findings of fact and without an opportunity to the appellant to prepare a record as contemplated and required by Code Civ. Proc. §§ 648, 677, is not "an exception to the decision and verdict" within section 939, providing that such an exception on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment unless taken within 60 days after rendition of the judgment, and hence the court, on appeal from such order of dismissal, is authorized to review the judgment on the evidence though the appeal is not taken within 60 days.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1888.]

2. DISMISSAL AND NONSUIT — REQUEST FOR JUDGMENT—DISCRETION.

A motion to dismiss because no request that judgment be entered was made within six months after the filing of findings and conclusions of law as contemplated by Code Civ. Proc. § 581, subd. 6, is addressed to the judicial discretion of the court.

3. SAME—ABUSE OF DISCRETION—EVIDENCE.

Plaintiff, a riparian proprietor, sued to enjoin defendant from diverting waters from a stream above plaintiff's land. The court ordered judgment for plaintiff, decreeing that each party should bear its own costs. Plaintiff was represented by two attorneys one of whom was a nonresident of the county. He prepared findings of fact and conclusions of law which he forwarded to his associate who was then absent from the state. The absent attorney's son, a young attorney, caused the findings and conclusions to be filed, but failed to demand the entry of judgment within six months as required by Code Civ. Proc. § 581, subd. 6, and both of plaintiff's attorneys of record believed that judgment had been entered, until served with notice to dismiss on that ground, when they immediately applied to have judgment entered but were refused. The delay was beneficial to defendant, who in the meantime was permitted to continue his diversion of the water. *Held*, that an order of dismissal because of the nonentry of the judgment was an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, § 120.]

In Bank. Appeal from Superior Court, Mono County; J. D. Murphy, Judge.

Action by the Rickey Land & Cattle Company against C. P. Glader. From a judgment of dismissal, plaintiff appeals. Reversed and remanded, with directions.

See 91 Pac. 414.

James F. Peck, Wm. O. Parker, Chas. C. Boynton, and Alfred Shurtz, for appellant. Richard S. Miner (J. P. Langhorne, of counsel), for respondent.

HENSHAW, J. Plaintiff, the owner of certain lands in Mono county riparian to a water course, brought its action to enjoin defendant from illegally diverting the waters of this stream above plaintiff's land. The action was tried before the court and submitted. Thereafter the court, after mature consideration, ordered judgment for plaintiff, decreeing that each party should bear and pay its own costs. Detailed findings and conclusions of law were signed and filed upon the 19th day of August, 1905. No judgment was entered, and no request that a judgment be entered was made within the six months thereafter, as contemplated by section 581, Code Civ. Proc. subd. 6. On the 10th of March following the defendant moved the court to dismiss the action, under the authority of this section. The court granted the motion, and a judgment of dismissal was entered. From this judgment of dismissal plaintiff has appealed, taking his appeal more than 60 days after the entry of the judgment. To the hearing of the appeal respondent first objects that the evidence which was before the trial court may not here be considered, since the appeal was taken more than 60 days after the rendition of the judgment. Section 939, Code Civ. Proc. But a judgment of dismissal such as this, without findings of fact and without opportunity to the appellant to prepare a record, as contemplated and required by sections 648 and 677, Code Civ. Proc. is not "an exception to the decision and verdict" within the contemplation of section 939, Code Civ. Proc. Falkner v. Hendy, 107 Cal. 52, 40 Pac. 21, 386. In such a case as this, either this court must have the power to review the judgment of dismissal upon the evidence which was before the trial court, or the right of appeal becomes a vain and empty thing, and the decision granting a motion to dismiss, which motion under the statute is addressed to the discretion of the court, can never be corrected, however glaring the abuse of such discretion may be. With the evidence then before us, we come to consider whether or not in this instance the court did abuse its discretion in granting the motion.

In the years that section 581, subd. 6, Code Civ. Proc., has been a part of the law of this state, no case has come before this court where a dismissal has been granted under it. In every case where a dismissal of the action has been denied, the discretionary ruling of the trial court has been upheld. Neihaus v. Morgan (Cal.) 45 Pac. 255; Rosenthal v. McMann, 93 Cal. 505, 29 Pac. 121; In re McDevitt, 95 Cal. 17, 30 Pac. 101; Marshall v. Taylor, 97 Cal. 422, 32 Pac. 515; San Jose R. Co. v. San Jose L. & W. Co., 126 Cal. 322, 58 Pac. 824.

Coming thus to consider whether or not, under the facts presented, the court abused its discretion in dismissing the action, it is made to appear that the plaintiff was represented by attorneys having offices in different counties. The action was tried in Mono county. One of these attorneys was William O. Parker, whose office was at Bridgeport, the county seat of Mono county. James F. Peck, another of the attorneys, had his office in San Francisco. On him was imposed the duty of the preparation of the findings of fact and conclusions of law. This duty he performed, forwarding these papers to his associate, Mr. Parker, at Bridgeport. Mr. Parker at the time was absent from the state. In his office was his son, a young attorney. He, in the absence of his father, caused the findings of fact and conclusions of law to be filed, but failed and neglected to demand judgment. Mr. Peck and Mr. Parker both believed that judgment had been entered, and received no intimation to the contrary until served with notice of motion for dismissal of the action. Immediately upon receiving this notice they sought to have judgment entered, but were refused. We have, then, a case fully and elaborately heard upon its merits, after trial consuming three weeks of time. We have abundant evidence that the neglect or inadvertence of appellant's attorneys did not arise either in wantonness or indifference, but was the result of the unexpected circumstance that the matter of demanding judgment was left to a young and inexperienced attorney, who failed to make the demand. Under such circumstances it will unhesitatingly be said that it was an abuse of discretion of the court to dismiss an action and to deprive a litigant of the just fruits of a judgment to which he was entitled after full and fair trial, unless, upon the other hand, some injury and wrong may be shown to have resulted to the moving party, which would render it inequitable that a judgment, after the lapse of six months, should be given to the prevailing party. Otherwise, not a dismissal of the action, but, at the most, the imposition of terms for the entry of a judgment, is all that justice could require.

We look in vain, however, to discover any injury which respondent may have suffered by appellant's failure to have the judgment entered, and, indeed, as disclosed, not only did respondent suffer no injury, but he received a positive benefit. First, as to injury, it may be said in passing, that respondent himself could have prevented any by a demand upon his part that judgment be entered. and the fees for such entry would have been recoverable against plaintiff in the event of success. That the defendant sustained no injury by the failure to enter judgment, but in fact was benefited thereby, is made apparent from the following facts: The order for judgment declared him a trespasser, illegally depriving plaintiff of the waters of a stream. Until such judgment was entered, he was under no legal duty to cease his trespass. So long, then, as the judgment remained unentered, he could, and doubtless did, continue in the use of water to which the findings and conclusions of the court decreed that he was not entitled. That this is clearly so is demonstrated by the correspondence which passed between defendant and his attorneys touching the appeal in the case. In one of these letters (contemplating an appeal) it is said: "You can get use of water for two or three years. Might get a compromise, as it would cost Rickey quite a sum to fight the appeal." And Mr. Miner, attorney for defendant, testifies at the hearing: "After that time my client wanted to know if there was an injunction against him using the water, and if he would be guilty of contempt of court in using it." As suggested by one of the foregoing quotations, an appeal, if taken, would have been for vexatious delay and to force a compromise. This is even more clearly shown by further letters from the defendant's attorney to his client. Thus he writes: "It is for you to decide if it is worth the cost, which would be five or six hundred dollars by the time it went through the Supreme Court, and unless that court modifies its decisions on riparian rights you would lose." Again, "As I wrote you before, it will cost from four to six hundred dollars to carry the case through the Supreme Court and to try to get that court to modify the doctrine of riparian rights." And, finally, defendant's attorney testifies: "As an inducement on my part which might influence Rickey to settle the Glader Case, I stated to Mr. Parker, in substance, something to the effect that in any event if Rickey did not settle the Glader Case, we would appeal from the judgment and keep the case going for some time." Bearing in mind that respondent on this appeal was not deprived even of costs, since by the order for judgment each side was to bear its own costs, it is manifest that he was injured in no way, but was positively benefited by the failure of plaintiff to have the judgment recorded.

The judgment of dismissal is reversed, and the cause remanded, with directions to the trial court to permit plaintiff, upon payment of proper costs, to cause entry of judgment to be made in consonance with the findings of fact and conclusions of law heretofore filed in the action.

We concur: SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.

153 Cal. 190

BOLLINGER v. BOLLINGER (S. F. 4,433.)

(Supreme Court of California. March 9, 1908.)

1. EXCEPTIONS, BILL OF — SETTLEMENT—PRESENTMENT—WAIVER OF OBJECTIONS.

Defendant's attorneys presented their proposed bill of exceptions, and plaintiff's attorneys presented their proposed amendments thereto in due season. The former gave notice of rejection of the proposed amendments, and named a time at which the proposed bill and amendments could be presented to the judge for settlement. One of plaintiff's attorneys, and none for defendant, appeared at the appointed time, and the judge requested that the attorneys of the respective parties meet and settle the bill of exceptions so far as possible, and thereafter present the same to him. The attorney present made no objections. An attorney for defendant soon after appeared, was informed by the clerk what was done, at once saw such attorney for plaintiff, and asked when they could take up the settlement, to which the latter replied merely that he could not say till he had seen his associate; relying on which defendant's attorney gave no further notice of presentment to the judge for settlement. *Held*, that objection that the bill had not been presented to the judge or left with the clerk for settlement in time was waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 72.]

2. APPEAL—REJECTION OF EVIDENCE.

Rejection, in an action based on plaintiff's assignor having dismissed a cross-complaint against defendant on defendant's promise to pay him a certain amount, of evidence that thereafter said assignor stated to witness that the dismissal was not made on any promise of payment, was prejudicial, the other witnesses having been merely plaintiff and his assignor on one side, and defendant and his wife on the other, and the testimony of one group having been diametrically opposed to that of the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4187-4193.]

3. DEPOSITIONS—ADMISSION IN EVIDENCE—IRREGULARITIES.

A deposition taken by defendant under Code Civ. Proc. § 2021, subd. 3, and sections 2031, 2032, should not be rejected because in the copy of the papers served on plaintiff the affidavit required by section 2031 to show the case was a proper one for taking a deposition was defective, in that the name of no notary or other officer authorized to administer oaths appeared thereon; it appearing on the original, plaintiff's counsel having attended the taking of the deposition and cross-examined the witness, and section 4 providing that the rule of the common law that statutes, in derogation thereof are to be strictly construed has no application to the Code, but that it is to be liberally construed with a view to effect its objects and to promote justice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, § 306.]

Department 2. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by John E. Bollinger against George Bollinger. There was a judgment for plaintiff, and from an order denying a new trial defendant appeals. Reversed and remanded.

Charles W. Slack, V. A. Scheller, and Adolph Loessel, for appellant. Wm. P. Veuve and Wm. A. Bowden, for respondent.

McFARLAND, J. This is an appeal from the order of the court denying defendant's motion for a new trial. To the hearing upon the merits respondent interposes the preliminary objection that plaintiff's bill of exceptions was not presented in time. The facts in this regard are the following: Defendant's attorneys had presented their proposed bill of exceptions, and plaintiff's attorneys had presented their proposed amendments thereto in due season. Defendant's attorneys gave notice of the rejection of all of the proposed amendments, and named the day and hour at which they would present to the judge for settlement the proposed bill of exceptions and the proposed amendments thereto. One of the plaintiff's attorneys was present at the hour named, but neither of defendant's attorneys appeared. About an hour elapsed, when the judge inquired of the plaintiff's attorney whether the attorneys for the respective parties had conferred in order to dispose of the objections to the proposed amendments as far as posssible, and was answered that they had not. The judge then requested that the attorneys of the respective parties meet and settle the bill of exceptions so far as possible and thereafter present the same to the judge. The judge understood the attorney for plaintiff as assenting to that request, but not as waiving any objection to the settlement of the bill. Defendant's attorney, Mr. Scheller, who had charge of the settlement of the bill, was busily engaged, and through inadvertence forgot the matter until 2 o'clock of the same day, when he went immediately to the courtroom and was informed by the clerk of the court that court was adjourned for the day. He was told also of the request which the judge had made to plaintiff's attorneys, and that plaintiff's attorney, Mr. Veuve, had made no objection thereto. On the same day Mr. Scheller saw Mr. Veuve and asked him when they could take up the settlement of the bill. Mr. Veuve answered that he could not state what could be done in that matter until he had consulted with Mr. Bowden, his associate attorney in the action. Mr. Scheller, relying upon that answer, did not give further notice that the bill and objections to it would be presented to the judge for settlement. Subsequent to this, the attorneys did meet, and disposed of most of the objections to the settlement of the bill without the intervention of the judge, though at this meeting Mr. Veuve objected to the settlement of the bill upon the ground that it had not been presented to the judge or left with the clerk for settlement within the time prescribed by law; Mr. Scheller always contending that such objection had been waived. The judge stated that he regarded it as his duty under the circumstances to settle the bill, and did so. At the hearing of the motion for new trial plaintiff's attorney formally objected, and moved to dismiss the motion upon the ground above stated. The order of the court in the matter is as follows: "Thereupon said motion is presented to the court and submitted for consideration and decision, and the court being fully informed in the premises now orders that said motion be and the same is hereby denied." This order, in legal effect, exculpates the defendant from the consequences of his negligence, whatever that neligence may have consisted of. In fact, the negligence itself was of the slightest character. He appeared in court, though tardily, upon the day set in his notice. He was informed of the arrangement which the judge had suggested, that the attorneys should confer, and of the fact that plaintiff's attorney made no objection thereto. He interviewed plaintiff's attorney upon the same day to fix the time for their conference, and was not then advised that any objection would be made to the settlement, but merely that Mr. Veuve would have to consult with his associate before naming a day. It will be remembered that Mr. Veuve voiced no formal objection before the judge, nor yet to Mr. Scheller, at the time of their interview. His subsequent objection came too late. In Hicks v. Masten, 101 Cal. 651, 36 Pac. 130, under a similar state of facts this court said: "The time at which the want of notice should have been urged was when the court fixed the time for the settlement and requested him to be present; and his failure to object then, and his assent, implied in the statement that he would be on hand, should have been held a waiver of any other or different notice. Objections of this character should be made at the earliest opportunity, or at least, when the party is first required to speak in relation to it." It is therefore held that respondent's preliminary objection to the hearing of this appeal is without merit.

The single proposition presented upon the appeal is, did the court in excluding a certain deposition commit error harmful to appellant's rights? To the better understanding of the court's ruling and of its consequences, the following facts are pertinent: George Y. Bollinger, defendant herein, and David A. Bollinger (plaintiff's father and assignor) were, with others, defendants in an action pending in the superior court of the county of Santa Clara. David had filed an answer and cross-complaint against his codefendant George. Subsequently he dismissed his cross-complaint. In this action a recovery against George for $10,000 is sought upon the ground that the cross-complaint was dismissed pursuant to an oral agreement between David and George, made by way of compromise, to the effect that George would pay $10,000 for the dismissal. The evidence upon the trial was sharply conflicting. David and his son John, plaintiff herein, testify to a conversation at which they and the defendant George alone were present, at which the agreement was made. This is squarely denied by George. It was shown on cross-examination of David that while he was contending that George owed him this $10,000 he borrowed from him $572, and gave him his promissory note therefor. David could not explain, and did not know, why he had given the promissory note. There was some testimony to the effect that David had on several occasions asked George for the $10,000. This again is positively denied by George. George in turn testified that after the dismissal of the cross-complaint a conversation took place at his home, at which there were present David, himself, Hattie E. Bollinger, his wife, and Marian Allen, his wife's mother. George testifies that upon this occasion David said, in the presence and hearing of all, that he had been accused of being bought off for dismissing the case, and that the fact was that he had never got a cent nor ever got the promise of a cent. George's testimony to this effect is corroborated by his wife, and, in turn, is positively denied by David.

So much has been stated to show how sharply conflicting was the evidence, and how diametrically opposed were the statements of the interested witnesses. The case presented is one where corroborative or cumulative testimony upon any of the disputed matters must have proved of great value. The testimony of Mrs. Allen in the rejected deposition was that David said to her upon the occasion above referred to: "By the way, I have seen the Pullans. They accuse me of receiving money or going to get money to dismiss the suit. I never have received a cent nor the promise of a cent. I dismissed the suit because I wanted to, and I am glad of it." This testimony, if true, amounts to an admission by David that he had no contract or agreement with George, and thus drags down the very foundation of the cause of action here pleaded. If true, the cause of action must fail, saving upon the one theory that in the making of this admission David deliberately lied, and, if so, this circumstance itself is important as affecting the credibility to be given to his testimony. But we need not prolong this consideration. It is all-apparent that the rejected evidence was material and important.

The deposition was taken by virtue of the provisions of section 2021, subd. 3, and sections 2031, 2032, Code Civ. Proc. The affidavit required by section 2031 had been made. In the copy of the papers served on the plaintiff the affidavit was set forth, and was defective only in this: that the name of no notary or other officer authorized to administer oaths appeared thereon. It did so appear upon the original, and, indisputably, the omission in the copy was but a clerical misprision. Plaintiff's counsel attended at the taking of the deposition, and, after objecting, remained and cross-examined the witness. In behalf of the ruling of the trial court in suppressing the deposition, respondent invokes the rule that the statutes authorizing the taking of depositions are in derogation of the common law and must be strictly pursued, and that such irregularity as above indicated warrants, if it does not command, the exclusion of the document.

But whatever force may be attached to this proposition in forums where the rules of common law are strictly pursued, it has no force in this state, by virtue of section 4 of the Code of Civil Procedure, which distinctly declares that the rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the Code, and that its and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice. Even in the federal courts, where the common law furnishes the rules for procedure, and where, as in this state, there is no statute ameliorating its sometimes harsh provisions, it is said, in a case like this: "Being in derogation of the rules of the common law, the formalities prescribed by the act must be observed; and many cases can be found in which such depositions have been rejected, because it did not appear that the required conditions or formalities had been observed. They are all, however, cases in which the party objecting did not attend the cross-examination of the witness, or took no part in it." Shutte v. Thompson, 15 Wall. (U. S.) 151, 21 L. Ed. 123. Indeed, it may be set down as the universal rule that, where the jurisdictional steps prescribed by the statute for the taking of the deposition have been complied with and the defect is an irregularity in the form of notice, such a defect is waived and cured by the appearance of the opposing counsel at, and the participation in, the taking of the deposition. Of course the rule is to the contrary if the error be substantive, going to a failure to comply with any of the prerequisites in obtaining the order for the taking of the deposition. Says 1 Greenleaf on Ev. (16th Ed.) § 163b, "The whole object of the notice being the opportunity to cross-examine, the deposition is receivable if there was actually a cross-examination or an attendance for it, even though the notice was formally defective." And says Jones (3 Jones on Ev. § 689): "It is a familiar rule that defects in the notice or in other steps incident to the taking of the deposition may be waived, either by the acts of the parties or by express stipulations. Thus, if a party or his attorney appears and cross-examines a witness, this is a waiver of all defects in the notice or of the fact that no notice has been served. This rule rests upon the ground that, when a person avails himself of the privilege which a notice is designed to give, he ought not to be heard to say that he has had no notice." See, also, Miller v. McDonald, 13 Wis. 753; Erwin v. Bailey, 123 N. C. 628; 31 S. E. 267; Long v. Straus, 124 Ind. 84, 24 N. E. 664; Ryan v. People, 21 Colo. 119, 40 Pac. 775; Wallingford v. Western Union Tel. Co., 60 S. C. 201, 38 S. E. 443, 629; Osgood v. Sutherland, 36 Minn. 243, 31 N. W. 211; Hunt v. Crane, 33 Miss. 669, 69 Am. Dec. 381; Goodfellow v. Landis, 36 Mo. 168; Kelly v. Ning Yung Benevolent Ass'n, 2 Cal. App. 460, 84 Pac. 321.

For these reasons the judgment and order appealed from are reversed and the cause remanded.

We concur: HENSHAW, J.; ANGELLOTTI, J.

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7 Cal. App. 482

BAKER et al. v. LAKE LAND CANAL & IRRIGATION CO. et al. (Civ. 414.)

(Court of Appeal, Third District, California. Jan. 29, 1908. Rehearing Denied by Supreme Court March 26, 1908.)

1. Mechanics' Liens — Premature Filing — Effect.
   A claim of mechanic's lien prematurely filed cannot be enforced.
2. Same—Time for Filing—Completion of Building or Contract — Occupancy of Building — Statutory Provisions — Construction.
   Under Code Civ. Proc. § 1187, relating to mechanics' liens, and providing that the occupation or use of a building, improvement, or structure by the owner, etc., or the occupation by the owner of said building, etc., and cessation from labor for 30 days on any contract, or on any building, etc., shall be deemed equivalent to a completion thereof for all the purposes of this chapter, both occupation and cessation from labor for 30 days must exist before the structure or contract is complete for purposes of a lien.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Consolidated actions by J. E. Baker and others and William Gramley and others against the Lake Land Canal & Irrigation Company and the Union Water & Ditch Company. From a judgment for plaintiffs and from an order denying defendants' motion for new trial, they appeal. Reversed.

Chas. G. Lamberson and Frank Lamberson, for appellants. W. R. McKuiddy and Litus N. Crowell, for respondents.

BURNETT, J. The case represents the consolidation of two actions brought to foreclose liens for labor bestowed upon a certain canal and right of way belonging to defendants. The appeal is from the judgment in favor of plaintiffs and an order denying a motion for a new trial.

About June 25, 1904, appellants entered into a contract with defendants W. B. Livermore and J. W. Livermore, who were doing business as partners under the firm name of Livermore Bros., under which the latter agreed to construct a certain ditch or canal leading from Kings river in Kings county. The amount agreed to be paid thereunder was in excess of $1,000, but the contract was not recorded until some time after the work of construction was begun. It is conceded, therefore, that the work done by plaintiffs must be deemed to have been bestowed upon the canal at the personal instance of the owners. Section 1183, Code Civ. Proc.; Kellogg v. Howes, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588; Davis, Henderson Lumber Co. v. Gottschalk, 81 Cal. 641, 22 Pac. 860; Pierce v. Birkholm, 115 Cal. 657, 47 Pac. 681; Smith v. Bradbury, 148 Cal. 41, 82 Pac. 367, 113 Am. St. Rep. 189. Appellants, however, assail the judgment upon various grounds, among which is that the claims of lien were prematurely filed by plaintiffs.

The work was not completed by Livermore Bros. In fact, a very small part of it was done by them. On the 24th of September they were notified by the owners that the contract under which the work was being done was canceled, and the said Livermore Bros. were forbidden to do any further work on the canal. Consequently, on September 26th, they ceased their work, and the owners took possession. On October 26th the owners filed in the office of the county recorder the statutory notice that said contractors on the 26th day of September ceased to perform any labor in the construction of said canal, and that said cessation from such labor had continued for more than 30 days. Each plaintiff in the complaint alleges: "That within thirty days after the cessation of labor upon said canal the plaintiff filed for record in the office of the county recorder * * * a written notice of his claim of lien," etc. The contention of appellants is that the contract is not deemed completed until there has been a cessation of labor for 30 days in addition to the occupation by the owners. The language of section 1187, Code Civ. Proc., is: "And in all cases the occupation or use of a building, improvement or structure by the owner, or his representative, or the acceptance by said owner or his agent of said building, improvement and structure, and cessation from labor for thirty days upon any contract or upon any building, improvement or structure, or the alteration, addition to or repair thereof, shall be deemed equivalent to a completion thereof for all the purposes of this chapter." If the Legislature did not intend to provide that both conditions should exist, to wit, occupation and cessation from labor for 30 days before the structure or contract should be deemed complete for the purposes of a lien, it is difficult to conceive what language could be chosen to express such intention.

It will not be controverted that if it appears from the complaint that the claims of lien were filed prematurely the general demurrer of appellants should have been sustained, as the only cause of action against them is based upon the theory of the compliance by respondents with the provisions of the statute in reference to liens. A claim of lien filed prematurely cannot, of course, be enforced. Roylance v. San Luis Hotel Co., 74 Cal. 273, 20 Pac. 573; Davis v. MacDonough, 109 Cal. 547, 42 Pac. 450; Marchant v. Hayes, 120 Cal. 137, 52 Pac. 154. Respondents, in answer to this contention, say: " 'Occupation by the owner or his representative and cessation from labor' is the language of the law. The complaint alleges, and the findings of fact show, that the claims of lien were filed after cessation of work and occupation and within thirty days thereafter. Therefore the law, as to the filing of the claims of lien, was correctly complied with." In support of this statement they make the following quotation from Orlandi v. Gray, 125 Cal. 372, 58 Pac. 15: "The occupation of the building by the owner is conclusive evidence of its completion, within the meaning of section 1187 of the Code of Civil Procedure, only where it is open, entire, and exclusive, and inconsistent with a continuance by the contractor in the completion of his contract, and such as to give notice that the building is accepted in satisfaction of the contract"; and again from Ward v. Crane, 118 Cal. 676, 50 Pac. 839: "Where a mechanic, engaged by the owner to erect a building under the control of its owner, is discharged by him when the work was on the verge of full and actual completion, the owner undertaking to finish it, such discharge is equivalent to an acceptance of the work as a completed contract for the erection of the building, and the notice of lien may properly be filed at any time within thirty days thereafter." But these decisions and others cited by respondents were rendered under the provisions of section 1187, Code Civ. Proc., as it existed prior to the amendment of 1897, until which time it read: "And in case of contracts, the occupation or use of the building, improvement or structure by the owner or his representative, or the acceptance by said owner or his agent of said building, improvement or structure shall be deemed conclusive evidence of completion." In other words, occupation or acceptance alone was deemed conclusive evidence of completion, but now, as we have seen, occupation and cessation of labor for 30 days must concur before the work is deemed complete. The law was changed probably because of the difficulty, sometimes encountered, suggested in the Orlandi Case, supra, of determining when the structure was really occupied to the exclusion of the contractor.

In the case of Santa Monica L. & M. Co. v. Hege, 119 Cal. 378, 51 Pac. 555, cited by respondents, it is said: "There is no evidence in the record fixing this day (July 23d) as the date on which the building was completed, but as it was sufficient for the plaintiff to show that the building was completed before its notice of lien was filed, any finding of the particular day was not essential and may be disregarded"—but this must be read in view of the facts of that case and the contention of the parties. The only controversy considered by the court in that connection was whether the building was completed before or after the notice of lien was filed, and hence, as far as that question is concerned, the particular date is immaterial as long as there is evidence that the building was completed before said notice of lien was filed. In the same case, though, it is held that "the plaintiff was required to file its notice of lien within thirty days after the completion of the building," and furthermore, "unless the building was completed before the notice of lien was filed, the filing was premature and conferred no right to enforce the lien."

We think it clear, therefore, from the provisions of the law, that either the contract must be actually completed or deemed completed before the right to file a claim of lien accrues. But in the case at bar it is not claimed that the contract was completed. Reliance is had upon what the statute provides shall be deemed equivalent to a completion. This is, as we have seen, occupation and cessation from labor for 30 days. The claims of lien were filed before the expiration of the 30 days, and hence the action was premature.

While the law of liens is a remedial measure, and should be liberally construed with a view of accomplishing its beneficent purpose, yet it is for the Legislature to determine the method by which a lien can be enforced, and the courts are not at liberty to disregard any statutory requirement. We cannot see how the judgment can be upheld without ignoring the plain provisions of the law to which attention has been directed.

As to the order denying the motion for a new trial, we deem it sufficient to say that the aggregate amount for which liens were declared is somewhat in excess of the sum shown by the evidence; but it is not necessary to review the matter in detail, as, under the view we have taken of the subject, the liens cannot be maintained for any amount or at all.

The judgment and order as to appellants are reversed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. App. 460

LOS ANGELES PRESSED BRICK CO. v. LOS ANGELES PACIFIC BOULEVARD & DEVELOPMENT CO. et al.

(Civ. 453.)

(Court of Appeal, Second District, California. Jan. 23, 1908. Rehearing Denied by Supreme Court March 23, 1908.)

1. MECHANICS' LIENS—NATURE OF RIGHT TO LIEN—MATERIALMEN.

The right of a materialman to a lien upon the property for which he has furnished the material is of constitutional creation, and is based upon the theory that he has an equitable right to payment for the material from the owner of the building into which it has gone, while the mechanic's lien law is but a legislative provision for making the right effective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 140, 141.]

2. SAME.

The right of a materialman to a mechanic's lien against the property or on the unpaid portion of the contract price does not depend upon the material being ordered by the contractor, but under the express provisions of Code Civ. Proc. § 1183, depends only upon the furnishing of the material, and its being used in the construction of the building, "whether * * * furnished at the instance of the owner of the building * * * or his agent; and every contractor, subcontractor * * * or other person having charge * * * of any building * * * shall be held to be the agent of the owner" for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 140, 141.]

3. SAME — MATERIALS FURNISHED SUBCONTRACTOR—NOTICE TO OWNER.

A materialman claiming a mechanic's lien for materials furnished a subcontractor need not serve notice on the contractor that he has furnished material, but the notice, under the express provisions of Code Civ. Proc. § 1184, may be served on the reputed owner, who must thereupon withhold from the contractor "sufficient money due or that may become due to such contractor, * * * to answer such claim," etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 163.]

4. SAME.

The right of a materialman to a mechanic's lien for materials furnished a subcontractor is not affected by the failure of the contractor to protect himself from the misappropriation of funds by his agent, the subcontractor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 140, 141.]

5. SAME — PROCEEDINGS TO PERFECT — ATTORNEY'S FEES.

Attorney's fees are not allowable in mechanic's lien proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 653.]

Appeal from Superior Court, Los Angeles County; J. S. Noyes, Judge.

Action by the Los Angeles Pressed Brick Company against the Los Angeles Pacific Boulevard & Development Company and others. From a judgment for plaintiff and an order denying a new trial, certain defendants appeal. Judgment modified and affirmed. Order affirmed.

See 83 Pac. 292.

Chas. L. Batcheller, Thos. C. Ridgway, and Barstow & Variel, for appellants. Munson & Barclay, for respondent.

TAGGART, J. The defendant Los Angeles Pacific Boulevard & Development Company is the owner of a brick building erected by defendants Brown & Alcorn as contractors, defendant William Leonard being a subcontractor for the brickwork. Plaintiff furnished brick for the construction of the building upon the order of Leonard, and in due time served notice of doing so upon the owner in accordance with the provisions of section 1184 of the Code of Civil Procedure. At the time such notice was given there remained in the hands of the owner more than enough of the contract price still unpaid to the contractors to satisfy plaintiff's claim in full. The contractors who were not notified of plaintiff's claim, had paid Leonard, their subcontractor, all that was due him before plaintiff notified the owner. All parties to the appeal agree that but one question of law is involved in the appeal. Appellants state this as follows: "Under the mechanic's lien law must the contractor 'take care of' the claims of materialmen or employés of the subcontractor under such contractor?" Respondent states it in this wise: "Whether under the mechanic's lien law the contractor's payment to his subcontractor in full, without notice of the materialman's claim, prevents the materialman from collecting his claim from the owner, the owner having had due notice, and having in hand at the time of notice the means to pay the materialman in full." (The term "means" being evidently used in the sense of having on hand enough of the unpaid contract price.)

The right of a materialman to a lien upon the property for which he has furnished the material is of constitutional creation (Hampton v. Christensen, 148 Cal. 737, 84 Pac. 200), and is based upon the theory that he has an equitable right to payment for it from the owner of the building into which it has gone (Humboldt, etc., v. Crisp, 146 Cal. 686, 81 Pac. 30, 106 Am. St. Rep. 75). The mechanic's lien law is but the legislative provision for making the right effective. The right to a lien against the property or on the unpaid portion of the contract price does not depend upon the material being ordered by the contractor. The right to the lien is dependent only upon the furnishing of the material and its being used in the construction of the building, "whether * * * furnished at the instance of the owner of the building * * * or his agent; and every contractor, subcontractor * * * or other person having charge * * * of any building * * * shall be held to be the agent of the owner, for purposes of this chapter." Code Civ. Proc. § 1183. The notice which constitutes an equitable garnishment of the funds in the hands of the owner is not required to be served on the contractor, and he is the only one of the persons named in section 1183 who cannot avail himself of the provisions of section 1184. The notice is required to be given only to the reputed owner, although the materials may have been furnished to the contractor or other person acting by authority of the reputed owner.

There is nothing in the spirit or the letter of the law which indicates that the laborer's or materialman's lien can be affected by the obligations which exist between the contractor and the subcontractor. Upon the notice being given as provided by section 1184, it shall be the duty of the reputed owner, or the person representing him in making the payments to the contractor, to withhold from the contractor "sufficient money due or that may become due to such contractor, or other person, to answer such claim," etc. There is no uncertainty in the law in regard to the right of the owner to withhold the money to pay bills for material furnished at the request of the subcontractor. Appellants contend that the construction given the law by the trial court would work a hardship upon the innocent contractor, who has obeyed the law, merely because he has prematurely paid the subcontractor. This would be no greater than that which falls upon the owner who has made a premature payment to the contractor. It is always in the power of the contractor to protect himself by a contract with his subcontractor, but if the contention of appellants were sustained the laborer and materialman might be deprived of their compensation by the act of the contractor and be helpless to protect themselves or to enforce the lien given to them by the Constitution.

Appellants' argument appears to be summed up in this paragraph: "No provision of the lien law seems to authorize him (the contractor) to withhold the contract price, or any part of it, from his subcontractor, and yet it is claimed that in effect he must do so, or else pay the subcontractor over again by paying his unpaid bills." The answer to this is that, since the law does not authorize him to do so, it would appear to be a good business proposition for him to protect himself from a loss in this manner by exacting of the subcontractor a contract which would require him to show that his labor and material bills were paid before the money was paid to him, or provide that the contractor might see that the sums paid to the subcontractor were applied to the payment of such bills. There are some matters relating to buildings which are not yet covered by the lien law, and within this sphere any of the parties to the construction of houses and other improvements upon real estate may still exercise their contractual rights.

There is nothing in the opinion in Macomber v. Bigelow, 126 Cal. 15, 58 Pac. 312, which makes for the contention of appellants. So far as applicable here, the decision in that case merely holds that subcontractors and their employés alike are entitled to a lien upon the property for labor performed; that, since the subcontractor is personally liable to his laborers, he may include the amount of their claims in his. This, however, does not preclude them from protecting themselves by filing a lien covering the same claims. In enforcing these liens a court of equity will render judgment in favor of each according to the amount he is entitled to receive. The property being liable only for the value of the work done, if there be not sufficient funds to pay the subcontractor and his employés, the latter will be first paid, and the loss, if any, must be borne by the subcontractor. The same principle will be applied as between the contractor and the materialman, and laborer, whether the latter be employed by the contractor directly or by the subcontractor.

The principle upon which the decision in Dore v. Sellers, 27 Cal. 588, 594, rests can have no application to the present mechanic's lien law. Of the lien of employés there under consideration it is said (page 594 of 27 Cal.): "They (employés and materialmen) have this right, not for the reason that the employer's property has been benefited by the labor or material furnished by the employés, but because they have furnished the labor or materials for the contractor, to whom the law has granted a lien, for the amount which became due to him under the contract in consequence of their labor and materials. It therefore follows that the employés cannot acquire a lien upon the house independent of the original contract, and they are not entitled to a lien as principals, though entitled to be first paid out of the moneys becoming due under the contract." It is evident from this that the decision in Dore v. Sellers was based upon an entirely different theory as to mechanics' liens from that which now obtains in this state.

The right of a materialman to a lien for the value of his goods for which he has not been paid is not affected by the failure of the contractor to protect himself from the misappropriation of funds by his agent, the subcontractor. As said in Humboldt v. Crisp, supra, it is an equitable right which he has to have the owner of a building pay for the materials of which the latter has had the benefit by their becoming a component part of his building.

While counsel for both parties have stated there is but one point involved in the case, appellants incidentally call to our attention the fact that an attorney's fee was allowed to plaintiff. The record discloses that the sum of $100 for that purpose was included in the judgment. This allowance was error. Union Lumber Co. v. Simon, 89 Pac. 1081.

The judgment is modified by striking therefrom the allowance for attorney's fees, and as so modified it is affirmed. The order denying the motion of a new trial is also affirmed.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. App. 473

KING v. GREEN. (Civ. 449.)

(Court of Appeal, Second District, California. Jan. 28, 1908. Rehearing Denied by Supreme Court March 26, 1908.)

1. Municipal Corporations—Use of Streets—Negligence—Contributory Negligence—Evidence.

In an action for injuries to plaintiff through being struck from behind while oiling street car tracks by defendant's automobile, evidence *held* to support a finding that defendant was negligent and that plaintiff was not guilty of contributory negligence.

2. Same.

The rights of a laborer whose duties require him to be in that part of a street devoted to the use of vehicles, with respect to such vehicles, cannot be determined by the same rules applicable to pedestrians with no occupation requiring their presence in that part of the street.

3. Same—Contributory Negligence—Questions for Jury.

While engaged in oiling street car tracks, the proper discharge of which duty required him to move backwards along the rail, plaintiff was struck from behind by defendant's automobile. He was facing at the time in the direction from which any car or vehicle obeying the law of the road would approach. *Held*, that the question of plaintiff's contributory negligence was for the jury.

4. Appeal — Review — Verdict — Conclusiveness.

In an action for injuries through negligence, the verdict of the jury is conclusive both as to the existence of negligence and its effect as contributing proximately to the injury, unless a contrary conclusion necessarily follows from undisputed facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3912–3924.]

5. Same—Presumptions.

In considering as a question of law the relative negligence of plaintiff and defendant, and the conduct of either or both as contributing to the injury, an appellate court will assume that the jury took any view of the facts, justified by the evidence, which tends to support the verdict, and the same rule applies to findings of fact by the court where a jury is waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3755–3761.]

6. Same.

Where the deposition of a witness bore directly on the issue of contributory negligence, the appellate court will assume that it was material and that the trial court gave it some weight in determining that issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3755–3761.]

7. Depositions — Officers or Persons Authorized to Take Depositions.

The person taking a deposition must be one authorized by law, and he should be named unless the commission be directed to an officer, authorized by statute, by his official title.

8. Depositions—Sufficiency and Scope of Objection.

An objection to the admission of a deposition in evidence must particularly specify the grounds of the objection.

9. Appeal — Objections in Lower Court — Sufficiency and Scope.

Objections to the admission in evidence of a deposition on the grounds that no legal proceedings had been taken, that it was without authority of law, and was inadmissible, irrelevant, and immaterial, were too general to call the trial court's attention to the fact that the deposition was taken under a commission directed to any notary public, etc., and not to a judge, justice of the peace, or commissioner selected by the court issuing it, as required by Code Civ. Proc. § 2024, and could not be made the basis of a reversal of the judgment.

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Stanley King against E. K. Green. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Affirmed.

Will D. Gould (James H. Blanchard, of counsel), for appellant. John Murray Marshall and Percy R. Wilson (W. W. Middlecoff, of counsel), for respondent.

TAGGART, J. The case was tried by the court without a jury, and judgment was for plaintiff in the sum of $7,000. Defendant appeals from the judgment and the order of the court denying his motion for a new trial.

The complaint alleges that plaintiff was an employé of the Los Angeles Street Railway Company, among whose duties was that of oiling the tracks of the company in certain streets of the city of Los Angeles. That in pursuance of his employment he was, at the time of his injury, engaged in oiling the company's tracks in East First street near the corner of Chicago street. While he was so engaged defendant, who was driving an automobile in and along East First street at a high rate of speed, carelessly and negligently ran into and permanently injured him. The answer of defendant denies negligence on his part, and alleges that plaintiff was guilty of contributory negligence.

The circumstances under which plaintiff was injured were substantially as follows: Chicago street runs approximately north and south, and First street east and west. The former is 60, and the latter 80, feet wide. While the lines of Chicago street are continuous at the intersection, those of First street "offset," and from the south line of First on the east side of Chicago to the north line of First on the west side of Chicago is more than 100 feet. The traveler on First street must pass this distance along Chicago street in order to get from one part of First street to the other, and there is a double line of street car tracks on First street which passes across and along Chicago street at this place. Plaintiff's evidence shows that he was oiling the southernmost rail of the two tracks on First street, just east of the east line of Chicago street, when he was struck. That he was moving eastward but facing toward the west, had a bucket of oil in one hand and a swab in the other, and was using the latter to apply the oil to the inside rail of the inside track around the curve, thus bringing him near the curb on the south side of First street. That defendant approached him from behind, coming diagonally across both tracks from the north side of First street to the east side of Chicago street, instead of continuing around the outside of the railway curve on the north side of First street and passing down the west side of Chicago street. Plaintiff testified he heard no noise of any approach, and there was no positive testimony that the horn on the machine was sounded in warning. The line of travel through Chicago street from one intersection of First street to the other passes between two blocks of brick buildings. These buildings are of such a character as to obstruct from the view of one approaching the corner from one street a vehicle or car on the other street. The speed at which defendant was traveling, as described by plaintiff's witnesses, was "very fast," one witness estimating it at 25 to 30 miles an hour.

Accepting plaintiff's evidence as true, and the negligence of the defendant might be declared as a matter of law; therefore the objection of respondent that the inference of fact to this effect by the trial court in its findings is not supported by the evidence cannot be sustained. Under the circumstances here shown, it was the duty of the driver of the vehicle to proceed at a slow pace and with great circumspection if he would escape liability even to a pedestrian for injuries done to him. Sykes v. Lawlor, 49 Cal. 238.

Respondent's defense of contributory negligence rests upon the fact that the plaintiff, according to his own testimony, was moving backward and not looking out for his own safety at the time he was struck. His testimony cited in support of this contention is: "I had to go backward. My back was toward the east. He (I) can't be looking every minute. I started right back to oil. I got a few feet, and I thought I had better look up to see if anything was approaching, and I didn't get more than halfway turned around—I didn't get turned around east enough to see—before I was struck." Negligence is a comparative and not a positive term, and its use is relative whether applied to the negligence of the defendant or that of the plaintiff. For this reason in most cases it becomes a question of fact for the jury to determine who was negligent under the circumstances of the case. The degree of care which in one case is insufficient to relieve from a charge of negligence, in another might constitute more than ordinary prudence and caution. Had a pedestrain with no occupation requiring his presence in that part of the street devoted to the use of vehicles, been struck by a passing vehicle while he was backing along the roadway without looking to see where he was going, it is clear that he would have been guilty of contributory negligence. Niosi v. Empire Laundry Co., 117 Cal. 260, 49 Pac. 185. But the rights of a laborer whose duties require him to be in the roadway cannot be determined by the same rule. Not that he is bound to exercise any less care, but because the care to be exercised must be determined from a different standpoint. 18 Am. & Eng. Ency. of Law (2d Ed.) p. 586. The proper discharge of his duties required plaintiff to move backward along the rail which he was oiling. He did this in such a manner as to face in the direction from which any car or vehicle obeying the "law of the road" (Pol. Code, § 2931) would approach, and also looked in the other direction often enough to satisfy the trial court that he was exercising due care at the time he was struck. His care or want of care was a fact to be determined from all the circumstances surrounding him at the time. Clark v. Bennett, 123 Cal. 277, 55 Pac. 908. It was for the jury to determine what would have been the conduct of a person of ordinary prudence under the circumstances of the case, as well as to determine whether or not the facts show negligence. The verdict of the jury is conclusive, both as to the existence of negligence and its effect as contributing proximately to the injury, unless a contrary conclusion necessarily follows from undisputed facts. Schneider v. Market St. Ry. Co., 134 Cal. 488, 66 Pac. 734.

In considering as a question of law the relative negligence of plaintiff and defendant, and the conduct of either or both as contributing to the injury, an appellate court will assume that the jury took any view of the facts, justified by the evidence, which tends to support the verdict. Scott v. San Bernardino, etc., Co., 93 Pac. 677. The same rule holds good as to the findings of fact by the court where a jury is waived. So considered, the evidence in the case at bar clearly sustains the finding of the court that plaintiff was not negligent.

The deposition of the witness Matthews, introduced on behalf of the plaintiff, was taken upon a commission which was directed to "Any Notary Public or Other Officer Authorized to Take Depositions in the County of Noble, State of Indiana," and the return and certificate show that the deposition was taken before "Levi W. Welker, Notary Public." It was not taken under a commission directed to a "judge, justice of the peace, or commissioner selected by the court or judge or justice issuing it," as required by section 2024 of the Code of Civil Procedure. Counsel for defendant had notice of all the steps preliminary to the issuance of the commission and the settlement of the interrogatories, but proposed no cross-interrogatories and made no objections to the form in which, or the person to whom, the commission was directed. When the deposition was tendered in evidence he objected to its introduction in evidence upon the following grounds and in the following language: "We object on the ground that no proper showing has been made, or proper authority given for taking the same, no interrogatories have been settled, or cross-interrogatories settled, or legal notice given that there was to be any time given for settling interrogatories or cross-interrogatories, no order was granted for taking the deposition, and that no legal proceedings have been taken for the taking of this deposition, and that it is without authority of law, or order of this court, and it is inadmissible, irrelevant, immaterial, and incompetent." The testimony contained in the deposition tended to establish that plaintiff was engaged in his occupation of oiling the tracks of the street railway, and thereby accounted for conduct on his part which would have been negligence in a mere pedestrian. It bore directly upon the issue of contributory negligence and we must therefore assume that it was material and that the court gave it some weight in determining that issue. Smith v. Westerfield, 88 Cal. 383, 26 Pac. 206; Salinas Bk. v. De Witt, 97 Cal. 80, 31 Pac. 744; Rulofson v. Billings, 140 Cal. 460, 74 Pac. 35.

It is a primary rule that the person taking a deposition must be one authorized by law. The person who is to take it should be named, unless the commission be directed to an officer, authorized by statute, by his official title. 6 Ency. Pl. & Pr. pp. 499, 493, and 494. Some of the cases hold that even where directed to an officer of one of the classes enumerated by the statute the particular one must be selected by the officer issuing the commission. De Renzes v. De Renzes, 115 La. 675, 39 South. 805, 2 L. R. A. (N. S.) 1089; Newton v. Brown, 1 Utah, 287; Argentine, etc., v. Molson, 12 Colo. 405, 21 Pac. 190.

Conceding that the deposition was irregularly taken and that the testimony therein was material, the objection to its admission which is now urged as a reason for the reversal of the judgment was not particularly specified or called to the attention of the trial court. While the rule requires this in respect to all objections to the trial court's rulings, it is emphasized by the courts in regard to objections made to a deposition on the ground of irregularity or want of authority in its taking. In most jurisdictions such defects must be taken advantage of by a motion to suppress the deposition. Such a motion is required to be made before the trial, and must specify the irregularity with particularity, or the motion will be denied and the objection be deemed to have been waived; the reason for the rule being that the party in whose favor the deposition was taken should be given an opportunity to retake it, and remedy the defect complained of if the deposition was inadmissible because of an irregularity in its taking. Manning v. Gasharie, 27 Ind. 399; 6 Ency. Pl. & Pr. 591, 594.

The reason for the rule is as worthy of consideration under our system of practice as where the motion to suppress obtains, and the requirement of a specification of the particulars wherein the taking is defective is as necessary when it is pointed out by objection at the trial as where the defect is urged by a motion to suppress. As said in Weeks on Depositions (section 389): "A general objection to a deposition reaches the relevancy, competency, or legal effect of the testimony only, and will not be considered as extending to any matter of form or question of regularity or authority in respect of the taking of such deposition. If it be liable to objection on either of the latter grounds, the specific objection must be pointed out with reasonable precision and certainty, and, if overruled in the inferior court, must be set forth in the bill of exceptions; and no exception not thus taken and set forth in the record can be raised or assigned as error on appeal. To hold otherwise would not infrequently enable a party to obtain a reversal, perhaps on some ground merely formal or technical, not made in the inferior court, and which, if it had been taken there, might have been easily obviated." Garvin v. Luttrell, 10 Humph. (Tenn.) 20; Greene v. Tally, 39 S. C. 338, 17 S. E. 779; Blackburn v. Morton, 18 Ark. 384.

The only specific objections stated, that no interrogatories or cross-interrogatories were settled, no legal notice given and no order was made for the taking of the depositions, etc., have no support in the record. The objections that no legal proceedings have been taken, that it is without authority of law, that it was inadmissible, irrelevant, and immaterial, were too general to call the specific defect relied upon here to the attention of the trial court, and cannot be made the basis of a reversal of the judgment. Greene v. Tally, 39 S. C. 338, 17 S. E. 779.

We cannot say that the amount of damages awarded is excessive. The court had before it the wage-earning ability of the plaintiff and his expectancy of life according to the mortality tables used by the insurance companies of the United States. It was also entitled to consider those other elements of damage for which a jury alone must determine the compensation. Skelton v. Pacific Lumber Co., 140 Cal. 444, 74 Pac. 13. We are not prepared to disturb its finding in this respect.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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7 Cal. App. 220, 487

BARNES et al. v. DAVECK. (Civ. 382.)

(Court of Appeal, Third District, California. Dec. 24, 1907. On the Merits, Jan. 29, 1908.)

HIGHWAYS—DEDICATION AND PRESCRIPTION.

Where owners of adjoining lands abutting on a highway construct and fence a road from the highway along their dividing line to their houses, half a mile from the highway, and there put a gate across the end of it, and for 40 years it is used generally by the public for all purposes in going to and from highways beyond the gate, without such use being called in question or forbidden or interfered with, it becomes a highway by dedication and prescription.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 8.]

Appeal from the Superior Court, Sonoma County; Emmet Sewell, Judge.

Action by Henry Barnes and others against Nicholas Daveck. From a judgment for defendant, and from an order denying motion for new trial, plaintiffs appeal. Affirmed.

T. J. Butts, for appellants. F. McG. Martin, for respondent.

CHIPMAN, P. J. This is an action to perpetually restrain defendant from traveling over or across a certain strip of land, the property of plaintiffs. "The Supreme Court shall have appellate jurisdiction on appeal from the superior courts in all cases in equity" (section 4, art. 6, Const.), and to that court the appeal should have been taken. The appeal not having been taken to the proper court, "the cause shall be transferred to the proper court." (Ibid.)

Agreeably to rule 32 (78 Pac. xiii), it is ordered that the cause be transferred to the Supreme Court.[1]

We concur: HART, J.; BURNETT, J.

On the Merits.

CHIPMAN, P. J. Action to restrain defendant from entering upon or traveling over a certain strip of land claimed to be owned by plaintiffs, and over which they claim to have constructed a private way to their dwelling houses. The cause was tried by the court, sitting without a jury, and defendant had the judgment. Plaintiffs appeal from the judgment, and from the order denying their motion for a new trial.

The important issues in the case are disposed of in the following findings of the court, which appellants insist are not supported by the evidence, to wit: "(2) That plaintiffs' grantors did not construct a private way over and along said strip of land leading from the Santa Rosa and Penngrove wagon road to the dwelling houses upon the respective ranches of said Barnes and Roberts, but did construct a way for the uses and benefits herein set out. That plaintiffs have not for many years prior to the commencement of this action kept and maintained said road as a private road over said lands for their mutual use and benefit, and for the use and benefit of each of their respective places, but said road has been kept and maintained and existed as a public road for more than 44 years prior to the commencement of this action, by said plaintiffs, their grantors, and by neighbors who used and traveled over the same. That said strip of land or road has been fenced on both sides thereof and said fences maintained thereon for at least 44 years prior to the commencement of this action, and during all of said time the westerly outlet thereof has been the Santa Rosa and Petaluma public road, unobstructed, by gate or fence or at all. That said strip of land was not on October 5, 1906, nor at the commencement of this action, nor is it now, a private road or way. (3) That over 44 years prior to the commencement of this action the then owners thereof made, laid out, and dedicated, as and for a public road, a road over, upon, and along said described strip of land, and that continuously thereafter said road has been used and is now used and traveled by the public, and for more than 44 years last past, the same has been and is now a public road or highway used as such continuously during said period by the public." There were many witnesses at the trial and a large amount of testimony taken to show the use made of the way in question and the character and duration of that use. There is but little dispute about the facts; the controversy being as to the application of the law to the facts.

There was much evidence tending to establish the following: A highway between Petaluma and Santa Rosa, running north and south, was dedicated and has been used as such for some 40-odd years. It bounded the lands of plaintiffs on the west. Along the dividing line between their lands and beginning at this Santa Rosa and Petaluma highway the strip of land referred to in the pleadings was used as a roadway and was traveled by the public before the land was inclosed. This travel at the beginning was not confined to the strip definitely, but in a general way followed it. About 40 years ago the strip of land was fenced by plaintiffs' predecessors defining the road as it now exists, thus separating the lands of plaintiff Barnes from the lands of plaintiff Roberts. This road connected with the public highway leading from Petaluma to Santa Rosa and ran east for half a mile, and not far from the east end of the roadway were the residences of plaintiffs. At the east end of this roadway was a gate which was placed there when the road was fenced and has ever since remained, requiring users of the road to open it in order to pass to and from the neighborhood further east. The west end of the road was left open. This roadway furnished a convenient means for the public to pass from the dedicated highway before mentioned to other public highways traversing other parts of the county further east. It connected at this gate with the roadway used by the public in order to reach the other public highways, with one of which, the Bennett Valley highway, this continuation of the roadway in question connected about half a mile from the gate mentioned. The public traveled over this route continuously, using the road in question in both directions for all purposes, and there was cumulative evidence that it has been so used by the public with the knowledge and consent of the owners of the Barnes and Roberts lands and without objection from them for about 40 years as found by the court. There has been a schoolhouse for many years situated not far from the gate mentioned, to reach which some of the children in attendance had to pass over the road in question. The use of this road was general by all classes of persons and for all kinds of purposes, and at all hours of the day, not only those traveling for pleasure, but by farmers and teamsters hauling the products of the farm to market and freights coming out of the mountains east of the Petaluma and Santa Rosa highway. There was no direct evidence of any open assertion that this use by the public was of right during these many years, nor was there direct evidence that this use was adverse to the owners of the land. There seemed to have been no occasion for such assertion or claim, as the use was never called in question or forbidden or interfered with by the owners of the land in any way. The owners did most of what work was done to keep the road in repair, but there was evidence that the neighbors did some of this work.

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[1] Retransferred from Supreme Court Jan. 10, 1908.

The position of appellants is stated as follows: "We contend that the use of the highway, no matter how long, does not even tend to prove that the highway is a public highway, unless such use is shown to have been under some claim of right and adverse to the owner, or under some claim of right with the knowledge and acquiescence of the owner; and in the case at bar, while we freely admit that the road in question has been shown to have been used by all persons who wished to travel the same for 30 or 40 years, yet we still insist that the evidence does not show that such use was adverse to the owner of the land, or that the said road was used under a claim of right by any person or persons whatsoever." We do not feel called upon to review the numerous cases decided by our Supreme Court where the questions here presented were under consideration. Certain principles have been clearly established which we think decisive of this case. There are presumptions arising from certain facts which are conclusive and obviate the necessity for direct evidence to the point. It is not always necessary for the public in using a roadway to make proclamation that they are using it under a claim of right where the right is asserted as flowing from long usage with the knowledge and acquiescence of the owner of the land; nor is it always necessary to show some aggressively hostile act by the public that such use was intended to be adverse to the owner. The claim of right, the adverse character of the use, and the knowledge and acquiscence of the owner of the land may be presumed from the facts and circumstances attending the use. It was said in Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448: "Where the claim of the public rests upon long continued adverse use, that use establishes against the owner the conclusive presumption of consent, and so of dedication. It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license." In speaking of adverse possession where prescriptive title to land is claimed, it has been said that the hostile possession must be open and notorious, and with intent to usurp the place of the true owner and put him out of possession (Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100); but the rule as to highways requires only such adverse use and occupation as is inconsistent with the owner's right to claim the exclusive use of the land; i. e., such adverse use as carries with it the assertion of an equal right by the public to use the highway. The general and indiscriminate and daily use of the road by the public, as in this case, with the knowledge and acquiescence of the owners, was evidence of its use adverse to any claim of the owners to the exclusive use of the land. Speaking of the rule, under facts not greatly variant from the facts here, the court said, in Hartley v. Vermillion, 141 Cal. 339, 74 Pac. 987: "When, as in this case, the public, or such portion of the public as had occasion to use the road, traveled over the same, with full knowledge of the landowners interested, without asking or receiving any permission and without objection from any one, for a period of time beyond that required by law to bar a right of action, a right in the public to the use of the road arises by prescription or implied dedication." In the recent case of Fleming v. Howard et al., 150 Cal. 28, 87 Pac. 908, it appeared that "there was an open, visible, continuous, and unmolested use of the way for more than 30 years prior to the beginning of the action." The court said, speaking through Mr. Justice Shaw: "Under these circumstances, it will be presumed that the use was under a claim of right, and adverse, and a prima facie title by prescription is thereby established," citing Washburn on Easements (4th Ed.) 156; 14 Cyc. 1147; Kripp v. Curtis, 71 Cal. 66, 11 Pac. 879; Franz v. Mendonca, 131 Cal. 209, 63 Pac. 361. Mr. Jones says: "A presumption that the use was under a claim of right and adverse arises from an undisputed use of an easement for the established period of prescription; and the burden is upon the party alleging that the use has been by virtue of a license or permission to prove that fact by affirmative evidence, * * * otherwise the presumption stands as sufficient proof and establishes the right." Jones on Easements, § 186. This burden was not seriously assumed by plaintiffs, much less sustained, to rebut the thoroughly well-established presumption, adverse to their contention. In Washburn on Easements and Servitudes (4th Ed.) p. 156, it is said: "And, if there has been the use of an easement for 20 years unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant unless contradicted or explained." The rule to some extent was discussed in a recent case in this court, where it was said: "No particular act or series of acts is necessary to be done in order that the possession may be notorious, but any visible act which clearly demonstrates an intention to claim ownership and possession will be sufficient to establish claim of adverse possession. [Citing cases.] Such claim may be made out by visible acts, without any assertions by word of mouth. When the use is not secret or clandestine, but open, visible, and notorious, the presumption of knowledge follows. [Citing cases.]" Guernsey v. Antelope Creek & R. B. Water Co. (Cal. App.) 92 Pac. 326.

Respondent contends that this strip of land became a public highway by operation of section 2619, Pol. Code 1872, as it was originally enacted, which declared that "all roads used as such for a period of five years are highways"—citing Bolger v. Foss, 65 Cal. 250, 3 Pac. 871. See, also, Southern Pacific Co. v. City of Pomona, 144 Cal. 345, 77 Pac. 929. The evidence in the case makes the section of the Code applicable as it read when first in effect January 1, 1873, for the road had then been traveled by the public for 20 years, and had been fenced as an open lane as it now is for at least 12 years. Respondent's point seems well taken, but we do not think it necessary to decide it. We are clearly of the opinion that the road became a public highway both by dedication and prescription under the rules of law hereinabove pointed out.

Error is claimed in admitting and excluding certain testimony. We have examined these assignments, and find no erroneous ruling of sufficient importance to justify a reversal.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

7 Cal. App. 524

C. SCHEERER & CO. v. HUTTON, Superior Court Judge. (Civ. 473.)

(Court of Appeal. Second District, California. Feb. 4, 1908.)

1. Eminent Domain—Proceedings to Assess Compensation — Statutory Provisions — Modification of Report.

Laws 1903, p. 379, c. 268, § 11, provides that upon filing the report of the referees appointed to determine the compensation for the taking of property for public use, where a jury is waived, the court must on motion of any party appoint a day for hearing, that notice of the hearing shall be served on all parties who have answered, that at the hearing any party may file exceptions in writing, and after hearing the exceptions the court may confirm the report or modify it. *Held* that, on the filing of exceptions to the report of referees and notice thereof, the court had jurisdiction to modify the report, and confirm it as modified, notwithstanding one whose rights were thereby adversely affected had made no objection to the report.

2. Same — Notice of Exception — Sufficiency.

The notice of filing exceptions need not set out the scope and extent of the exceptions, and the filing of specific objections prior to the date set for hearing is unnecessary.

3. Mandamus — Condemnation Proceedings —Statutory Provisions—Remedy by Appeal.

Section 12, c. 268, p. 379, Laws 1903, provides that upon confirmation of the report the court shall make and enter an interlocutory judgment in accordance therewith. Section 13 provides that an appeal may be taken from the interlocutory judgment within 30 days from the entry, and from an order denying a new trial within 10 days after entry thereof. A report of referees allowed compensation to S. as the holder of a leasehold interest in property, and the balance of the compensation for the taking to the fee owner. On exceptions by the fee owner and notice thereof the court, on hearing, modified the report by striking out the compensation for injury to the leasehold, and directed it to be paid to the fee owner, and entered its interlocutory judgment in accordance therewith. *Held*, that any errors in the interlocutory judgment could have been corrected by appeal therefrom, and a writ of mandate should not be granted to compel the court to render a different judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 9.]

Petition by C. Scheerer & Co., a corporation, for a writ of mandate against George H. Hutton, as judge of the superior court of the county of Los Angeles, Cal., to compel the entry of a judgment upon the report of referees as returned by them in a condemnation proceeding. Writ dismissed.

C. W. Pendleton, for petitioner. Julius Lyons and Howard Robertson, for respondent.

ALLEN, P. J. It appears from the record that the city of Los Angeles instituted a proceeding for the condemnation of certain property for public use; that the defendants in said action waived a jury; that thereupon the court appointed three disinterested persons referees to ascertain the compensation to be paid to such defendants; that such referees made their report to the court, from which it appears that in a certain tract of land sought to be condemned in the action petitioner had an interest by virtue of a certain lease therein, which leasehold was of the value of $300, and to that amount the lessees were entitled to compensation; that the total compensation proper to be paid to certain other defendants, owners of the fee in the premises affected by such leasehold, was $6,441.85. After the coming in of said report, and within due time, one of the owners of the fee in the tract above mentioned filed his exceptions to the report of the referees, upon the ground that the party so filing his exceptions was the owner in his own right of all of the fee, and that the other parties named therein had no interest, and that it was not true that petitioner herein, or any other person, had any interest in the leasehold, or otherwise in the property described, and, further, that the amount of compensation awarded was not just compensation. Notice that such exceptions had been filed was duly given to all of the parties interested, and thereafter the court proceeded, under section 11 of the act of March 24, 1903 (St. 1903, p. 379, c. 268), to hear such exceptions, and pending such hearing made its order modifying the report of the referees by striking out the compensation to be paid petitioner herein, and allowing the same to be paid to the owner of the fee, and thereupon entered its interlocutory judgment, setting forth that from the evidence introduced at the hearing of the report and the exceptions thereto the said report should be modified, and adjudged and decreed that the same be modified in certain respects, among which were that petitioner is not entitled to receive any compensation as the owner and holder of a leasehold interest in the property, or any portion thereof, sought to be condemned, and that the compensation allowed petitioner as the owner and holder of a leasehold interest should be awarded to the owner in fee, and that said owner in fee is entitled to receive said compensation awarded to said petitioner, making an aggregate amount to the owner of the fee of $6,741.85, and further decreeing that petitioner is not entitled to receive any compensation in said action. Petitioner thereupon files application for a writ of mandate to compel the superior court to enter a judgment upon the report of said referees in favor of the petitioner for the amount of $300, as by said original report it was entitled to have as such compensation, in support of which application for the writ it is claimed by petitioner: (1) That the court had no jurisdiction to modify the order made in favor of petitioner, because petitioner had made no objections thereto; (2) because the notice of the filing of the exceptions did not contain a specific statement of the scope and extent of such exceptions; and (3) because the finding of the referees that petitioner was the owner of a leasehold is not modified by the judgment, and that, being such owner of the leasehold, petitioner was entitled to compensation, of which the court could not deprive it by its order and judgment.

In this proceeding for the condemnation of property for the purposes set forth in the action, a right of appeal is given to any person aggrieved by the order or judgment of the court within 30 days from the entry thereof, and from an order granting or denying a new trial within 10 days after the entry thereof. We are of opinion that the notice of the hearing of exceptions was sufficient. Section 11 of the act directs the court, upon the filing of the report of the referees, to appoint a day for hearing, and at such hearing any party may appear and file his exceptions. There is nothing in the act requiring specific objections or exceptions to be filed before the day set for the hearing. The court had jurisdiction to modify the report, and to confirm it as modified, and by section 12 of the act was required, upon such confirmation, to enter the interlocutory judgment. While it is true that the court did not make a finding as to the ownership of the leasehold, nor of its value, the intendments in favor of such judgment, however, lead to the conclusion that the court found, as a question of fact, either that the leasehold possessed no value, or that no leasehold interest was held by petitioner in said premises. Whatever may have been the finding of the court in that regard as to the questions of fact, if not warranted by the evidence, it would have been error only; or, assuming that petitioner was the owner of the leasehold and that it had some value, the legal conclusion of the court that petitioner was entitled to no part of the compensation would have been at most but an error of law, either of which errors could properly be reviewed upon an appeal. The statute gives a speedy and adequate remedy through which parties aggrieved may correct any errors of the court or referees; and no appeal being taken, and no motion for a new trial being filed, this court will not, on an application for this writ, undertake to direct a court to render a judgment different from the one rendered, especially in this case, where there is no means of ascertaining the facts upon which said judgment was based. We must content ourselves with assuming that the judgment of the court was warranted from the evidence adduced before the court at the hearing of the exceptions, and where parties have not availed themselves of the rights given them by the statute they cannot be heard in a proceeding of this nature to correct errors, if any there be, in the proceedings.

Writ dismissed.

7 Cal. Unrep. 342

We concur: SHAW, J.; TAGGART, J.

BRYANT v. HAWLEY. (Civ. 457.)

(Court of Appeal, Second District, California. Feb. 4, 1908.)

APPEAL—REVIEW—SCOPE—APPEAL FROM FINAL JUDGMENT.

In an action on a note given for an option to purchase lots, matters of testimony or exhibits constituting title or showing some kind of an agreement, as to which there is no mention in the record, cannot be considered on appeal from the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2867-2872.]

Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by W. S. Bryant against C. O. Hawley. Judgment for defendant, and plaintiff appeals. Affirmed.

Job Harriman, Harriman & Spring, and M. E. C. Munday, for appellant. Waterman & Wood, for respondent.

TAGGART, J. Appeal from a judgment. The action was on a promissory note executed by defendant to plaintiff and two other parties, who assigned their interests to plaintiff. Defendant by his verified answer denies that there is anything due or payable on the note, and alleges that it was given in payment of an option to purchase certain particularly described lots of land, which option to purchase he was induced to enter into by false and fraudulent representations as to the property made to him by the plaintiff. The court finds that the note was given for the option, but upon all the other issues finds in favor of plaintiff, and gives judgment in his favor.

The only points presented by appellant on the appeal relate to some matters of testimony or exhibits constituting title or showing some kind of an agreement, as to which there is no mention in the record. No question which this court can consider upon an appeal from a judgment is urged.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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7 Cal. App. 504

NASH v. ROSESTEEL. (Civ. 434.)

(Court of Appeal, Second District, California. Jan. 31, 1908.)

1. FRAUD — FRAUDULENT REPRESENTATIONS—FALSITY AND KNOWLEDGE THEREOF.

The president of a corporation represented to plaintiff that the corporation's last semiannual dividend was 6 per cent., whereupon plaintiff purchase from the president the latter's stock in the corporation. When the dividend was paid there was no surplus profits out of which to pay it. Civ. Code, § 309, provides that corporations must not make dividends except from surplus profits, and must not divide any of the capital stock among stockholders. It was not contended that the dividend was declared for the purpose of effecting the sale of the stock. The board of directors, which included the president, paid the dividend in an honest belief that they had, during the preceding six months, made a sufficient profit out of which to pay it. Their belief was based on an inventory and balance sheet, the preparation of which was intrusted to employés. Plaintiff never saw the inventory, and so was not deceived by its being erroneous. The value of the assets of the corporation seemed to have been ignored in the transaction. *Held*, in an action for fraud against the president, that his statement was not equivalent to the false representation that the corporation, during the half year, had made a profit equal to the amount of the dividend.

2. Same—Evidence of Fraud in General.

In such a case knowledge of the erroneous inventory and intent to deceive cannot be imputed to the president merely because he was a director and exercised general supervision over the affairs of the corporation, since, in the absence of gross negligence, he and his co-directors were justified in relying on subordinates for data upon which to base their action in declaring the dividend.

3. Same — Pleading — Complaint — Sufficiency.

Civ. Code, § 1572, defines actual fraud as "the suggestion as a fact of that which is not true by one who does not believe it to be true," or "the positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true," etc. A complaint in an action under the statute set out false representations, but did not allege that defendant did not believe them to be true, nor negative the fact that, if untrue, defendant's information did not warrant him in making the representations. *Held*, that the objection to the reception of any evidence on the ground that there were no actionable issues should have been sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 40.

For other definitions, see Words and Phrases, vol. 1, pp. 157, 158.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by J. D. Nash, trustee, against J. A. Rosesteel. Judgment for defendant, and from an order denying a new trial plaintiff appeals. Affirmed.

B. W. Hahn and Hahn & Hahn, for appellant. Russ Avery and Anderson & Anderson, for respondent.

SHAW, J. The plaintiff seeks to recover damages resulting from alleged false and fraudulent representations made by defendant to the plaintiff, whereby the latter was induced to buy certain corporate stock. At the time of the transaction complained of the United Wholesale Grocery Company was a corporation engaged in the wholesale grocery business, having an outstanding capital of $116,000, divided into 1,160 shares of the par value of $100 each. Defendant owned 300 shares of this stock, and held the position of president of the company. Negotiations were entered into by the parties which, on May 1, 1902, resulted in a sale of the 300 shares of stock to the plaintiff for the sum of $31,200. Upon all material issues the court found in favor of the defendant, and rendered judgment in accordance therewith. The appeal is from an order denying plaintiff's motion for a new trial; the sole ground urged therefor being that the findings are not supported by the evidence.

The evidence is conflicting, and appellant does not point out wherein any specific finding is not supported. The court finds that defendant represented to plaintiff that a dividend of 6 per cent. had been declared and paid by the company to its stockholders covering the period extending from July 1, 1901, to January 1, 1902, which representation it further finds to be true. According to the testimony of appellant this representation constituted the sole inducement for making the purchase. After testifying that he did not see the books of the company or inventory of its goods prior to making the purchase, he was asked: "Q. How did you come to purchase the stock? A. Upon representations of Mr. Rosesteel—the same as any one would make a purchase of anything upon the representation of somebody else that he thought it was a desirable purchase. Q. (by the Court). Well, what made you think it was a desirable purchase? A. Because of the fact that they were paying 6 per cent. semiannual dividends. Q. (by Mr. Hahn). And upon any other representation other than the fact that it was paying 6 per cent. dividends, or did you rely upon that one statement alone that it was paying 6 per cent. dividends? A. I think that was the main part, and that they were doing a good business, which they must have been doing to pay that dividend." He does not attack this finding, but contends that, while the uncontradicted evidence shows that the dividend was paid, there was, at the time of declaring it, no surplus profits out of which to pay it, and that the statement was equivalent to a representation that the company had made a profit during the said period equal to the amount of the dividend. Conceding there was no surplus at the time of declaring and paying this dividend, and that it was paid out of the capital of the company, it was not a matter which, at such time, concerned appellant. Civ. Code, § 309; Baldwin v. Miller & Lux et al. (Cal.) 92 Pac. 1030. It is not contended that it was declared for the purpose of effecting a sale of this stock to appellant. The evidence conclusively shows that the board of directors, including the defendant as a member thereof, declared and paid this dividend in an honest belief that they had, during the preceding six months, made a sufficient profit out of which to pay it. Their action in so doing was based upon an inventory and balance sheet furnished by those intrusted with the preparation of the same. Conceding that the books of the company and this inventory exhibited an erroneous condition of the business, it is not, and indeed, under the evidence, could not be, claimed that either the defendant or other members of the board with whom he acted had any knowledge thereof until nearly six months thereafter.

Defendant's good faith in the transaction is not attacked; neither actual knowledge of the alleged erroneous inventory, nor an intent to deceive, is claimed, but appellant contends that both knowledge and intent must be imputed to him, because of the fact that he was a director, and as president exercised a general supervision over the affairs of the company. We cannot assent to this contention. On the contrary, defendant, as president, and his co-directors, were justified in relying upon subordinates and employés for data upon which to base their corporate action in declaring the dividend, and were justified, in the absence of anything constituting gross negligence, in accepting and acting upon their reports, which fully warranted defendant in making the representation. Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513; Cowley v. Smyth, 46 N. J. Law, 380, 50 Am. Rep. 432; Kountze v. Kennedy, 72 Hun, 311, 25 N. Y. Supp. 982, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651.

Counsel insists that this inventory, which purported to show the merchandise on hand December 31, 1901, had been "padded" by including therein goods to the value of several thousand dollars in excess of that actually in stock. Plaintiff, however, had never seen the inventory, nor was he informed of what it purported to contain. Hence, admitting the truth of his contention, he could not have been misled or deceived by such document. When plaintiff's request that he be permitted to take an invoice of the stock was denied, he was told by defendant that, if it should invoice but 90 cents on the dollar, he would not sell his stock for less than $104 per share. The value of the assets of the corporation seem to have been ignored in the transaction.

Appellant insists that this action is brought under the provisions of section 1572 of the Civil Code, which defines actual fraud to consist in: "(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true, * * * with intent to deceive another party thereto, or to induce him to enter into the contract." Admitting that the representations set forth in the complaint were false, it is not alleged that defendant did not believe them to be true; nor is there any allegation therein negativing the fact that, if untrue, defendant's information did not warrant him in making the representations. Upon the trial defendant objected to the reception of any evidence upon the ground that there were no actionable issues. We think that the objection should have been sustained. It therefore follows that, for the further reason that the complaint is inadequate to sustain a judgment for plaintiff, the order appealed from must be affirmed. South San Bernardino Co. v. S. B. Nat. Bank, 127 Cal. 247, 59 Pac. 699; Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 76 L. R. A. 745, 29 Am. St. Rep. 133.

The order denying appellant's motion for a new trial is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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7 Cal. App. 493

ELSER v. SOUTHERN PAC. CO. (Civ. 389.)

(Court of Appeal, First District, California. Jan. 30, 1908.)

1. Carriers — Carriage of Passengers—Excursion Tickets—Signature.

Excursion tickets sold by defendant carrier to S., with authority to resell at an advance, provided that the purchaser ("whose signature and * * * appear below") agreed that the ticket was good only for continuous passage at the times indicated; that it was not transferable; that, failing to comply with such agreement, the ticket might be refused and full fare demanded; and that the purchaser agrees to sign his name or otherwise identify himself when called on to do so by conductors or agents. S. was told by defendant that in reselling the tickets he should obtain the signature of the purchaser on each ticket before delivering it, but that one person could sign for his whole family. A. purchased two tickets, one for himself, and one for plaintiff, his brother-in-law, and, being requested by S. to sign each ticket with the name of the intended user, signed plaintiff's ticket with plaintiff's name. *Held*, that the requirement that plaintiff sign his name was waived by the conduct of S., so that plaintiff was entitled to transportation thereon, though, when requested by an inspector on the train to sign his name, it appeared the ticket had not been signed by him, and he was unable to identify himself to the inspector's satisfaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1423.]

2. Same—Ejection of Passenger—Payment of Fare to Avoid Ejection.

Where a passenger is entitled to passage on the ticket presented by him, though his name is signed thereto by another, the provision that it be signed by him having been waived, and he is unable to satisfactorily identify himself, and a cash fare is wrongfully demanded, he need not pay it or leave the train, but may stand on his right and recover for his ejection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1434–1438.]

3. False Imprisonment—Liability of Carrier for Arrest of Passenger.

Where a passenger presenting a ticket rightfully refuses to pay a cash fare or leave the train, and he is arrested, removed from the train, and incarcerated by a police officer, not for what the officer saw or heard, but because the conductor told him to do so, and in ordering the arrest the conductor was acting for the carrier and within his authority, it being the method adopted by him to effect the passenger's ejection, the carrier is liable for the arrest and detention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Imprisonment, § 66.]

4. Same—Excessive Damages.

Where a passenger is ejected by being arrested for disturbing the peace at the direction of the conductor, and is incarcerated till the next day, but suffers no physical injury, and there was no malice, but the conductor thought he was not entitled to ride on his ticket, a verdict for $4,000 damages is excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Imprisonment, §§ 113-115.]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by Robert Elser against the Southern Pacific Company. Judgment for plaintiff. Defendant appeals. Affirmed on condition of remittitur.

O'Neal & Richardson, for appellant. Tom C. Thornton and B. A. Herrington, for respondent.

KERRIGAN, J. This is an action to recover damages brought by plaintiff for having been ejected from a passenger train of the defendant. The verdict and judgment were for the plaintiff, and from a judgment and order denying defendant's motion for a new trial this appeal is prosecuted.

It appears from the transcript that in the month of August, 1903, there was to be a pugilistic contest at San Francisco, and that the defendant made a special rate from Los Angeles to that city for all who desired to visit San Francisco at that time. One Harry Stuart conducted an excursion or "prize-fight train" from Los Angeles to San Francisco. The defendant sold Stuart 340 tickets at a certain rate each, giving him authority to resell them at an advance. These tickets read as follows:

"Southern Pacific Company, Special Limited Ticket. Good for one continuous first-class passage from San Francisco to Los Angeles, subject to the following contract and conditions: In consideration of the sale of this ticket at a rate less than the regular, full first-class rate, I, the purchaser (whose signature and personal description appear below), hereby agree that it will be good for going passage only as indicated on attached coupon, and that it will not be good for return passage after the date indicated by the agent's punch marks in the margin, and that it will be good only for a continuous trip in each direction; that it is 'not transferable,' and that I, failing to comply with this agreement, conductors may refuse to accept this ticket, and demand the full regular fare, which I agree to pay. Baggage checked to destination only. No stop-over privileges given on this ticket. Agents will in no case extend time on this ticket. If more than one date be punched it will not be received for passage by conductors. The purchaser agrees to sign his name or otherwise identify himself whenever called upon so to do by conductors or agents. I hereby agree to all the conditions of the above contract."

The ticket on the margin thereof provided for a description of the passenger, such as sex, age, size, color of eyes and hair, etc; but for the purposes of this occasion those requirements were waived, and across that part of the ticket was stamped in large red letters "Not required." Stuart was told by defendant that in reselling the tickets he should obtain the signature of the purchaser on the face of each ticket before making delivery thereof, but that one person could sign for his whole family.

The plaintiff desired to attend this contest with his brother-in-law, Frank G. Adams, and a lady friend, and commissioned Adams to purchase two tickets for him. Adams went to the Del Monte Saloon, conducted by Stuart, and purchased three tickets—one for himself and two for plaintiff. Stuart requested Adams to sign each ticket with the name of the intended user. He proceeded to do so, and had signed one with plaintiff's name, another with the name "Mrs. R. H. Elser" (this ticket being destined for the plaintiff's female companion), when plaintiff entered the saloon, and thereupon, at the request of Stuart, he signed the name of Adams to the ticket intended for that person. Plaintiff made the journey to San Francisco, and was thereafter returning to Los Angeles on one of defendant's trains, when an inspector of defendant examined his ticket, and requested him to sign his name on a separate piece of paper. Elser complied with this request, and it was then discovered by the inspector, and admitted by Elser, that his name appearing on his ticket had not been written by him. Elser exhibited to the inspector billheads bearing his name, but was unable to identify himself to the inspector's satisfaction, and, believing that Elser was not the original purchaser of the ticket, the inspector took it up, and the conductor demanded that Elser either pay the full regular fare or leave the train, which Elser refused to do. In this connection the conductor said to him: "Let's have no trouble. Pay your fare, and the company will adjust the matter satisfactorily later." Elser persisted in his refusal either to pay fare or leave the train, whereupon, having arrived at San Jose, the conductor attemped to force him from the train, but, being unable to do so, he secured the assistance of two trainmen. These two men grasped Elser and attempted to eject him, but again Elser resisted, and did so, as he put it, to the best of his ability. What immediately followed is well told by quoting from plaintiff's testimony: "There was considerable of a scuffle there. There were some ladies in the car. * * * Five or six trainmen and some outsiders participated in the scuffle. The outsiders were not friends of mine. I have no idea how many extra passengers came in. Everything was confusion. Ladies were frightened, some screaming, and some crying. It was at this time that Officer Black came in and placed me under arrest. * * *" There is evidence that plaintiff, when told by the conductor that he must pay fare or get off, offered to get off at San Jose, the next station, if given a receipt for his ticket. Several times before his final expulsion he offered to get off if given his ticket or a receipt therefor. The plaintiff was placed under arrest by a police officer, taken to the city prison at San Jose, and remained in custody upntil 2 o'clock the next day. Other facts having a bearing on the case will be stated in the course of the opinion.

Under the circumstances of this case the requirement that respondent sign his ticket was waived by the conduct of Stuart, and respondent was entitled to transportation on his ticket to Los Angeles. But as respondent had read the contents of his ticket a dozen times, as he said, he must have known that he might be called upon to sign his name or otherwise prove his right to travel on the ticket; and, as he had not signed it himself, he must have known that his right to transportation thereon was open to question. Many authorities are cited and quoted from in appellant's brief to the effect that a passenger must pay a fare wrongfully demanded or leave the train, where he has been negligent in starting without taking every reasonable precaution to secure a proper ticket, or if he has notice of its infirmity, and that under such circumstances he cannot recover for his ejection from the train. Note, 43 L. R. A. 706; 6 Cyc. 565. But this is not the rule in California. In this state he may stand upon his right, secured by his contract, and recover damages for expulsion. Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

As just stated, the respondent was entitled to the transportation called for in his ticket, and the appellant company is responsible to him in damages for his unlawful expulsion; but appellant contends that it is not liable for damages caused by respondent's excessive resistance of the efforts of its agents to expel him from the train, and that to allow a recovery for such resistance would be to permit him to enhance his own damages. Appellant asserts that some of the damages claimed by respondent, including his arrest and incarceration, were the result of his violent resistance. There is a variety of views in different jurisdictions in this country on the amount of force that a passenger rightfully on a train may use in resisting expulsion. Assuming that the rule stated by appellant is the one that would meet with our approbation were the question presented to us for decision, we are at a loss to see how we could apply it in this case. The question of resistance is not presented to us by the record for determination. It is not raised—assuming that it could have been—by any objection to evidence, nor by any proposed instruction to the jury. In fact, at the request of appellant the court instructed the jury that respondent "was not entitled to any damages sustained by him by reason of any resistance made by him."

Appellant contends that it is not liable for the arrest and subsequent incarceration of the respondent because, first, it did not authorize such arrest and incarceration; second, it did not ratify such arrest and incarceration; and, third, to cause or request respondent's arrest and incarceration was not within the scope of the authority of appellant's servants or agents, or any of them, and that the appellant is not liable for the arrest of respondent, because such arrest was made by a police officer for a misdemeanor committed on view.

We think that the evidence, while not strong, supports the conclusion, which the jury must have reached, that the police officer who made the arrest did so at the request of the conductor, and not on his own initiative, or solely in his capacity as a police officer. When the officer was first called on to make the arrest he refused, because "at that time Elser was not creating any particular disturbance," and because the officer "did not feel authorized to arrest him." Subsequently the officer heard the turmoil and confusion in the car, and "from what he heard and saw he was satisfied that there was a disturbance of the peace," and he "entered the car to arrest whoever was responsible for the disturbance," and "on entering the car the conductor said, 'Here is your man. Arrest him.'" The officer, on cross-examination, further said that he arrested the respondent, not on account of what he saw or what he heard, but because the railroad conductor told him to do so; that he arrested him on the promise of the conductor that he (the conductor) would prefer charges against respondent.

We think also that the testimony warrants the conclusion that in ordering the arrest of respondent the conductor was acting for the company and within his authority. It was the method adopted by the conductor to effect the ejection of plaintiff.

In Gulf, C. & S. F. Ry. Co. v. Conder, 23 Tex. Civ. App. 488, 58 S. W. 59, a passenger was arrested on a mistaken idea that he was the person who had assaulted the conductor, and the company was held liable for his ejection, though the conductor acted contrary to orders not to make the arrest. In that case appellant's counsel asked a charge to the effect that if the plaintiff was entitled to recover the jury could only find damages for a breach of the contract to carry him safely to his destination, but could not recover the damages resulting from his imprisonment and detention after the departure of the train. It was insisted that the refusal to give this charge was error; the contention being that the defendant, if liable, was only liable for the wrongful ejection, and not for the imprisonment and detention. The court said: "The evidence shows that the arrest and detention were clearly unlawful, and were caused by the wrongful acts of the conducter; and the imprisonment and detention were the natural and proximate results of the said wrongful acts, and were matters properly to be considered by the jury in reaching a verdict. The charge was properly refused."

And in the case of Jardine v. Cornell, 50 N. J. Law, 485, 14 Atl. 590, it is held that a police officer who, in response to the invitation of the regular agents of the company, assists in ejecting a passenger, becomes a special agent of the company for the purpose.

The verdict was for $4,000, and appellant insists that this is excessive. The court correctly instructed the jury substantially that they had a right to assess damages in full compensation for the injury which plaintiff actually received, but that they had no authority to award in addition damages as a punishment of appellant by way of example or warning for the protection of the public. In our judgment, after carefully considering all the circumstances of this case, the contention of appellant that the damages are greatly disproportionate to the injury suffered must be sustained. The neglect of the respondent to have a ticket free from defects contributed largely to engender the dispute which arose. According to some of his own witnesses respondent addressed to the conductor, in the presence of women, vile and indecent language. He was the cause of a disturbance of the peace. The wrongful expulsion of him was free from malice or ill-will. The conductor thought he was doing right, although it turned out he was mistaken. No blows were struck, and the respondent suffered no direct physical injury, in fact no injury except some slight and temporary nervous disturbance. The offense with which he was orally charged by the police officer was not one involving moral turpitude. The conductor was not authorized by any rule of the company to cause the arrest of the respondent, and the superintendent of the company at San Francisco, on being apprised of what had occurred, directed that no charge be placed against the respondent.

In the case of Tarbell v. C. P. R. Co., 34 Cal. 616, the court says: "There is no evidence in the transcript which has any bearing on the question of damages, except the naked fact that the plaintiff was put out of the cars at a point 10 or 12 miles from his place of destination, and five miles from the place of departure." A verdict of $500 was held greatly disproportionate to the injury, and a new trial was ordered unless the plaintiff would take a judgment for $100.

And in Sloane v. Southern Cal. R. Co., supra, the plaintiff was entitled to transportation, but she was compelled to leave the train, and she started to walk to the station from which she had started, a distance of three miles. She walked part of the way, and was carried the rest of the way by a passing vehicle. The humiliation of her expulsion from the train brought on a recurrence of insomnia and nervous paroxysms to which she had previously been subject whenever placed under great mental excitement. In its opinion the court says: "While the amount of damages that may be awarded in a case like the present is in the discretion of the jury, it must be a reasonable and not an unlimited discretion, and must be exercised intelligently and in harmony with the testimony before them. We think that the jury in the present case must have been influenced by other considerations than the testimony before them in arriving at the amount of their verdict." Under the evidence in that case the Supreme Court considered a verdict of $1,400 excessive, and ordered a new trial unless the plaintiff should accept a judgment for $400.

We think in the present case that $4,000 is so out of proportion to the injury as to indicate passion or prejudice or both on the part of the jury. The judgment and order denying a new trial are reversed, unless the respondent shall, within 30 days after the filing of the remittitur in the superior court, file with the clerk and give to the appellant a stipulation, remitting from the judgment the sum of $3,200. If such stipulation be so filed and delivered, the superior court is directed to amend the judgment in conformity therewith, and thereupon the judgment and order shall be affirmed.

We concur: HALL, J.; COOPER, P. J.

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7 Cal. App. 531

Ex parte UPSON. (Cr. 125.)

(Court of Appeal, First District, California. Feb. 6, 1908.)

1. HABEAS CORPUS—QUESTIONS REVIEWABLE—SUFFICIENCY OF INDICTMENT.

Where defendant was charged with publishing certain indecent and defamatory pictures with intent to injure the character of another, and pleaded guilty on trial, he may not by habeas corpus be discharged on the ground that the complaint under which he was convicted on a plea of guilty was insufficient in not stating a public offense, since that question should have been raised by demurrer on trial.

2. SAME—JURISDICTION—COURTS OF LIMITED JURISDICTION—POLICE COURT.

The fact that petitioner was tried and convicted before a police justice did not entitle him to attack the sufficiency of the complaint on habeas corpus; the record showing affirmatively that the police court had jurisdiction of defendant's person and of the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, §§ 81, 87.]

In the matter of the application of Joseph F. Upson for a writ of habeas corpus against the chief of police of the city of Oakland. Writ denied.

Frank J. Murphy, for petitioner.

COOPER, P. J. The petitoner alleges that he is restrained of his liberty by the chief of police of the city of Oakland under and by virtue of a judgment duly given and made by the police court of said city, which judgment was entered upon a plea of "guilty" to the charge set forth in a complaint in writing, which complaint is annexed to the petition herein. Said complaint states that the prisoner, in the city of Oakland, on the 14th day of August, 1907, did maliciously, with intent to injure the integrity and good name of one W. Parker Lyon, publish "certain lewd, obscene, indecent, and defamatory pictures" of said Lyon, then and there well knowing the same to be lewd, indecent, and false, contrary to the statute, etc.

It is claimed that the facts stated in the complaint are not sufficient to constitute a public offense, and that hence that the petitioner should be discharged on habeas corpus. If the complaint is defective in not showing in what way the pictures were lewd or obscene or indecent, the prisoner could have raised the question by demurrer to the complaint in the police court. It will be presumed that the court would have ruled correctly upon the point, and if it did not do so the prisoner could have appealed to the superior court of the county in the regular manner provided by law, and there have had the matter determined. Not having done so, having pleaded guilty to the offense charged in the complaint, we will not now on habeas corpus examine as to whether or not the facts were as fully set out in the complaint as they should have been if tested by demurrer, or by appeal in the ordinary way. The complaint purported to and attempted to state an offense of which the police court had jurisdiction. That is sufficient when tested by the writ of habeas corpus after judgment. Ex parte Ruef, 150 Cal. 665, 89 Pac. 605; Ex parte Mogensen (Cal. App.) 90 Pac. 1063.

Counsel for petitioner claims that the rule as above stated does not apply to an inferior court, such as a justice of the police court. We see no reason for such distinction. In an inferior court, the record or evidence of its proceedings must affirmatively show jurisdiction of the person of the defendant and of the subject-matter; but, when it is shown that the court had jurisdiction of the person of the defendant and of the subject-matter, the rule as to the attempt to state the facts in the complaint is the same as in the superior court. If any distinction should be made, it would seem that the pleadings in an inferior court, or in a court of limited jurisdiction, should be less strictly construed, because they are often drawn by justices of the peace, or persons not learned in the law or regularly admitted to practice. Here it is not claimed that the police court had no jurisdiction of the person of the defendant, or of the crime of libel, which was attempted to be charged in the complaint. We are cited by counsel for the petitioner to Ex parte Kearney, 55 Cal. 212, which we have carefully examined. While that case contains statements that do not appear to have been necessary to the decision, it is not, as to the question before the court, in conflict with what we have said. It was there held that it affirmatively appeared that the prisoner was tried and sentenced for an act which was not a crime. The court said: "This is not the case of a complaint inartificially drawn, which intimates the existence of the facts necessary to the constitution of the offense, or even of an attempted statement insufficient, but indicating a purpose to declare on the essential facts." In Ex parte Boynton, 1 Cal. App. 294, 82 Pac. 90, in the Third appellate district, the court discharged the prisoner for the reason that the complaint in the justice's court did not state facts sufficient to constitute a public offense. It does not appear that the court's attention was called to the rule as here stated, and the point is not discussed. We therefore do not deem it our duty to follow the practice of that case.

We might deny the writ asked for here for the reason that a prior petition for a writ was granted by this court, and heard in December, 1907, and the prisoner remanded. No permission has been obtained to renew the application. After a petition for a writ of habeas corpus has been granted, the matter argued, and the prisoner remanded, to allow here a new petition for another writ by the same defendant for the same offense, but by different counsel and upon a different ground from that stated in the original petition, is a practice that certainly should not be encouraged. If a case could arise in which it might be deemed advisable to apply for a second writ after a similar application had been denied, the orderly and proper way would be to apply to the court for leave to file a new petition.

The writ is denied.

We concur: HALL, J.; KERRIGAN, J.

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7 Cal. App. 515

In re WELLS' ESTATE. (Civ. 424.)

(Court of Appeal, First District, California. Feb. 3, 1908. Rehearing Denied by Supreme Court March 2, 1908.)

1. COVENANTS — IMPLIED COVENANTS — COVENANT AGAINST INCUMBRANCES — STATUTORY PROVISIONS—"GRANT."

Mortgaged property was conveyed by deed of gift, which was silent as to the mortgage, and the conveying words were "give, grant, alien, and confirm." *Held*, that there was no covenant by implication against incumbrances, notwithstanding Civ. Code § 1113, subd. 2, declaring that from the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be passed a covenant is implied that at the time of the execution of the conveyance the estate was free from incumbrances.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3151–3156; vol. 8, p. 7674.]

2. WILLS—CONSTRUCTION—RECITALS.

W. gave a mortgage on real estate, and two months later conveyed it to his wife by deed of gift, without mentioning the mortgage. Less than a week later he made his will, which provided: "Thirdly. I do declare that I have by deed of gift conveyed, subject to the incumbrances thereon, to my wife, R., certain premises [describing the premises conveyed]." *Held*, that the reference in the will to the deed was a mere recital, and not an attempt to dispose of the property, and the deed and will need not be construed together.

3. Executors — Payment of Claims—Mortgage on Property Conveyed by Testator's Deed of Gift.

Where a will made no provision for payment of indebtedness other than for his last sickness and funeral expenses, payment by the executor of a note secured by mortgage on land conveyed by the testator to his wife by a deed of gift containing no reference to the mortgage was not proper.

4. Judgment—Probate Proceedings—Order for Sale to Pay Debts—Res Judicata—Validity of Debt.

A testator had conveyed mortgaged property to his wife by deed of gift. A petition by the executor to sell personal property to pay debts set forth the alleged indebtedness and a schedule of claims against the estate, including the mortgage indebtedness. An order for sale was made, reciting the matters alleged in the petition. *Held*, that the order was not a determination that the claim was a valid debt due from the estate.

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Accounting by the executors of the will of Asa R. Wells, deceased. From an order surcharging the executors' final account with the amount of a certain claim paid by the executors, they appeal. Affirmed.

D. E. Alexander, for appellants. J. E. Barry and Jas. F. Tevlin, for respondent.

KERRIGAN, J. This is an appeal from an order surcharging the executors' final account the amount of a claim against the estate of the decedent. On October 27, 1903, Asa R. Wells, the deceased, borrowed of the Hibernia Savings & Loan Society $7,000, for which he gave his promissory note, secured by a mortgage on certain premises in the city and county of San Francisco known and designated as Nos. 1404 and 1406 Jackson street. December 29, 1903, the decedent conveyed the mortgaged premises to his wife, Reba E. Wells, by a deed of gift which is silent as to the mortgage. The conveying words are "give, grant, alien, and confirm." A little less than a week later, on January 4, 1904, the decedent made his will. The third clause thereof, which refers to the aforesaid deed, is as follows: "Thirdly. I do declare that I have by deed of gift conveyed, subject to the incumbrances thereon, to my wife, Reba E. Wells, certain premises situated in the city and county of San Francisco, state of California, and designated and known as Nos. 1404 and 1406 Jackson street, and I hereby give, devise and bequeath to my said wife all the furniture, fittings and fixtures appertaining to and contained in said No. 1406 Jackson street." Wells died December 8, 1904, and thereafter his will was duly admitted to probate. In the course of the administration of his estate the Hibernia Savings & Loan Society presented its claim for $15,115, the amount of his promissory notes given by the decedent. One of these is the note of October 7, 1903, for $7,000 and interest, secured by the mortgage on the land conveyed to Reba E. Wells. This claim of the bank was allowed and paid in full, but the court refused to credit the executors with the amount paid by them on this note, and surcharged their account therewith.

Appellants' counsel contend that the deed shows that it was made free from incumbrances done, made, or suffered by the grantor. The reason given for this assertion is that as the word "grant" is used in the deed, under subdivision 2 of section 1113 of the Civil Code, a covenant against incumbrances is implied. The conveyance was by deed of gift, wherein the mortgage was not mentioned, and it has been held in this state that such a deed will not support a covenant by implication against incumbrances. In re Porter, 138 Cal. 618, 72 Pac. 173.

The next contention of appellants is equally untenable. It is in effect that the deed and will having been made at or about the same time, the deed should be considered as part of the will; that, if it is a part of the will, it is a specific devise of the land in question; and that, being such a devise, Reba E. Wells is entitled to the property exonerated from the mortgage. The deed and mortgage are referred to in the will in this way, "I do hereby declare that I have by deed of gift conveyed, subject to the incumbrances thereon, to my wife, Reba E. Wells," the mortgaged premises. This contention would require us to regard the phrase "subject to the incumbrances thereon" as merely descriptive of the incumbered condition of the property, and not as subjecting it to the burden of the mortgage; but we think the whole reference in the will to the deed is a mere recital of fact or legal opinion, and not an attempt therein to dispose of the property. The will merely states: "I do hereby declare that I have by deed of gift conveyed," etc. The testator did not say "I do hereby give, devise, and bequeath" the property described in the deed, or by the use of any other expression indicate that he was disposing of, or desired to dispose of, that property by his will. Wells recognized in his will, as was the fact, that his wife had been clothed with the title to the property by virtue of the deed of gift. She took title thereto as a grantee, and subject to the mortgage thereon.

In the case of In re Heydenfeldt, 106 Cal. 434, 39 Pac. 788, cited by appellant, the court found authority in the will for the payment of a mortgage debt on property previously deeded to a child. Referring to the claim of the child, to whom the mortgaged premises had been deeded, the court said: "Appellant bases her rights entirely upon the claim that the will exonerates her property. If the will does not provide for the payment of the debt, her appeal must fail."

The Heydenfeldt will contained the provision: "I direct my executors to pay all debts which I may owe at my decease from the proceeds of sale of my unproductive property." It was only by force of this language and other facts concerning the condition of the estate that the court was able to say that Heydenfeldt had in effect directed the payment of the mortgage debt out of his estate. In the case at bar there is no direction at all in the will for the payment of the debts of the testator except funeral expenses and the expenses of testator's last sickness. "The will does not provide for the payment of the debt," and, under the doctrine of the Heydenfeldt Case, "her (this) appeal must fail."

In passing we may also say that, while the deed is not set forth in the opinion in the Heydenfeldt Case, it is apparent from what is said by the court near the bottom of page 437 (106 Cal. 437, 39 Pac. 789) that the deed to the mortgaged property contained the word "grant." It is thus apparent that the court laid down the rule that a grantee under a deed of gift cannot require payment of a mortgage debt on the property conveyed out of the estate of the grantor by reason of the implied covenant against incumbrances, unless provision therefor can be found in the will of the deceased grantor. See, also, Estate of Porter, supra.

In the course of the administration of the estate the executors applied for and obtained an order of sale of personal property for the payment of debts. The petition, after setting forth the general condition of the estate, alleged the indebtedness thereof, and in a schedule of claims attached thereto there was included the claim of the said Savings & Loan Society for $15,115, $7,035 of which was secured by a mortgage on the property in question. The matters alleged in the petition were recited in the order granting the petition for the sale of personal property. The appellants claim that the court in that proceeding determined that the claim now objected to was a debt due from the estate. In this we think they are mistaken. The ultimate fact determined in that proceeding was whether a sale should be had, and, if so, how much property should be sold. The question of the exoneration of the property conveyed to Mrs. Wells was not presented by the petition, nor was it considered or passed upon by the court.

The other alleged errors are not of sufficient importance to require notice.

The order appealed from is affirmed.

We concur: COOPER, P. J.; HALL, J.

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7 Cal. App. 534

GURNSEY v. NORTHERN CALIFORNIA POWER CO. (Civ. 419.)

(Court of Appeal, Third District, California. Feb. 6, 1908.)

1. HIGHWAYS—REGULATION—EXTENT OF REGULATION—BOARD OF SUPERVISORS.

Under Pol. Code, § 2631, providing that by taking land for the public highway the public acquire only the right of way and the incidents necessary to enjoying and maintaining it, subject to regulations provided by law, and County Government Act 1897 (St. 1897, p. 458, c. 277), § 25, subd. 4, empowering the board of supervisors to lay out, maintain, control, etc., the public roads in the county, the public has a right to use the highway only for travel over it without obstruction or interference, and the county board of supervisors cannot lawfully exercise control over such highway beyond what is necessary to facilitate travel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 288, 456.]

2. ELECTRICITY—ELECTRIC COMPANIES—FRANCHISES—RIGHTS OF ABUTTING OWNERS.

County Government Act 1897 (St. 1897, p. 458, c. 277), § 25, subd. 4, empowers the board of supervisors to lay out, maintain, control, etc., the public roads in the county, and subsection 35 (p. 466) authorizes the board to grant franchises along and over the public roads for all lawful purposes. Pol. Code, § 2631, provides that by accepting land for a highway the public acquire only a right of way and the incidents necessary to maintaining it. The board of supervisors granted defendant a franchise to erect poles and string electric wires thereon along and over the public highways of the county, for the purpose of lighting the highway. *Held*, that the lighting of the highway was an incident to the contemplated use thereof; that the determination of lighting the highways was within the powers of the board in controlling and managing the highways; and that the franchise was for a lawful purpose, and it was immaterial that the lighting was used in part for private purposes.

3. SAME—GRANT OF FRANCHISE—REVIEW BY COURTS.

The action of the board of supervisors in granting the franchise will not be reviewed by the court, in the absence of a showing that it abused its discretion or exceeded its jurisdiction in granting the franchise.

4. JUDGMENT—PLEADING—PLEADING JURISDICTIONAL FACTS—NECESSITY—STATUTES.

Under Code Civ. Proc. § 456, providing that in pleading a judgment or other determination of a court, board, etc., it is not necessary to state the facts conferring jurisdiction, but such determination may be stated to have been duly given, where defendant claimed under a franchise by the board of supervisors to erect its poles and string its electric wires thereon along the county road, it was not necessary for defendant to allege in pleading its franchise that the board determined that it was necessary to light the highway, nor that the board had entered into a contract with defendant for lighting the road.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1795–1803.]

5. HIGHWAYS—REGULATION—OBSTRUCTIONS—ABATEMENT—PLEADING FRANCHISE—SUFFICIENCY.

Assuming it to be necessary where defendant relies on a franchise to justify possession, in an action of ejectment, to show that he is complying with the terms thereof, where defendant alleged that it was granted a franchise to erect poles and string electric wires thereon along the county highway, and erected its lines on the highway to furnish electricity to the towns along the highway, and is now, and has for a long time been, engaged in furnishing electric power and light to persons along such highway, it sufficiently avers a compliance with the franchise.

6. WORDS AND PHRASES—"GRANT"—"GIVE."

The word "grant" is synonymous with the word "give."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3094–3098, 3151–3156; vol. 8, p. 7674.]

7. JUDGMENT — PLEADING — GRANT OF FRANCHISE.

Under Code Civ. Proc. § 456, providing that in pleading a judgment or other determination of a court, board, etc., it is not necessary to allege the jurisdictional facts, but the determination may be stated to have been duly given or made, an allegation that after the requirements of the law had been duly complied with the county board of supervisors granted defendant the franchise of erecting its poles and electric wires was a sufficient averment of the determination of the board granting the franchise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1795–1803.]

8. HIGHWAYS — REGULATION—OBSTRUCTIONS —REMOVAL—ACTION BY ADJOINING OWNER —EJECTMENT.

Where an electric lighting corporation unlawfully erects and maintains its poles and wires on a public highway in which the public has only an easement, ejectment is a proper remedy in an action by the owner of the adjoining land to prevent such unlawful use of the highway.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 297.]

Appeal from the Superior Court, Tehama County; J. F. Ellison, Judge.

Action by W. H. Guernsey against the Northern California Power Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed.

Reid & Dozier, for appellant. P. H. Coffman, for respondent.

BURNETT, J. The complaint is in ejectment. It contains the allegation that "the defendant, without title and without the consent of the plaintiff, entered upon and into the possession of the said lands and premises, and has dug holes and erected poles thereon, and has strung, built, and erected wires and an electric power line for a distance of about two miles on and over the said lands, * * * and has maintained and used the said poles, wires, and power line thereon for the purpose of conveying electricity for power."

In its answer defendant seeks to justify on the ground that it is "a corporation organized for the purpose of furnishing the public along its lines with electricity for power, heating, and lighting purposes, including the lighting of the highways, and for the purpose of furnishing municipalities and the people of incorporated and unincorporated cities and towns and the authorities thereof with electricity for the purpose of heating, lighting, and power, including the lighting of highways"; that over the lands described in the complaint a public highway extends which has been used as a wagon road for more than 45 years; "that on the 10th day of October, 1902, after due and legal notice had been given, and after the requirement of law had been duly complied with, the honorable board of supervisors of Tehama county, in pursuance of law, at a regular meeting thereof, granted the said Northern California Power Company the right and privilege of erecting poles and stringing wires thereon for the transmission of electricity and electric current over, along, and upon the roads, bridges, and highways of said Tehama county for a period of 50 years, * * * and said franchise applied to said road at that time; that since the granting of said franchise the said defendant has constructed and erected over said public highway where it crosses the lands of said plaintiff a power pole line for the purpose of conveying electricity and electric current, which said power pole line has been constructed for the purpose of heating, lighting, and power purposes, and for the purpose of connecting up with other portions of the system of the defendant so that the said defendant might furnish power and light to towns, cities, and municipal governments, and for the purpose of lighting public highways leading to and from cities and towns, both incorporated and unincorporated; that the said portion of said line which crosses the public highway over the lands of the plaintiff are intended to be used for lighting public highways both in incorporated towns and the other highways over which it may cross, including the public highway across the lands of the plaintiff herein; that the said defendant is a public service corporation, and as such has been granted a franchise on, over, and upon said public highway where it crosses the lands of plaintiff and any other place in the said county, for the purpose of transmitting electricity and electric current for power, light, and other useful purposes, including the lighting of the highway over which it crosses; and that the said defendant is now and for a long time past has been actually engaged under contract with abutting owners in lighting said public highway herein described, and the said defendant, if ejected from said premises and compelled to remove its power pole line, cannot fulfill said contracts, and cannot light said public highway."

The plaintiff demurred to the answer on the general ground, and also for uncertainty, among others, for the following reasons, that it cannot be ascertained (1) whether the board of supervisors ever granted by ordinance or otherwise any franchise to defendant; (2) whether defendant is bound by contract or otherwise to light for the public and furnish light for public use on the public highway on and across the plaintiff's said lands; and (3) whether it is a public necessity to construct and maintain poles and a power line on or to light the public highway which is on and across plaintiff's said lands.

The demurrer was sustained, but on what particular ground it does not appear, and the default of defendant having been entered, judgment was rendered for plaintiff, from which the appeal has been taken.

The following questions are treated by counsel as of vital and controlling importance in the determination of the appeal, and to them our attention will be directed: (1) Did the board of supervisors have authority to grant to defendant the franchise described in the answer, which could be legally exercised without compensation being paid to the abutting landowners? (2) conceding that such action is within the scope of the power of the board, is there a sufficient allegation of the fact that said board of supervisors granted to said defendant the said franchise? and (3) assuming that plaintiff is right in his answer in the negative to the first question, is ejectment his remedy?

The main controversy hinges upon the extent of the control and authority of the board of supervisors over the highways of the county. The respondent contends that "the poles and power line are an additional burden on the fee in the land over which the highway passes, which cannot be imposed or maintained without the consent of the owner"; and the appellant insists that the power which it claims was exercised by the board is within the contemplation of subdivision 4 of section 25 of the county government act of 1897 (St. 1897, p. 458, c. 277), which provides that the board of supervisors has power "to lay out, maintain, control, construct, repair and manage public roads, turnpikes, ferries, wharves, chutes and other shipping facilities and bridges within the county," the position being that "the words 'maintain,' 'control,' and 'manage' give the board of supervisors power among other things to light the highways." Furthermore appellant cites subdivision 35 of section 25 of said act authorizing the board of supervisors "to grant franchises along and over the public roads and highways for all lawful purposes, upon such terms and conditions as in their judgment may be necessary and proper, and in such manner as to present the least possible obstruction and inconvenience to the traveling public," and declares that "we know of no decision or law which in any way indicates that a franchise such as is held by the defendant in this case is not for a lawful purpose."

It is not disputed that the board of supervisors has control of the public highways, and has authority to grant franchises for "all lawful purposes"; but it is contended by respondent, and it must be obvious, that this authority of the board has relation to the purpose for which a highway is dedicated, and is limited by the uses, primary and incidental, to which under the law a highway is devoted. In other words, the "lawful purpose" must be consistent with the character and in furtherance of the design of the easement which the public has in and to the highways. The nature of such easement is disclosed in section 2631 of the Political Code as follows: "By taking or accepting land for a highway, the public acquire only the right of way and the incidents necessary to enjoying and maintaining it subject to the regulations in this and the Civil Code provided."

The only right, then, which the public has in and to the highway, is to use it for the purpose of traveling over it without obstruction or interference; and the control which the board of supervisors can lawfully exercise must have in view the promotion of that use, and cannot extend beyond whatever is necessary to facilitate travel. With the exception of such use and control all interest in the soil over which the highway extends belongs to the abutting landowner, and, as held in many cases, he "retains his right for all purposes which are consistent with the full enjoyment of the easement acquired by the public. This right of the owner may grow less and less as the public need increases; but at all times he retains all that is not needed for public uses, subject, however, to municipal or police regulation." Colegrove Water Co. v. City of Hollywood, 90 Pac. 1053, and cases cited.

The first question to be settled is, therefore, whether the lighting of the highway tends to facilitate and accommodate travel? In other words, does it promote the use for which a highway is dedicated, and hence included within the scope of the control of the board of supervisors over the highways, which is delegated by the provisions of the statute? The precise point has not been decided by our Supreme Court, but we are not without valuable suggestions from other jurisdictions, and we are aided somewhat by the opinions of standard authorities upon the subject.

In section 331, Joyce on Electric Law, we have an epitome of various decisions as follows: "Although a rural highway may not be subject to the same burdens or easements as city streets, yet in its dedication or appropriation as a highway it is made impliedly subject to such uses as the public may in the future require. The distinction as to the use of city streets and highways arises out of the necessary requirements of the public in the use made of them. We have seen that in the case of telegraph or telephone lines upon rural highways the weight of authority supports the conclusion that they constitute an additional servitude. In the construction and maintenance of poles and wires of an electric lighting company upon which are suspended wires and lamps for the purpose of lighting the highway, however, there is a use different from that of the telegraph or telephone lines. In the case of the latter the poles and wires are not used in any sense for a street or highway purpose. The primary object of the highway is for the use of the traveling public, and any reasonable means tending to promote the safety and convenience of travelers is a proper use. The lighting of many of the country highways may not be necessary, yet in a large number of cases a rural highway, especially where a main avenue of connection with a large city, may be used to such an extent for the purpose of travel that the lighting thereof may be such a benefit to the traveling public, and so promote its safety and convenience, that it may be said to be a necessity, and be within the proper uses to which a highway may be devoted, and for which an abutting owner is not entitled to compensation."

In a case of a highway that is merely a country road and but lightly traveled, however, the author states the rule to be that such poles and wires constitute an additional burden, entitling the abutting owner to compensation.

Lewis, in his work on Eminent Domain, § 131a, says: "It seems beyond question from the authorities that under the general power to improve streets and render them more convenient and safe for travel the public authorities may provide for lighting them at night. If this is so, it can hardly be that such authorities are limited to any particular kind or system of lighting. It follows that poles and wires may be placed in the street for the purpose of lighting them by means of electricity. Such a use is directly connected with, and incidental to, the public right of passage. The abutting owner would have no ground of complaint, in the absence of any abuse of the right to so use the street."

Elliott in his work on Roads and Streets, § 397, calls attention to the distinction between urban and suburban highways, and states what is generally recognized by the authorities that: "The owner of the dominant estate in an urban servitude has very much more authority and much greater rights than the owner of the dominant estate in a suburban servitude. The easement of the one is very much more comprehensive than that of the other"—and in section 399 et seq. he describes the extent of the control of the roads by highway officers as follows: "Whatever is necessary to be done in order to make a safe, convenient public country road the highway officers may lawfully do. * * * They may not use it for purposes entirely disconnected with the purpose to which it was set apart, but they may use it for public purposes legitimately connected with the system of highways of which it forms a part; for great as are the rights of the owner of the servient estate, they are nevertheless subordinate to the right of the public, and by this paramount right they are always limited."

More specifically as to the question under consideration here it is said in section 404: "If the light is for the highway, and it is necessary to make it safe and convenient for free passage, then it is probable that the highway officers would have a right to dig trenches and lay pipes; for we think it must be the law that, where it is necessary to secure gas to light the public way, and thereby make it safe, the highway officers may use the way for a pipe line. To make our meaning plain, suppose, for example, there is a dangerous bridge or other place in a rural highway much traveled after night, and that the best and most convenient mode of lighting and making it safe is by conveying gas to it from a place nearby, would not the highway officers have a right to dig trenches and lay pipes in the road for the purpose of lighting the dangerous place and thus make it safe for passage? To our minds it seems clear that they would have this right."

In Keasbey on Electric Wires it is declared that electric light wires sustain the same legal relation to streets and highways as gas pipes, and that the same principles apply to both. The author, in section 108, quotes with apparent approval from Judge Dillon to the effect that the use of the streets under legislative or municipal sanction for the purpose of laying down gas pipes or other pipes for the purpose of supplying the city and its inhabitants with light is a legitimate use of the streets for which the abutting owner is not entitled to compensation, and in section 109 it is said: "With the rapid growth of population around the large cities, it is not always easy to distinguish between city streets and country roads. Suburban roads soon require the conveniences of city streets; and, as electric wires are not often carried where there are so few houses that the light is not needed along the line of the street, it is hardly necessary to decide whether they would be an additional servitude upon the land in such a case. It is pretty safe to say that, if the poles and wires may be used in city streets without conpensation, they may be used in the same way wherever they are needed for the same reason"—and the author claims it is well settled that, wherever the local government has authority to provide for lighting the streets, an abutting landowner is not entitled to compensation for the mere use of the soil, or for anything except injury to his easement or damages arising from negligent construction.

Many cases are cited by respondent in support of his contention that a license from the board of supervisors or other legislative body to erect poles and string wires upon the highway imposes an additional burden upon the freehold which is not authorized without a grant from the owner of the fee. Some of these are not in point. But there is some conflict in the authorities upon the subject; but, where the facts of each particular case are considered, the conflict generally is more apparent than real.

For instance, in Kincaid v. Indianapolis Natural Gas Co. et al., 124 Ind. 577, 24 N. E. 1066, 8 L. R. A. 602, 19 Am. St. Rep. 113, the Supreme Court of Indiana said: "A use for any other than a legitimate highway purpose is a taking within the meaning of the Constitution, inasmuch as it imposes an additional burden upon the land, and whenever land is subjected to an additional burden the owner is entitled to compensation. The authorities, although not very numerous, are harmonious upon the question that laying gas pipes in a suburban road is the imposition of an additional burden, and that compensation must be made to the owner." In that case, however, there was no contention that the gas pipes were to be used for the benefit of the highway, of which the claimant was the abutting owner of the fee, but the gas was to be conducted to a distant city.

We cannot agree with the doctrine announced in some of the cases cited; but our judgment yields assent to the more progressive and enlightened understanding, as we conceive it, or, as said in Montgomery v. Railway Co., 104 Cal. 192, 37 Pac. 788, 25 L. R. A. 654, 43 Am. St. Rep. 89, "a broader and more comprehensive view of the rights of the public in and to the streets and highways of city and county," and, while we should carefully conserve the rights of individuals to their property, the title which the owner in fee holds in the land in a street or highway during the duration of the easement of the public therein should be declared subject to all legitimate uses of a highway in harmony with the advanced methods and growing demands of modern society.

We are satisfied that within the spirit and purpose of the law the lighting of an urban or suburban highway may be considered incidental to the use contemplated by the dedication; that it tends to promote the comfort, convenience, and facility of travel over the highway; that the determination of the necessity for said lighting in any particular case is clearly within the authority of the board of supervisors or other local legislative body charged with the duty "to maintain, control, and manage" the public highways; that the franchise in the case at bar was granted for a "lawful purpose"; and that the action of the said board is not subject to revision by the court in the absence of any showing that there has been an abuse of discretion or excess of jurisdiction in said action. We understand that the conclusion from the foregoing statements is not affected by the consideration that the poles and wires are to be used for private purposes as well as for the illumination of the public highways.

In Lewis on Eminent Domain, § 131, it is said: "In regard to poles and wires to be used for both public and private lighting, the logical position would seem to be that the abutting owner would be entitled to a remedy to the extent of the unlawful use." But if he have any remedy, it must be apparent that it cannot be ejectment, because that would destroy the lawful as well as the unlawful use. It must be by injunction to restrain the unlawful use or by an action for damages, if at all. It would be a narrow and technical view that would inspire us to hold that because the poles and wires are also to be used for private purposes the board of supervisors is precluded from granting a franchise which is to be exercised for the safety, convenience, and comfort of the traveling public.

Again, we do not understand that defendant is required to allege that the board of supervisors determined that it was necessary to light the highway. This is one of the jurisdictional facts, which the board was called upon to determine, it is true; but the statute has obviated the necessity for pleading it. It is sufficient to aver substantially that the order granting the franchise was duly given or made. Code Civ. Proc. § 456.

Neither do we think the answer defective because of the omission of any allegation that the board of supervisors has entered into any contract with defendant for the lighting of said road. A justification for the occupancy of the highway is found in the allegations that the franchise was granted to defendant by the board of supervisors for the purpose of lighting the said highway; that in pursuance of said provision defendant has erected its poles and constructed its wires for said purpose, and has performed and is performing said service. It is true that the allegation is that the contract for lighting was made with the abutting owners; but it can be no concern of plaintiff's if they are willing to pay for the service rather than to have it made a charge against the county, as the public is receiving the benefit. Assuming that in the defense to an action of ejectment it must appear that the defendant who relies upon a franchise to justify possession must show that he is complying with the terms of said franchise, this fact sufficiently appears in the answer when properly construed.

Since the facts showing the jurisdiction of the board of supervisors are not alleged, the more difficult question is whether there is a sufficient averment of the action of the board in granting the franchise. The contention is that it cannot be determined whether the privilege was conferred by virtue of an ordinance or otherwise, and also the allegation that the board "granted" the right and privilege is rather a conclusion of law than of fact. In support of his contention respondent cites Young v. Wright, 52 Cal. 410, Judah v. Fredericks, 57 Cal. 391, and City of Los Angeles v. Mellus, 59 Cal. 451.

In the first it is held that "duly rendered" is not equivalent to "duly given or made"; in the Judah Case it is held that the allegation that "the plaintiff is the duly qualified and acting executrix of the last will and testament of J. F., deceased," is not a sufficient averment of her official character; and in the last it was held that the allegation "an order was made" is not equivalant to "an order was duly made." But the later decisions do not indulge in such subtle refinement. In Collins v. O'Laverty, 136 Cal. 33, 68 Pac. 327, the ruling in the Judah Case is questioned, and in Clark v. Nordholt, 121 Cal. 26, 53 Pac. 400, the application of the rule embodied in section 456, supra, is limited to courts of inferior jurisdiction. But, conceding that we are dealing with an inferior tribunal exercising judicial functions, we think there has been a substantial compliance with the requirement of said section 456. The word "grant" is synonymous with "give" (Webster's Dictionary); and we can see no substantial difference between "duly given" and given "after the requirements of law had been duly complied with." The pleader has used, as we view it, unnecessary circumlocution, as it would have been an exceedingly simple matter to allege that the board by ordinance or resolution duly given and made, granted, etc., thus avoiding the question we are now considering. While there is no direct allegation that it was through an ordinance that the privilege was granted, there is an averment that "defendant only claims the right to use the portion of said highway * * * under and by virtue of the said ordinance and franchise," and, considering the answer as a whole, we are of the opinion that it sufficiently alleges the enactment of an ordinance granting to the defendant the said franchise.

The following cases exhibit the more liberal and reasonable trend of judicial construction of said rule of pleading: In Los Angeles v. Waldron, 65 Cal. 283, 3 Pac. 890, it is held that the expression "duly passed and adopted the ordinance" is sufficient. In Pacific Paving Co. v. Bolton, 97 Cal. 9, 31 Pac. 625, "duly gave and made its determination to order the work done" is upheld. In Williams v. Bergin, 127 Cal. 578, 60 Pac. 164, the allegation, "the board of supervisors duly made and passed a resolution," is approved. In Werth v. Springfield, 78 Mo. 107, and Stewart v. Clinton, 79 Mo. 603, it is held that, "when the complaint avers an act which can be done only under an ordinance, an allegation that it was done by the corporation implies that it was done in pursuance of an ordinance."

As to the question of proper remedy for plaintiff upon the theory that defendant is occupying the highway without authority of law, there can be no doubt that an action in ejectment will lie. In section 647 of Lewis on Eminent Domain it is said: "The owner of the fee of a highway can maintain ejectment against any person occupying the soil for any purpose not connected with its use as a highway." Elliott, in section 708, says: "As owner of the fee, subject only to the public easement, the abutter has all the ordinary remedies of the owner of the freehold." In, 7 Encyclopedia of Pleading and Practice, p. 269, it is stated that: "As a general rule ejectment will lie to recover possession of land which is subject to an easement or servitude. The most common application of this rule is found in the case of highways, roads, streets, and the like. These in our law are regarded as easements, and the owner of the land through which a road or street dedicated to public use passes may maintain ejectment against any one who appropriates the same exclusively to his own use, or who uses the same in a manner inconsistent with the public easement or with the rights of the said owner to use the land in any way that is itself not inconsistent with the public right."

The question, indeed, is settled by a long line of authorities. It does not properly arise upon consideration of the complaint as it includes no allegation in reference to a highway. It contains the usual averments in ejectment, except it points out the peculiar method of occupancy by virtue of placing the poles and stringing the wires, and the demurrer was properly overruled. But, since it is conceded that the rights in and to the highway are involved, we deem it proper to say that, if at the trial defendant should not be able to prove the franchise upon which it relies, plaintiff can be granted adequate relief under the issues as presented.

While defendant's pleading is not altogether satisfactory and somewhat inartificial in some respects, we have reached the conclusion that the demurrer to the amended answer should have been overruled. We announce this with less reluctance, because there is no pretense that plaintiff has suffered any actual damage by the improvement constructed by defendant, which would seem to contemplate in a large measure the promotion of the public welfare.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

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7 Cal. App. 519

JOY v. HELBING et ux. (Civ. 381.)

(Court of Appeal, First District, California. Feb. 3, 1908.)

1. Fraudulent Conveyances—Elements of Fraud as to Creditors—Intent.

A husband may execute a deed of gift to his wife, if without intent to defraud a present or future creditor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 338, 339.]

2. Same—Remedies of Creditors—Presumptions and Burden of Proof.

The burden is on an assignee attacking a deed of gift by a husband to his wife as in fraud of creditors to show that the deed was made with fraudulent intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 805.]

3. Same.

Though fraud in a deed is sometimes difficult to prove, and courts grasp at all the facts and circumstances to arrive at the ultimate fact as to whether fraud was intended, yet it must be proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 798–803.]

4. Same—Badges of Fraud—Failure to Record Deed.

The fact that a deed of gift by a husband to his wife was not recorded until more than two years after it was made is a circumstance tending to cast suspicion on the good faith thereof, yet it is not sufficient of itself to show that the deed was made with fraudulent intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 485–492.]

5. Same.

Though fraud by grantee is not necessary to set aside a deed as in fraud of creditors, yet the absence of any intent by grantee or any circumstances tending to show that grantee knew of any intended fraud may be considered in connection with the other facts and circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 518–522.]

6. Appeal — Review—Harmless Error—Exclusion of Evidence.

In an action by an assignee to set aside a deed by a husband to his wife as in fraud of assignor, a witness testified that he had attended a certain sheriff's sale, and was then asked by assignee if he had made any memorandum of the articles sold, which question was objected to. Assignee then stated that the question was asked for the purpose of showing and leading up to questions that would show that a portion of the identical goods purchased from assignor by the husband were found by the sheriff concealed under the floor of the cellar of the house described in one of the deeds executed by the husband to his wife, and that the wife claimed under oath to be the owner thereof. The offer of proof was as to matters and things that occurred nearly four years after the deed had been executed, and was in regard to personal property having no connection therewith. *Held* that error, if any, in sustaining the objection to the question and excluding the offer, was not reversible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4187–4193.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by E. F. Joy, assignee, against Louis Helbing and wife. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

P. F. Dunne, Walter H. Linforth, and Jackson Hatch, for appellant. J. S. Reid, for respondents.

KERRIGAN, J. This action was commenced by the plaintiff, as assignee of W. W. Montague & Co., to set aside a conveyance made by defendant Louis Helbing to his wife, Louise. Judgment went for the defendants, and from the judgment and an order denying his motion for a new trial the plaintiff prosecutes this appeal.

May 15, 1893, Louis Helbing conveyed to his wife, Louise, by two deeds of gift, certain real property in the city and county of San Francisco. One deed conveyed the property in question on B street, the other embraced property on Waller and McAllister streets improved with 24 flats. Both deeds were recorded December 11, 1895. At the time of making these deeds the grantor had other property worth about $1,200. He was at that time engaged in no business, and remained idle for about one year and a half, when he embarked in the plumbing business. Between September and December, 1895, and prior to the recordation of the deeds, Helbing, upon the representation that he was the owner of the property described in the deeds, obtained credit from W. W. Montague & Co. for plumbing goods to the value of approximately $1,000. After the execution of the deeds above mentioned he exercised acts of ownership over the property conveyed by them. He insured the Waller street property in his own name, and on the occasion of a fire which partially destroyed that property he swore to a proof of loss, reciting therein that he was the owner of the property, and he receipted for the amount of the loss paid by the insurance company to the Humboldt Savings & Loan Society in accordance with the terms of a mortgage held by it on the property. In explanation of this he said that when the fire occurred he learned that the insurance company had made an error in issuing the policy in his name, and, to use his language, "I had to keep quiet and not say anything, and I had to swear to it so as to get the insurance and rebuild the house again." In the month of November, 1895, Helbing tried to sell the B street property to raise money for his own use. According to the wife's testimony, before the conveyances were made to her she requested her husband to pay all his debts, and helped him with money to do so, whereupon, at her instance, and upon a claim by her that she owned the property or had some interest therein, the deeds were made and delivered to her. Her testimony further shows that she failed to record the deeds, because she did not "know that they had to be recorded until shortly before they were placed on record." She was not shown to have had any knowledge that her husband represented this property as his own, or of the fact that he exercised acts of ownership over it.

On the issues framed by the pleadings the court found in part that the B street property was not conveyed to hinder, delay, or defraud Helbing's creditors; that said deed was not made while Helbing was insolvent, or in contemplation of insolvency; that it was made without consideration except love and affection; that by reason of the apparent ownership of Louis Helbing arising from the nonrecordation of the conveyance, and not by reason of anything else done or omitted by Mrs. Helbing, her husband was enabled to obtain from W. W. Montague & Co. credit to the amount aforesaid.

Appellant's counsel lay considerable stress on the case of Bush & Mallett Co. v. Helbing, 134 Cal. 676, 66 Pac. 967, and seem to think that the law as there set forth requires us to reverse this case. In this we think they are mistaken; but, as the case states some principles of law applicable in a general way to this case, it may not be amiss to refer briefly to what was there said. The two cases are against the same defendants, and in both cases the facts are the same except that in the Bush & Mallett Case the goods were purchased and used in repairing and improving either the McAllister or Waller street property. In that case it was said: "The general rule is that a deed of gift is valid if the grantor was not indebted at the time he made it, or had ample means outside of the property conveyed with which to pay his indebtedness. * * * To this rule there is a well-known exception. The exception is that a deed of gift, fraudulent in its inception, and made with the intent to enable the grantor to defraud future creditors, is void." After stating the general rule and the exception thereto reference was made to what the trial judge remarked in that case at the close of the evidence. The trial judge said: "There is no doubt a fraud was worked upon this plaintiff by this man (Helbing), but the wife cannot be shown to have had any connection with it." Mr. Justice Cooper, then a Supreme Court commissioner, speaking for the court, said: "It is evident that the court proceeded upon the theory that the deed was not fraudulent as to the defendant Louise, unless it had been shown that she intended the fraud and was a party thereto. In this view of the law the court was in error. A deed of gift made by the grantor for the purpose of defrauding his creditors is none the less fraudulent because the grantee took no part in the fraud. Such grantee is not a purchaser for value, and, being the party benefited by a gift, receiving that for which nothing has been paid, is not in a position to claim the benefit of a conveyance made for the express purpose of defrauding creditors. * * * If a man makes a deed of gift to his wife, it must be with no fraudulent purpose and openly, and under such circumstances that the law will impute no fraud as to his conduct. * * * It is well settled that it is the motive of the grantor, and not the knowledge of the grantee, that determines the validity of the transfer. The grantee, however innocent, cannot retain the fruits of a voluntary fraudulent transfer."

In the present case the trial court did not overlook this principle of law as did the trial judge in that case. There also the plaintiff offered to prove that after the transfer and before the deed was recorded Louis Helbing had supervision and charge of the property as his own. The trial court sustained objections to all such testimony, and this was held error. In the present case this kind of testimony was admitted. The intent of Helbing in making the deed to his wife was for the trial court to determine from all the facts and circumstances in the case. The deed was made at a time when Helbing was solvent, and more than two years before the indebtedness to W. W. Montague & Co. was incurred. There is no direct evidence even tending to show that it was made with intent to defraud any creditor who was such at the time of the execution of the deed. Helbing had the right to execute a deed of gift to his wife, provided by so doing he did not intend to defraud any present or future creditor. The burden was upon the plaintiff to show that the deed was made with the intent to defraud creditors of Helbing. While fraud is sometimes difficult to prove, and while courts grasp at all the facts and circumstances in order to arrive at the ultimate fact as to whether or not fraud was intended, yet it must be proved. The fact that the deed was not recorded until more than two years after it was made is a circumstance tending to cast suspicion on the good faith of the transaction, yet it is not sufficient of itself to show that the deed was made with fraudulent intent. The court, in the absence of testimony clearly showing the fraudulent intent, was in duty bound to find that the deed was executed with no such intent. There is no evidence in the remotest degree, with the exception that the deed was not recorded until long after it was executed, tending in any way to show any fraudulent intent or purpose on the part of Louise Helbing, the wife of Louis Helbing; and, while fraud on the part of the grantee was not necessary, yet the absence of any intent on her part, or any circumstance tending to show that she knew of any intended fraud, may be considered in connection with the other facts and circumstances in the case. The court was justified from the evidence in this case in finding that Helbing did not intend by the deed to his wife to defraud his creditors.

The appellant contends that the court committed error in sustaining an objection to a question asked of the witness Jefferies, a witness called for the defendant during the trial. The witness testified that he remembered attending a sheriff's sale in the month of August, 1907, and seeing the sheriff present at the time of sale. He was then asked the following question: "And did you make any memorandum at that time of the articles that were sold by the sheriff?" This question was objected to, and the attorney for the defendant stated that the question was asked for the purpose of showing, and leading up to questions that would show, that a portion of the identical goods purchased from W. W. Montague & Co. were found by the sheriff concealed under the floor of the cellar of the house described in one of the deeds executed by Helbing to his wife, and that in March, 1897, Mrs. Helbing claimed under oath to be the owner of these goods. The court sustained the objection to the question, and excluded the testimony. It was claimed in the discussion of the question that it was sufficient to offer to prove the facts stated by counsel so as to obtain a ruling in connection with the matter. The court expressly stated to counsel that it did not approve of that mode of procedure, but that counsel might discuss the offer to prove in explanation of any question that he desired to ask. Counsel then offered to prove the facts as herein stated, and the court sustained an objection to such offer, to which the plaintiff excepted. The offer of proof was as to matters and things that occurred nearly four years after the deed had been made and executed, and was in regard to personal property that had no connection in any way with the execution of the deed. It is very questionable whether the proof was capable of affording any reasonable presumption or inference of fraud at the time the deeds were made.

The ruling, even if erroneous, is not of sufficient importance to justify a reversal of the case.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

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7 Cal. App. 501

PEOPLE v. COWLEY. (Cr. 110.)

(Court of Appeal, First District, California. Jan. 31, 1908.)

1. CRIMINAL LAW—APPEAL—REVIEW—REFUSAL TO STRIKE EVIDENCE — DISCRETION OF TRIAL COURT.

Defendant, on trial for larceny, was asked on cross-examination why he left certain railway employment, and answered, "stopped my pay," and, in answer to the question why it was stopped, said that the cause was that for which all conductors have their pay stopped. *Held* that, this being without objection, there was no abuse of discretion in refusing to strike it out.

2. SAME—IMPROPER REMARK OF DISTRICT ATTORNEY—NECESSITY OF REQUEST TO STRIKE.

If the reason given by the district attorney for discontinuing his cross-examination contain any insinuation as to improper matter, the court should be asked in direct language to strike it out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1690, 1691.]

3. SAME—MISCONDUCT OF DISTRICT ATTORNEY—GROUND FOR REVERSAL.

It is only where it appears that a district attorney has willfully persisted in asking improper questions, with the evident purpose of injuring defendant, or where he has made a statement of a fact or matter that he would not have been allowed to prove, for the purpose of indirectly getting before the jury such fact or matter, that a conviction will be reversed on the ground of improper conduct of the district attorney.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1661.]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

J. B. Cowley appeals from a conviction, and from the denial of a new trial. Affirmed.

Crichton & St. John and L. L. Cory, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, P. J. Defendant was charged in the information with the crime of grand larceny, and upon his trial the jury returned a verdict of guilty of petit larceny. He was thereupon sentenced to pay a fine of $500, and in default of such payment to be imprisoned at the rate of one day for each $2 of said fine. From the judgment and order denying his motion for a new trial he prosecutes this appeal.

The sufficiency of the evidence to support the verdict is not questioned, nor is any error assigned as to the rulings upon the admissibility or exclusion of evidence during the trial.

It is claimed that the defendant was prejudiced by improper conduct of the district attorney during the trial. The record shows that the defendant was a witness in his own behalf, and testified to the effect that he was a railroad employé of considerable experience, and had been employed in different capacities by different railroad corporations; that he had been in the railroad business in Michigan, Idaho, Pocatello, Salt Lake City, and Arizona. He was then asked by the district attorney in cross-examination the following questions: "Q. How long did you stay at Pocatello? A. Oh, I was there probably— Q. Why did you leave? A. Stopped my pay. Q. Who stopped your pay? A. Union Pacific. Q. For what purpose? A. For cause. Q. For what cause? A. Well, the cause what all conductors have getting their pay stopped." No objection nor exception was taken to any of the above questions. The district attorney then stated that for fear of making an error he would not press the matter any further. Defendant's attorney then said: "We ask it to be stricken out, then, as incompetent, and the remarks of the district attorney are now assigned as error, and the purpose and the only purpose of the question was to prejudice this witness in the minds of the jury. We now assign it as error."

It does not appear that the court made any ruling in regard to the matter. The motion to strike out evidently referred to the questions and answers herein quoted, and as no objection was made to the questions when they were asked, and the district attorney of his own volition abandoned the line of cross-examination which he was pursuing, we think the court, if it in effect denied the motion by not passing upon it, did not abuse its discretion in so doing. The district attorney had no right to make any insinuations as to improper matters that he could prove if he were not afraid of committing error, and it does not clearly appear that he intended to do so. He voluntarily stopped the line of cross-examination he was pursuing, and gave his reason for doing so. If the reason given contained any insinuation as to improper matters, the defendant's attorney should have asked the court in direct language to strike out the objectionable words. The objection here is, not to the questions asked by the district attorney in cross-examination, but to the remark he made as to why he did not desire to further continue such cross-examination. It is only where it appears that a district attorney has willfully persisted in asking improper questions, with the evident purpose of injuring the defendant, or where he has made a statement of a fact or matter that he would not have been allowed to prove, for the purpose of indirectly getting before the jury such fact or matter, that courts will reverse on the ground of improper conduct of the district attorney. People v. Yee Foo, 89 Pac. 450; People v. Bradbury, 91 Pac. 497.

The court did not err in refusing defendant's instruction numbered "third." It is more in the nature of an argument than an instruction on the law pertaining to the facts of the case.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

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7 Cal. App. 547

PEOPLE v. MULLEN. (Cr. 70.)

(Court of Appeal, Second District, California. Feb. 6, 1908.)

1. Criminal Law—Orders Appealable—Denial of Motion in Arrest of Judgment.

No appeal lies from an order denying a motion in arrest of judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2583–2598.]

2. Same — Evidence — Presumptions—Identity of Persons.

The presumption of identity of person from identity of name, created by Code Civ. Proc. § 1963, is a disputable one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 719, 724; vol. 36, Names, § 10.]

3. Homicide — Identity of Decedent—Evidence.

On a trial for the killing of "Patrick Connelly," the testimony of a physician that he saw accused at the inquest over the body of "Patrick Connelly," and that the cause of the death of "Connelly" was fracture through the temporal bone, is sufficient to prove the death of the person whom defendant is charged to have killed, though the witness in the course of his testimony referred to decedent first as "Patrick Connelly," and later as "Patrick J. Connelly," and lastly as "Connelly."

4. Same.

Where, on a trial for homicide, the evidence showed that accused, while engaged in an altercation with a third person, knocked him down and kicked him, when decedent remonstrated against his conduct, and that while decedent was leaning over the third person, apparently for the purpose of assisting him to his feet, accused struck decedent a blow on the head, causing death a few days later, the jury might find that the attack on decedent was unjustifiable, and that an undue advantage was taken of decedent while he was in a defenseless position, authorizing a verdict of involuntary manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 539–541.]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

William Mullen was convicted of involuntary manslaughter, and he appeals. Affirmed.

A. D. Laughlin and Peck & Palmer, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was charged by information with the crime of manslaughter, alleged to have been committed upon one Patrick Connelly. Upon his plea of not guilty a trial was had, wherein a verdict of guilty of involuntary manslaughter was returned, upon which he was adjudged to serve a term of five years in state prison. He prosecutes this appeal from the judgment and an order denying his motion for a new trial, and also from an order of the court denying his motion in arrest of judgment.

There is no law authorizing an appeal in arrest of judgment, and therefore the attempted appeal from this order must be disregarded. People v. Matuszewski, 138 Cal. 533, 71 Pac. 701. Appellant bases his right to reversal of the order denying his motion for a new trial upon the ground of insufficiency of evidence to support the verdict, in that, first, there was no evidence of the death of Patrick Connelly, the person whom defendant was charged with killing; and, second, that the evidence failed to establish the elements constituting the crime of involuntary manslaughter.

1. As regards the first point, Dr. Campbell, a witness called on behalf of the people, testified that he saw the defendant at the inquest over the body of Patrick Connelly, and that the cause of the death of Connelly was fracture through the temporal bone. The Patrick Connelly alleged to have been killed by defendant is, in the absence of any evidence to the contrary, presumed to be identical with the person of that name upon whose body the inquest was held, and whose death was caused by a fracture of the temporal bone. Identity of person is presumed from identity of name. Section 1963, Code Civ. Proc. While the presumption is a disputable one, there is no evidence in the record here tending to controvert it. People v. Riley, 75 Cal. 100, 16 Pac. 544; People v. Rolfe, 61 Cal. 540. Witness Campbell, in testifying to the autopsy which he made on the body May 20, 1907, speaks of the deceased as "Patrick J. Connelly," and appellant contends that there is no evidence connecting "Patrick J." with "Patrick" Connelly. The witness in the course of his testimony refers to the deceased first as "Patrick Connelly," whose body he "posted" on May 20th, and later as "Patrick J. Connelly," upon whose body he made an autopsy, and lastly as "Connelly," the cause of whose death "was fracture through the temporal bone." There can be no question as to this evidence being sufficient to prove the death of the person whom defendant is charged in the information to have unlawfully killed, and the evidence clearly tends to show that his death resulted from the blow delivered by defendant.

2. Regarding the second point upon which the appellant claims reversal, the jury were fully and fairly instructed as to what constituted excusable homicide, as well as the law of involuntary manslaughter. While, under the evidence, the jury would have been justified in rendering a verdict of excusable homicide, it is equally clear that the evidence might convince them that the attack upon deceased was lacking in the elements constituting excusable homicide. The evidence strongly tends to show that defendant, while engaged in an altercation with one Caulfield, knocked him down and was engaged in kicking him, when deceased interposed and re-

monstrated against his kicking a man when he was down. While deceased was leaning over Caulfield, apparently for the purpose of assisting him to his feet, defendant struck deceased a swinging blow upon the head, knocking him down, and as a result of the injury caused by said blow Connelly died a few days thereafter. Under these facts the jury might very properly find the attack wholly unjustified, and without sufficient or any provocation, and that an undue advantage was taken of Connelly while he was in a defenseless position. The evidence fully supports the verdict of involuntary manslaughter. People v. Denomme (Cal.) 56 Pac. 98; People v. Munn, 65 Cal. 211, 3 Pac. 650.

The judgment and order denying appellant's motion for a new trial are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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7 Cal. App. 510

DALTON v. PACIFIC ELECTRIC RY. CO. (two cases). (Civ. 424.)

(Court of Appeal, Second District, California. Jan. 31, 1908. Rehearing Denied Feb. 29, 1908.)

1. Release—Execution—Evidence — Sufficiency.

A finding that a release relied on by defendant to defeat an action for personal injuries was never signed by plaintiff is justified on the positive testimony of plaintiff that he never signed the release as pleaded by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Release, § 107.]

2. Appeal—Review—Harmless Error—Evidence — Sufficiency — Immaterial Findings.

Where the court found that plaintiff had not executed a release as pleaded by defendant to defeat the action, a finding that the release was procured by fraud was immaterial, and, even though unsupported by the evidence, could not affect the result.

3. Action—Grounds—Motive.

Where, in an action for personal injury negligently inflicted, defendant admitted the negligence and denied that plaintiff sustained any injuries, and pleaded a release, evidence that a third person had advised the suit and had a contingent interest therein was immaterial; the motive of plaintiff or his advisers being of no consequence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 8.]

4. Judgment — Modification — Damages — Personal Injuries—Part Payment.

Where, in an action for personal injury, the answer alleged the payment of a specified sum in payment of satisfaction of all claims, and the court found the claim to be untrue, and plaintiff testified that the sum was paid to compensate for loss of time resulting from the injury, a judgment for plaintiff need not be modified to the extent of crediting thereon the sum so paid.

Appeals from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Separate actions by Martin Dalton and by J. W. Dalton against the Pacific Electric Railway Company. From judgments for plaintiffs in each case, defendant appeals. Affirmed.

Bisknell, Gibson, Trask, Dunn & Crutcher (Norman S. Sterry, of counsel), for appellant. John W. Kemp, for respondents.

SHAW, J. Action for damages for personal injuries. As a result of defendant's negligence plaintiffs were injured in an electric car collision while riding as passengers on defendant's railway. They brought separate suits for damages. In each case defendant filed its answer admitting the negligence charged, but denying that plaintiffs sustained any injuries; and as a further defense pleaded a settlement and release in writing with each plaintiff whereby defendant paid to each of them, and they each accepted, $25 in full payment and satisfaction of all claims and demands of every kind and nature, and especially from all claims and demands resulting from the accident in question, copies of which receipts and claimed releases were set out in each answer. By affidavit filed under section 448 of the Code of Civil Procedure plaintiffs averred that said alleged releases and receipts were not genuine, and denied the execution of the same. The court rendered judgment in favor of Martin Dalton for $250, and for J. W. Dalton in the sum of $100. Defendant moved for new trials. These motions were denied, from which orders and judgments defendant prosecutes these appeals.

The questions involved are practically the same in each case, and they come here on one record.

The evidence on the part of plaintiffs shows that they signed a receipt wherein none of the blanks had been filled, and which was in the following form:

Pacific Electric Railway Co.

$........ Los Angeles, Cal., ...190..
To ....Dr.
Address, ...
....

Received of the Pacific Electric Railway Company, a corporation, the sum of ....dollars, in full payment and satisfaction of all claims and demands of every kind and nature which I now have, or ever have had, against said Pacific Electric Railway Company; and especially from all claims and demands against said company occasioned, or in any manner arising or growing out of an accident which occurred on or about the......day of .... 190.. at or near ....

Witness ......hand in ....this ......day of ...., 190..

....

Witness:
....
....

Correct:	Audited:	Approved for Payment:
....	....	....
Claims Adjuster.	Auditor.	V. P. &. G. M.

The document as set forth in the answer, the genuineness and due execution of which is denied by plaintiffs, consisted of this blank form with the blank spaces filled by writing therein the appropriate words, giving the amount, name, address, date when, and place where, accident occurred, and with the further description added: "On the Long Beach Line where two cars collided while I was a passenger on one of said cars en route to Long Beach." Plaintiffs testified that at the time they signed this document it was free from any writing whatever, and contained only the printed words.

The case was tried without a jury, and the court found that each and all of the allegations of plaintiffs' complaint were true, except as to the amount of damages suffered by plaintiffs; that each and all of the allegations, denials, and averments of defendant's answer were untrue, except such matters as were admitted by said answer. The court further found with reference to the making of the alleged settlement and execution of said alleged release that plaintiffs did not compromise or adjust all their claims and demands against said defendant growing out of said accident, and did not, for the sum of $25 paid to them, execute and deliver to defendant a release wherein and whereby plaintiffs released said defendant from all claims and demands of every kind and nature arising or growing out of an accident which occurred on or about the 5th day of November, 1904, "and that it is not true that the document set out as Exhibit A (the one hereinbefore referred to) in defendant's answer was made, executed, and delivered by the plaintiff to the said defendant."

In our judgment, this last finding, to the effect that plaintiffs did not sign the document pleaded, disposes of these appeals. The evidence on the part of plaintiffs fully supports such finding. They testified positively that they never signed the document as pleaded by defendant, and upon their evidence the court was justified in making the finding.

Appellant, however, contends that the evidence is insufficient to support a further finding of the court to the effect that the alleged releases were procured by fraud and misrepresentation. In view, however, of the fact that plaintiffs never signed or executed the document at all as pleaded, this finding becomes immaterial, and, even if unsupported by the evidence, could not affect the result. Gould v. Adams, 108 Cal. 365, 41 Pac. 408; Coyle v. Lamb, 123 Cal. 264, 55 Pac. 901.

The instrument signed was not the instrument set out in the answer, and there is ample evidence to justify the court in finding that the instrument set out as a release was never executed by either of the plaintiffs. The court being warranted, then, in finding that the instrument as pleaded was not executed, it was scarcely necessary to have passed upon the question of fraud in the procurement of the signatures to another and different document, which, if admissible in evidence at all, must be regarded as merely a receipt open to explanation or contradiction by parol proof, as determined in California Packers Co. v. Merritt Fruit Co. (Cal. App.) 92 Pac. 509, and authorities there cited. Dredging Co. v. Whitney, 149 Cal. 269, 86 Pac. 691.

The court properly sustained objections by plaintiffs' counsel to a line of cross-examination tending to show that a third party had advised the suit and had a contingent interest therein. The matter under investigation related to the question of damages and the payment thereof. The motive of plaintiff, or of any of his advisers, in bringing the action, was of no consequence, if the right of action existed.

It appears that defendant paid to each of said plaintiffs the sum of $25 which, according to the testimony of said plaintiffs, was compensation for loss of time resulting from said injuries. Appellant contends that in any event the judgment in each case should be modified to the extent of crediting thereon the sum so paid to each plaintiff. According to our view, these payments are in no wise involved in the action. There is nothing in the pleadings which would justify the modification suggested. The answer alleges the payment of $25 to each plaintiff for a certain purpose, which the court finds to be untrue. The fact that it appeared on trial that $25 was paid for some other purpose than that claimed will not warrant the granting of the relief contended for.

We find no prejudicial error in the record, and the judgments and orders are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

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7 Cal. App. 480

PEOPLE v. ORTEGA. (Cr. 107.)

(Court of Appeal, First District, California. Jan. 29, 1908.)

1. CRIMINAL LAW—EVIDENCE—SUFFICIENCY.

Evidence on a trial for robbery *held* to sufficiently corroborate testimony by an accomplice confessing guilt, within Pen. Code, § 1111, requiring testimony of an accomplice to be corroborated by other testimony which, without the aid of the accomplice's testimony, tends to connect defendant with the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1128–1138.]

2. ROBBERY—ELEMENTS OF—"FORCE."

Where prosecuting witness was knocked down by two men and the money squeezed from his hand, the money was forced from him, within Pen. Code, § 211, defining robbery to be the taking of personal property from the person of another accomplished by "force" or fear.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Robbery, § 6.

For other definitions, see Words and Phrases, vol. 3, pp. 2868–2870.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

William Ortega, alias Lollie Ortega, was convicted of robbery. From the judgment, and an order denying his motions for a new trial and in arrest of judgment, he appeals. Affirmed.

Wm. H. Johnson, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. The defendant was convicted of the crime of robbery, for which he was sentenced to imprisonment for two years. He appeals from the judgment and from the order denying his motions for a new trial and in arrest of judgment.

The prosecuting witness, R. J. Little, testified that on March 6, 1907, at about 12 o'clock at night, while he was walking along a street in San José, two men came up behind him and knocked him down, and squeezed out of his hand a pocketbook containing about $12, and that "he hung onto it pretty tight all right." He did not know the men, nor could he identify either of them. During the trial Alexander Stokes took the stand, and stated that he and the defendant committed the robbery, and gave details of the crime. Appellant contends that this testimony, being that of an accomplice, was not corroborated as required by section 1111 of the Penal Code; that, aside from the testimony of the accomplice, there was no evidence which in itself and without the aid of such testimony tends to connect the defendant with the commission of the offense. A police officer testified that he saw the defendant, the accomplice, Stokes, and Little, who was robbed, together shortly before midnight March 6, 1907, and that a little later he saw the defendant alone. Another witness for the prosecution, William Hassett, testified that he saw two men, at about the time mentioned, standing over Little as he was lying on the ground; that the two men upon the approach of Hassett ran away; and that one of them was the defendant. This testimony, unaided by the testimony of the accomplice, tends strongly to connect the defendant with the commission of the crime charged. We think it is sufficient corroborative proof under section 1111 of the Penal Code.

One of the elements of robbery as defined by section 211 of the Penal Code is force, and another is fear. As we have just seen, Little testified that he was knocked down by two men and the money squeezed from his hand. He also testified that he was not afraid. Appellant asserts that the testimony does not show that the money was forced from Little. This contention is so obviously without merit that a discussion of it is unnecessary.

There is no other point presented in support of the appeal.

The judgment and order appealed from are affirmed.

We concur: COOPER, P. J.; HALL, J.

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7 Cal. App. 528

Ex parte MEYERS. (Cr. 81.)

(Court of Appeal, Second District, California. Feb. 5, 1908.)

1. Infants — Custody and Protection—Ordinances—Validity.

A municipal ordinance prohibiting minors from visiting public billiard and pool rooms is not in conflict with Pen. Code, §§ 273, 397b, prohibiting the sending of minors to saloons and gambling houses, and relating to permitting minors to visit saloons or public houses where liquors are sold.

2. Constitutional Law — Police Power — Nature.

The right to exercise the police power does not depend on the question of the morality of the conduct regulated, and regulations relating to the erection of wooden buildings within fire limits, fixing the speed of vehicles through the streets, etc., are referable to the police power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 148.]

3. Municipal Corporations — Ordinances — Validity.

A municipal ordinance prohibiting minors from visiting public billiard and pool rooms is a valid exercise of the police power when applied to billiard and pool rooms frequented by the professional gambler.

4. Habeas Corpus—Grounds for Relief.

The court, on an application for a writ of habeas corpus by one charged with the violation of an ordinance prohibiting minors from visiting public billiard and pool rooms, in that he suffered a minor to remain in a billiard and pool room, will not determine whether or not the regulation of such rooms should be limited to places frequented by the professional gambler, and, where accused has a complete defense, the court will deny the writ, and assume that the trial court will enforce the ordinance only against those who have actually violated it.

Application by Joseph Meyers for a writ of habeas corpus for his discharge from imprisonment for a violation of a municipal ordinance. Denied.

E. C. Bower and H. C. Millsap, for petitioner.

PER CURIAM. Petition for writ of habeas corpus. Petitioner is the proprietor of a billiard and pool room in the city of Los Angeles, and was arrested by the chief of police of that city upon a charge of violating section 2 of Ordinance 9671, entitled "An ordinance prohibiting minors from visiting gambling houses, public billiard and pool rooms, houses of ill fame, or retail liquor establishments." As disclosed by the petition, the complain upon which the warrant of arrest was based charges the applicant with suffering and permitting K. C. Oliver, a person of the age of 20 years (under the age of twenty-one years) to be in, remain in, enter, and visit the billiard and pool room conducted by him. The petition sets out that K. C. Oliver was a law clerk in the office of H. C. Millsap, an attorney at law; that said Millsap desired the petitioner to sign a document which had been prepared for his signature and sent Oliver as a messenger to take the paper to Meyers; and that the latter suffered and permitted Oliver to remain in his said place of business while he read and signed the said document.

The ordinance is claimed to be illegal and void because (1) in conflict with the provisions of sections 273 and 397b of the Penal Code; and (2) that it is unconstitutional so far as it attempts to prohibit a minor under the age of 21 from visiting a billiard or pool room. An examination of the ordinance and sections of the Code cited discloses that the last named section of the Code (397b) relates to the selling of liquor to minors under the age of 18 years and permitting them to visit saloons or public houses where liquors are sold; hence does not in any manner affect the question of frequenting billiard rooms. Section 273 is directed at employers or parents sending minors under the age of eighteen years to saloons, gambling houses, houses of prostitution, and other immoral places. This is to be distinguished from the charge here, which is not the sending of the minor to the place, but the permitting him to remain, that constitutes the offense. Another section of the ordinance appears to deal with the sending, which is limited to minors under the age of 21 years, but we are only concerned with the complaint before us when considering the conflict of the Penal Code with the ordinance.

Under the ground of the unconstitutionality of the ordinance, it is urged that a public billiard or pool room is not per se an immoral place, and therefore the regulation of its visitors is not a matter as to which the police powers of the municipality can be exercised. We do not agree with the view that the right to exercise the police power depends upon the question of the morality of the action or conduct regulated. The erection of wooden buildings within the fire limits is not a moral question; neither is the speeding of vehicles through the streets, nor the calling out of wares on the street, nor the exercise of many other pursuits or means "of obtaining liberty and happiness" which are prohibited or regulated within the limits of every well-conducted municipality. All of these regulations are referable to the police power. That a billiard hall is immoral per se because it is public will hardly be contended by any one. That it may become such by the presence of the professional billiardist and gambler ready to fleece the unwary and to inculcate the gambling habit in the youth of the city must be admitted. Freed from these influences, there can be no greater objection to them than to any other place of amusement. Indeed, it is quite probable that they often supply a resort and occupation for those who otherwise would visit places about whose immorality no question exists. In denying this writ, however, we are not called upon to determine whether or not the regulation of the billiard hall and the prohibition of minor visitors to them should be limited to such places as are open to the objections mentioned in order to be sustained by the courts. Each case presented must stand upon its own facts. It is apparent from the petition here that the applicant, if able to support his statement of the reasons why the minor was "remaining in" his place of business, has a full and complete defense to the charge. Police courts are expected to, and it must be presumed will, enforce the law only against those who have broken it in spirit. The reasons given, if true and presented to the trial court, will render it unnecessary for this court to establish a precedent of trying police court cases in the first instance.

Writ denied.

7 Cal. Unrep. 223

Ex parte PRINDLE.* (Cr. 17.)

(Court of Appeal, Second District, California. July 29, 1905.)

1. Game—Protection by Local Authorities—Constitutional Authorization.

Const. art. 11, § 11, authorizing any county, city, or town to make and enforce within its limits such local police regulations as are not in conflict with general laws, delegated to the county supervisors, prior to the passage of Const. Amend. art. 4, § 25½, authorizing the Legislature to divide the state into game districts, the power to legislate for the complete protection of wild game within the bounds of their respective counties.

2. Constitutional Law—Construction of Constitutions.

Const. Amend. art. 4, § 25½, authorizing the Legislature to provide for the division of the state into fish and game districts and enact appropriate laws for the protection of fish and game therein, is to be construed with other sections of the Constitution relative to the uniform application of the laws and the delegation of police power, and in such construction the more specific provision controls the general, without regard to the comparative dates; the different sections operating together, and neither working the repeal of the other.

3. Same — Amendments—Effect on Earlier Provisions.

Const. Amend. art. 4, § 25½, authorizing the Legislature to provide for the division of the state into fish and game districts and to enact appropriate laws for the protection of fish and game therein, prevails over earlier conflicting provisions of the Constitution; and, while laws previously in force continue in force until substituted by new legislation, legislation subsequently adopted must be in harmony with the amendment.

4. Same—Mandatory Provisions—"May."

Const. art. 4, § 25½, providing that the Legislature "may" provide for the division of the state into fish and game districts and "may" enact appropriate legislation for the protection of fish and game therein, is mandatory, and commands the Legislature to enact necessary legislation touching the care and custody of game with reference to local conditions, which require special legislation for particular localities.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4420–4447.]

5. Same — Local Regulation — Powers of Supervisors.

Under Const. Amend. art. 4, § 25½, requiring the Legislature to provide for the division of the state into fish and game districts and to enact appropriate legislation for the protection of fish and game therein, any previous authority existing in the Legislature to delegate legislative power in reference to fish and game to counties is revoked, and, notwithstanding the failure of the Legislature to obey the mandate of the Constitution, a board of county supervisors is without authority to regulate, by ordinance passed after the adoption of such amendment, the hunting of game within the limits of the county.

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*This opinion has been withheld because the case was ordered transferred to the Supreme Court. That court having subsequently held that such orders of transfer cannot be made in habeas corpus cases, this opinion has now become final.

6. SAME—UNREASONABLE LEGISLATION.

In view of the provision of Pen. Code, § 626a, making it a misdemeanor to hunt, kill, or destroy doves between February 15th and July 1st of the same year, a county ordinance declaring it unlawful to hunt or destroy doves within the limits of the county between the 30th day of June and the 15th day of August of each year, and between the 15th day of August and the 16th day of February of the year next ensuing, and thus leaving but one day in the year open to hunt doves, is unreasonable.

Application by Lyman D. Prindle for a writ of habeas corpus. Prisoner discharged.

Lee, Scott, Bailey & Chase, Miller & Page, and Robt. E. Ross, for petitioner. J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy Dist. Atty., for respondent. Henry T. Gage and W. I. Foley, amici curiæ.

ALLEN, J. The defendant was arrested for the violation of ordinance No. 120 (new series), enacted on the 16th day of May, 1905, by the board of supervisors of Los Angeles county. Section 1 of the ordinance provides: "It shall be unlawful in the county of Los Angeles, between the 30th day of June and the 15th day of August of each year, and between the 15th day of August of each year and the 16th day of February of the year next ensuing, for any person to hunt, pursue, take, kill or destroy, or have in his possession, any dove or doves." Upon trial the defendant pleaded guilty, and was committed to the county jail upon default of payment of the fine imposed. This writ was issued upon his application, and the respondent, upon the return, justifies the imprisonment under such conviction.

The question presented is as to the validity of said ordinance. Section 626a of the Penal Code makes it a misdemeanor "to hunt, kill, pursue, or destroy, or have in possession, any dove or doves, between the 15th day of February and the 1st day of July of the same year." It will be observed that, taking the ordinance and the section of the Penal Code last referred to together, there remains but one day in each year open for the hunting, pursuing, or killing of doves, or for having the same in possession, within Los Angeles county. The authority of the board of supervisors to enact this ordinance is claimed under section 11, article 11, of the state Constitution, which reads: "Any county, city, town, or township may make and enforce within its limits, all such local, police, sanitary and other regulations as are not in conflict with general laws." The county government act of 1897 provides that boards of supervisors shall have power to provide by ordinance, not in conflict with the general laws of the state, for the protection of fish and game, and may shorten the season for the taking and killing of fish or game within the dates fixed by the state laws, but shall not lengthen the same.

The respondent's contention is that the regulation as to the killing and protection of wild game is referable to the police power, is local in its character, and is by the Constitution delegated to the boards of supervisors. The right of the state Legislature to enact laws for the protection of wild game, which belongs to the people of the state in their collective capacity, is held by our Supreme Court, in Ex parte Maier, 103 Cal. 482, 37 Pac. 402, 42 Am. St. Rep. 129, to be founded upon the general power to legislate, where not restrained by express or implied provisions of the Constitution, and for the reason that the protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds, one of which is for the purpose of food. In the case last mentioned, the legislative authority prohibiting one to have in his possession wild game, wherever killed, is said to be referable to the police power. The phrase "police power," as employed in the Constitution, is admitted to be not susceptible of exact definition. There are, however, to be found many precedents wherein it is declared that certain legislation is referable to such power, notably in the case of Thorpe v. Rutland & Burlington R. R. Co., 27 Vt. 149, 62 Am. Dec. 625, cited and approved in Ex parte Maier, 103 Cal. 485, 37 Pac. 405, 42 Am. St. Rep. 129, where, in referring to the phrase "police power," it is said: "It extends to the protection of the lives, limbs, comfort, and quiet of all persons, and the protection of all property within the state according to the maxim 'Sic utere tuo ut alienum non lædas,' which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." It being establish that it applies to the use of private property under certain exigencies, no reason is apparent why it should not be extended so as to include the interest and property which each citizen may own and possess in the collective property of the people of the state; and where, as in California, the diversity of climatic conditions—the immensity of its territory—would indicate the impropriety of exercising this police power through a general law applicable to the entire state, the necessity for local legislation, in order that complete and effective control or protection may be afforded, becomes apparent.

Were anything else required to establish the necessity for such local legislation, the amendment to the Constitution, designated as section 25½, article 4, adopted in 1902, certainly indicates that the people of this state in the adoption of such amendment recognized the local character of legislation necessarily appropriate for the preservation of fish and game. We are of opinion, therefore, that the delegation of police power in section 11, art. 11, should be held to include the local legislation necessary, in the opinion of the supervisors, to completely protect the wild game within the bounds of the various counties of the state. What we have here said applies to conditions existing prior to the year 1902, when the amendment to the Constitution, designated as section 25½, article 4, was adopted. This amendment provides as follows: "The Legislature may provide for the division of the state into fish and game districts, and may enact such laws for the protection of fish and game therein as they may deem appropriate." This section and the other sections of the Constitution relating to the uniform application of the laws and the delegation of police power must be read and construed together; and in such construction the more specific provisions control the general, without regard to their comparative dates—the two acts operating together, and neither working the repeal of the other. Cooley's Constitutional Limitations, and other authorities cited in Martin v. Election Commissioners, 126 Cal. 411, 58 Pac. 932, in which latter case it is said that, although a new section may conflict with other sections of the same article, it would still be valid as to the particular cases for which it is intended, for in such case the particular and general both stand together, and neither abrogates the other; the former furnishing the rule for the particular case, the latter for all other cases. This section 25½ is manifestly a scheme for the regulation and control of a specific subject; and, according to the well-established rules of construction obtaining in relation to statutes, the later will prevail, and the earlier be held to have been superseded. Mack v. Jastro, 126 Cal. 132, 58 Pac. 372. And in Murdock v. Mayor, 20 Wall. 590, 22 L. Ed. 429, cited in Mack v. Jastro, supra, where a like question was presented in relation to statutes, it is said: "We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embraced all that was to be preserved of the old."

While it is true that an immediate repeal of one of the provisions of the Constitution may not be effected under the rule thus laid down as to statutes, yet the effect is to supersede previous constitutional provisions when conflicting amendments have been adopted, whenever appropriate legislation is enacted carrying the amendments into effect. "There is no express repeal of the former provisions of the Constitution. They merely cease to exist by reason of new provisions upon the same subject being substituted for them. * * * The old provisions will cease to have effect from time to time, as the substituted provisions commence to operate." In the Matter of Oliverez, 21 Cal. 418. Under these authorities, then, the laws in force when section 25½ was adopted continue in force until substituted by new legislation under the later amendments; but legislation after the adoption of such amendment must of necessity be in harmony with the Constitution existing at the time of its enactment. So that even the Legislature is restricted in its power to legislate upon this subject of game in any manner conflicting with section 25½.

The provisions of this section are mandatory. While the word "may" is employed, the subject of the amendment is in relation to the power given to public officers; and in Supervisors v. United States, 4 Wall. 436, 18 L. Ed. 419, it is said: "The conclusion to be adduced from the authorities is that, where power is given to public officers, * * * the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. It is given as a remedy to those entitled to invoke its aid"—cited in Hayes v. County, 99 Cal. 80, 33 Pac. 766. The word "may" in section 25½ must therefore be read "must"; and ever since its adoption the express command has been upon the state Legislature to enact such legislation touching the care and custody of wild game as is necessary for its effectual and full protection, and this with reference to local conditions, if any such there be, which would require special legislation for particular localities.

We are unable to see, however, any significance attaching to the manner in which the word "may" shall be read in this constitutional amendment, inasmuch as its obvious intent was to confer upon the state Legislature alone authority to deal with the subject of fish and game, and in such legislation to relieve it from the necessity of enacting general laws applicable alike to the whole state, and the effect of which could only be to remove the necessity theretofore existing for delegation of power to local authorities. We are of opinion, therefore, that any authority reposing in the Legislature to delegate legislative power to counties in reference to this subject was revoked by the amendment 25½; and the failure and neglect of the Legislature to obey the plain mandate of the Constitution does not empower the board of supervisors to assume this duty reposing in the state alone. This ordinance therefore having been adopted since the adoption of section 25½, and since authority to delegate power with reference to this subject has ceased to exist, it must be held to be invalid. Were it even a valid exercise of power, the ordinance upon its face is an unreasonable exercise thereof. The delegated power originally was with reference to shortening the season, which can only be held to be a period of time within which persons might exercise a natural right to hunt and kill the game belonging to the public, and not to enact an ordinance in its nature prohibitive.

The ordinance therefore being void, it follows that the prisoner should be discharged; and it is so ordered.

I concur: GRAY, P. J.

SMITH, J. I concur in the decision on the ground last stated.

7 Cal. App. 443

NEMO v. FARRINGTON et al. (Civ. 413.)

(Court of Appeal, Third District, California. Jan. 20, 1908. Rehearing Denied by Supreme Court March 20, 1908.)

1. APPEAL—REVIEW—PRESUMPTIONS—BURDEN OF SHOWING ERROR.

The burden is upon appellants to show error, as all presumptions are in favor of the judgment of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4047-4051.]

2. SAME—ADMISSIBILITY OF EVIDENCE—PRELIMINARY PROOF—JUDGMENTS.

In an action to quiet title, plaintiff put in evidence a former judgment in ejectment against one of defendants, but defendants claimed that pending that suit the defendant therein transferred the land in controversy to another defendant herein, and that, as no lis pendens was filed in the former suit, the grantee was not bound by the judgment. The record in this case did not show whether a lis pendens was filed in the former suit, or whether evidence of such fact was given below. Defendants did not object to the admission of the judgment on that ground, nor did the bill of exceptions purport to contain all the evidence. *Held*, that it would be presumed, in the absence of anything in the record to the contrary, that proper preliminary proof showing the admissibility of the judgment was made below.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3739-3740.]

3. LIS PENDENS — NOTICE OF PENDING ACTIONS—FILING—EFFECT.

Under Code Civ. Proc. § 1908, subd. 2, making a judgment in respect to matters directly adjudged conclusive between the parties and their successors in interest by title subsequent to the commencement of the action, if they have actual or constructive notice of the pendency thereof, where plaintiff brought an action of ejectment against one of the defendants herein and filed a lis pendens on instituting the suit, defendant's grantee pending the suit had constructive notice of the pendency thereof, and was bound by a subsequent judgment against her grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Lis Pendens, § 38.]

4. JUDGMENT—CONSTRUCTION—QUESTION DECIDED—PLEADINGS.

Code Civ. Proc. § 1911, provides that only that is deemed to have been adjudged in a former judgment which appears on its face to have been adjudged, or which was actually and necessarily included therein, or necessary thereto. A complaint alleged that plaintiff was the owner of certain property and entitled to possession, and that defendant unlawfully entered and held possession thereof, the complaint claiming the value of the rents, and the prayer followed the complaint, and judgment was had for plaintiff, giving him possession, rents, etc. *Held*, that the title to the land was directly put in issue, and the judgment giving plaintiff possession also adjudged that the title was in him.

5. LOST INSTRUMENTS—DEEDS—EVIDENCE—NATURE OF EVIDENCE.

Parol evidence to establish the contents of a lost deed should be clear and certain, and should show that the deed was properly executed with the legal formalities, and should show substantially, but not literally, the contents of the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Lost Instruments, §§ 51-57.]

6. JUDGMENT — CONCLUSIVENESS — MATTERS CONCLUDED — MATTERS WHICH COULD HAVE BEEN DETERMINED.

Where plaintiff recovered judgment against defendant by which title and right of possession to certain land was adjudged in plaintiff, it will be presumed that all of defendant's claims to the land were litigated therein, and defendants may not subsequently claim title under a deed dated prior to such judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1241.]

7. WITNESSES—CONTRADICTION—EVIDENCE.

In an action to quiet title, where defendant claimed in adverse possession, and had testified that no one had ever questioned her right to the property, a judgment in a former action by plaintiff resulting in defendant's ejection from the land was properly admitted in rebuttal of defendant's evidence.

8. QUIETING TITLE—EVIDENCE.

In an action to quiet title, where defendants introducing a tax deed under which they claimed, a judgment in a former action by plaintiff against defendants in which the title was adjudged in plaintiff was properly admitted to show that defendants' claim under the tax deed had been adjudicated against them.

9. SAME.

In a suit to quiet title, where defendant claimed under a deed from C., certain records in the matter of C.'s estate, introduced to show that C. died before the execution of the alleged deed to defendants, were properly introduced in rebuttal of the deeds introduced by defendants.

10. APPEAL—REVIEW—HARMLESS ERROR.

Even if the records were not the best evidence of the time of C.'s death, where the admission was not objected to on that ground, and witnesses afterwards testified without objection to the same effect, their admission may not be objected to on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4171-4177.]

11. ADVERSE POSSESSION — EVIDENCE—ADMISSIBILITY.

In an action to quiet title, where plaintiff claimed under adverse possession, he was entitled to put in evidence a deed under which he claimed, though the grantor of such deed had some months prior thereto granted the same land to another through whom the defendant claimed; the deed being admissible to show color of title in plaintiff to support his claim of adverse possession.

12. APPEAL—REVIEW—HARMLESS ERROR.

In a suit to quiet title, where defendant introduced in evidence a deed under which he claimed, and plaintiff afterwards introduced in rebuttal a later deed to the same land from the same grantor, even though the evidence was not strictly rebuttal, it being properly introduced by plaintiff to show color of title, its admission was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by Charles Nemo against Lizzie Farrington and others. From a judgment for plaintiff, defendants appeal. Affirmed.

A. H. Carpenter, for appellants. Miller & Clark, for respondent.

BURNETT, J. The action was brought to quiet title. Defendants Lizzie Kincaid and Rosanna Farrington filed an answer and cross-complaint putting in issue the title of plaintiff, and setting up a chain of title culminating in said Rosanna Farrington, and asking that her title be quieted as against any claim of plaintiff. Both parties insist upon title by "adverse possession." Plaintiff also claims by virtue of a judgment in ejectment rendered in favor of plaintiff's grantor against the said Rosanna Farrington. The latter also claims the record title by mesne conveyances from the grantee of a tax deed.

1. The evidence shows that on December 1, 1879, a complaint was filed in the district court for San Joaquin county by Alfred Fairbanks, plaintiff's grantor, against Patrick and Rosanna Farrington, in which it was alleged that plaintiff was, on or about the 5th day of November, 1879, ever since has been, and now is, the owner in fee of the property here in controversy and entitled to the possession thereof, and that said defendants, on November 5, 1879, unlawfully entered into possession of said property and still withhold it. The value of the rents was also set out, and the prayer followed the allegations of the complaint. The defendants answered, denying all the allegations of said complaint. The action was tried December 23, 1885. Findings were waived, and "judgment was rendered for the plaintiff as prayed for for the possession of said premises and for the sum of $377 rents and costs." Under a writ issued upon said judgment the sheriff ejected said defendants from said premises on July 6, 1886, and delivered possession to the plaintiff in said action.

It is claimed by respondent that the foregoing judgment "determined all claims of ownership that defendants therein had to the premises prior to the time of the rendition of said judgment, and, being adverse to them, was also adverse to all the defendants herein, as Lizzie Farrington Kincaid, under her deed of August 13, 1884, took only such title as was adjudged in said action to be void."

The answer of appellants is that during the pendency of said action, and more than one year before the judgment was rendered, the said defendants transferred the property to their daughter, the said Lizzie F. Kincaid, who 17 years thereafter conveyed it back to said Rosanna Farrington, and that the contention of respondent cannot be maintained, for the reason that "the plaintiff in that action of ejectment did not make such grantee a defendant in the action, and he filed no lis pendens to prevent a valid transfer during the pendency of the action. * * * Hence it was error to admit such judgment in evidence, as it was not between the same parties or their privies (Le Roy v. Rogers, 30 Cal. 229, 89 Am. Dec. 88; Shay v. McNamera, 54 Cal. 170); and, furthermore, the title to the property in question was not adjudicated, as the judgment was for rents and possession only, and hence the judgment roll was not admissible for the purpose of proving title (Mahoney v. Van Winkle, 33 Cal. 448; Burns v. Hogdon, 64 Cal. 72, 28 Pac. 61)."

The record is silent as to whether a lis pendens was filed in the former action, or whether it was received in evidence in the trial of the case at bar. No objection was made to the judgment on the ground that a lis pendens had not been filed, or that plaintiff at the time of offering said judgment had not shown that it was filed at the proper time. The record shows that the defendants objected on the ground that the same was "incompetent, irrelevant, immaterial, and not rebuttal, and was not an action between the same parties or that owned the property at the time of the decree." There is nothing in any of the assignments of "insufficiency of the evidence" to indicate that the said judgment was not binding upon Lizzie F. Kincaid by reason of the failure of plaintiff to file a notice of the pendency of the action, and the bill of exceptions herein does not in any manner purport to give all the evidence or proceedings at the trial. The burden is undoubtedly upon appellants to show error, as the presumptions are in favor of the judgment of the court below. It must be assumed, therefore, in the absence of anything in the record justifying a contrary inference, that the preliminary proof showing the admissibility of the judgment was made. Estate of Dean, 149 Cal. 495, 87 Pac. 13. The conclusion follows that said Lizzie F. Kincaid, under whom Rosanna Farrington now claims, had constructive notice of the pendency of said action, and was bound by the judgment rendered therein. Code Civ Proc. § 1908, subd. 2.

The second point of appellants is equally untenable. The title was directly put in issue by the pleadings, the right to possession was based upon it, and it is clear that the judgment of the court in favor of plaintiff was the result of the determination that plaintiff was the owner of the property. Section 1911 of the Code of Civil Procedure provides: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." It is manifest that as the pleadings were framed it was necessary for the court to find the ownership in order to determine the right to the possession. The judgment rendered upon the merits creates an estoppel in favor of the prevailing party as against the other, which can be successfully invoked in any subsequent proceedings between the parties and privies in reference to the questions necessarily determined. We think it must be held, therefore, that appellants are estopped from asserting ownership of said property on said December 23, 1885, on the part of both or either of them, or from denying that on said date the title was in said Fairbanks to whose interest plaintiff succeeded three months thereafter, to wit, March 22, 1886. The cases cited by appellants are entirely different from the case at bar. The scope of Mahoney v. Van Winkle is seen in the following quotation: "But it is insisted further that the defendant cannot go behind the judgment in the ejectment suit brought against him by Mahoney. The answer to this objection is obvious. The thing forbidden is not attempted here. A new event has happened since Mahoney v. Green was tried and adjudged; and the legal effect of the event is to confer upon the defendant a present right of possession, a right which he did not have at the beginning of the ejectment nor at its conclusion." The decision in Burns v. Hodgdon is based upon the ground that "the right, title, and claim now set up by the plaintiffs herein are not the same which were tried and determined in said suit brought by said Hodgdon, but the plaintiffs here have title to said premises and a right to the possession thereof, which were not tried nor determined, nor within any of the issues involved in said suit brought by Wadsworth Hodgdon." So in the case at bar the said judgment of December 23, 1885, is conclusive only as to the question determined, that is, who was the owner and entitled to the possession of the property at that time, and it does not preclude appellants from contending that by virtue of subsequent events they have become invested with the title and should have prevailed in the present action.

2. Appellants claim that the property was sold for taxes and a deed executed by the sheriff to John Crofton in 1861; that the said Crofton conveyed to Edmund Wiezsinger, October 9, 1861; and that the latter at some time thereafter, the date not being disclosed by the evidence, conveyed to appellant Rosanna Farrington, which was followed, as we have seen, by the deed to Lizzie Kincaid, and then the property was deeded back to Rosanna Farrington. Thereby it is sought to connect defendants with the original source of title. This position, however, cannot be maintained for two reasons—no deed from Wiezsinger to Rosanna Farrington was produced, and the parol evidence as to its execution and contents was so uncertain and unsatisfactory as to justify the court in finding that there was no such conveyance. Indeed, if the court had found in favor of appellants as to this contention, it is doubtful whether the finding could be upheld in view of the rule that "oral testimony as to the contents of a lost deed must be clear and certain and show substantially the contents of the instrument." Nicholson v. Tarpey, 124 Cal. 447, 57 Pac. 457; Kenniff v. Caulfield, 140 Cal. 44, 73 Pac. 803. In each of the foregoing cases the following from Edwards v. Noyes, 65 N. Y. 127, is quoted with approval: "Parol evidence to establish the contents of a lost deed should be clear and certain. It should show that the deed was properly executed with the formalities required by law. It should show all the contents of the deed, not literally, but substantially. If anything less than these requirements would suffice, evil practices, which it was the object of the statute of frauds to prevent, would be encouraged." The testimony of Rosanna Farrington, the only witness on the subject, does not meet this requirement. It is uncertain, unsatisfactory, and inconsistent. It is not clear as to whether Crofton or Wiezsinger executed a deed to her, or as to the contents of said alleged deed. But again, if said deed was executed, while the exact date of the conveyance is not shown, it does appear that it was long prior to the date of the said judgment of December 23, 1885. Hence we must assume that it was considered in said proceedings, as the questions whether such deed was made, and, if so, the legal effect of it, were necessarily involved in the issues presented by the pleadings, and were determined adversely to appellants' contention. Further inquiry is therefore foreclosed by said judgment.

The other claim that subsequently title by prescription was acquired by defendants might have been upheld by the trial court if full credit had been given to the testimony of said Rosanna Farrington. But her testimony was impeached in some material respects, and we cannot say that the court was not justified in rejecting her statements in reference to the elements of adverse possession. At least the evidence is sufficient to support the findings of the court against her upon this issue. Indeed, apart from the presumption that arises from the legal title, neither party seems to have had for the statutory period an adverse possession. But, as we have seen, the court was justified in finding against defendants as to the deed from Wiezsinger to Rosanna Farrington, and as to title by prescription; and by reason of said judgment of December 23, 1885, and deed from Fairbanks and subsequent possession, the finding is warranted "that plaintiff, at the time of the commencement of this action, was, and ever since the 22d day of March, 1886, has been, and now is, the owner in fee, and in the possession and entitled to the possession" of said property. These findings are decisive of the controversy, and they support the judgment in favor of plaintiff.

3. Some objections are made to the rulings of the court during the progress of the trial, but only three are deemed of sufficient importance to demand attention. The judgment roll to which reference has heretofore been made was offered as rebuttal evidence by plaintiff. Defendants made the objection, as before seen, that the evidence "was incompetent, irrelevant, immaterial, and not rebuttal." The general objection we have sufficiently considered. The evidence was clearly admissible in rebuttal for two reasons: (1) Rosanna Farrington had testified as to her peaceable and continuous possession of the property over a period of time including the filing of the complaint and the judgment in said action. She said no one ever questioned her

right to the property. She was asked upon cross-examination in reference to said suit and she denied any knowledge of it. It was manifestly proper, therefore, to oppose her declaration by the production of the record. (2) Plaintiff in his case in chief connected himself with the original source of title by mesne conveyances. Defendants, to nullify the effect of this evidence, introduced a tax deed in their attempted deraignment of title. Therefore it was proper by said judgment to show that said claim of defendants had been adjudged against them.

Certain records in the matter of the estate of John Crofton, deceased, and a deed from John Crofton and others to Frank Harrison, Jr., and Elizabeth Harrison, predecessors in interest of plaintiff, were also received in evidence over similar objections. The former were introduced to show that John Crofton died prior to the time when Rosanna Farrington testified she had received a deed from him. The evidence was therefore relevant, material, and in rebuttal. If not the best evidence, it is sufficient to say that no such objection was made, and a witness testified afterward without objection to the same effect. The said deed from Crofton and others was dated February 4, 1862, whereas the evidence of defendants showed that John Crofton had executed a deed to Wiezsinger of the same property October 9, 1861. The only point pressed by appellants in their brief as to this deed is that it "was given, executed, and recorded more than four months after the said Crofton had conveyed his title to Wiezsinger, and hence his deed to Harrison could have conveyed no title." But this objection is not tenable for the reason pointed out by respondent that the deed was admissible to show color of title in support of the claim of adverse possession by plaintiff. Wilson v. Atkinson, 77 Cal. 485, 20 Pac. 66, 11 Am. St. Rep. 299. It was probably not strictly rebuttal, but, if error was committed in that respect it was without prejudice.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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7 Cal. App. 443

NEMO v. FARRINGTON et al. (Sac. 1,552.)

(Supreme Court of California. March 23, 1908.)

Appeal—Rehearing—Scope and Questions.

A ground for reversal first urged on motion for rehearing will not be noticed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3242.]

In Bank. Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by Charles Nemo against Lizzie Farrington and others. A judgment for plaintiff was affirmed by the District Court of Appeal (see preceding case), and defendants moved in this court for a rehearing. Rehearing denied.

A. H. Carpenter, for appellants. Miller & Clark, for respondent.

PER CURIAM. In his petition for a rehearing counsel for appellants makes a point which was never raised either in the superior court or before the District Court of Appeal, viz., that it was error to admit in evidence the judgment roll in the case of Fairbanks v. Farrington, for the reason that it was not pleaded in plaintiff's answer to the cross-complaint of defendants.

It is true that plaintiff objected at the trial to the evidence of the former adjudication in these words: "To the admission of each of said instruments in evidence the defendants objected on the ground that the same were each incompetent, irrelevant, immaterial, and not rebuttal, and was not an action between the same parties or that owned the property at the time of the decree."

This was an objection which, so far as it was specific, directed the attention of the trial court to matters entirely foreign to the question of pleading raised for the first time in the petition filed here for a rehearing after decision of the District Court of Appeal. In the brief filed by appellant in that court no such question was suggested, and naturally it was not discussed. Even if it had been made in the argument there, it might have been properly disposed of by saying that the objection could not be raised for the first time on the appeal, for, if it had been raised at the trial, it might have been obviated by an amendment of the answer, if an amendment was necessary. Whether it would have been necessary is a point which we are not called upon to decide, the rule being that no specifications of error can be made for the first time in a petition for rehearing.

Rehearing denied.

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153 Cal. 230

WOOD, CURTIS & CO. v. EL DORADO LUMBER CO. et al. (Sac. 1,577.)

(Supreme Court of California. March 13, 1908. Rehearing Denied April 10, 1908.)

Railroads—Liens for Labor and Supplies—Right to Lien—Services Rendered—Construction Work.

Code Civ. Proc. § 1183, provides that materialmen, contractors, subcontractors, etc., performing labor in the construction, etc., of railroads, etc., shall have a lien on the property upon which the labor is bestowed. Plaintiff hired for a stipulated price a number of horses to contractors engaged in building a railroad for defendant; the contractors having full control of the horses and employing and paying the drivers thereof. *Held*, that plaintiff was not entitled, under the statute, to a lien on the railroad for the amount due from the contractor as hire for the horses, since it was not a subcontractor and occupied no contractual relation with reference to the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 495–498.]

In Bank. Appeal from Superior Court, El Dorado County; N. D. Arnot, Judge.

Action by Wood, Curtis & Co., a corporation, against the El Dorado Lumber Company and others to establish a mechanic's lien on certain property. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Judgment and order reversed, and cause remanded.

W. J. Bartnett, Chas. A. Gray, and Chas. A. Swisler, for appellants. L. T. Hatfield, for respondent.

HENSHAW, J. The facts involved in this appeal, briefly stated, are as follows: On February 17, 1904, the defendant and appellant herein the El Dorado Lumber Company entered into a contract with the defendants Carney, Roy & Carney for the construction of a single-track railroad, upon a private right of way from North Placerville to its storage yards in El Dorado county. Thereafter, and during the progress of construction work upon said right of way, the plaintiff corporation let to the firm of Carney, Roy & Carney 53 head of horses, with their harness, at the rate of $10 per month for each horse and harness. An examination of the record shows that these horses were used by Messrs. Carney, Roy & Carney in the course of the construction work, and that the drivers of the horses were hired and paid for by them. Suit was brought in the superior court of El Dorado county, and on October 31, 1904, the default was entered of defendants Edward Carney, E. J. Roy, and Edward Carney, Jr., and the case was tried as to the defendant corporation. An examination of the record shows that there was no conflict of evidence upon the proposition that the transaction between plaintiff and the contractors, Carney, Roy & Carney, was simply a letting by plaintiff of the horses and harness to the contractors for the doing of this work at a stipulated price per month for each horse. The contractors had full control of the horses during the time of the hiring, and employed and paid the drivers thereof. So far as the findings may be construed otherwise, they are unsupported by the evidence. Upon the theory that, by the use by the contractors of plaintiff's horses and harness in the work of constructing the railroad, plaintiff had performed labor upon the railroad, the trial court found it to be entitled to a lien on the railroad for the amount due from the contractors for such hiring.

The question, then, which the trial court answered in favor of plaintiff, is: Did plaintiff, by this letting of its horses at a stipulated price per month, "bestow labor" upon the work, so as to entitle it to a lien under section 1183, Code of Civil Procedure? Respondent contends that upon the reasoning, if not upon the direct authority, of Macomber v. Bigelow, 126 Cal. 9, 58 Pac. 312, the trial court was clearly right in its ruling. But in Macomber v. Bigelow this court was construing the provisions of the mechanic's lien law with reference to the right to a lien of a subcontractor who had not actually labored himself upon the work, but had "bestowed" upon it the labor of his servants and employés, and it was held that such a subcontractor brought himself within the purview of the statute. So far, and no farther, Macomber v. Bigelow went. We are asked here to hold (since to uphold the ruling of the trial court it must be so held) that one who merely lets, hires, or rents tools, implements, or machinery of any kind to one employed upon the work becomes thereby a subcontractor and entitled to a lien for the value of the use of such tools, implements, and machinery as he has let or leased. Yet certainly the plaintiff was in no sense a subcontractor. He occupied no contractual position whatsoever touching the work. He had merely turned over to the contractor, under a contract of hiring, certain personal property which the contractor himself used upon the work. The fact that the personal property which was so turned over consisted of horses and their harness should not be allowed to cloud the issue. The horses, as horses, were no more entitled to liens than were the harnesses themselves. Each and both together were but convenient appliances for the doing of specific work. In the ultimate analysis there is no difference in principle whether draying is done by horses and wagons, or by automobile trucks; whether grading is done by horses and scrapers, or by traction engines and steam paddies. One and all are in their essence but tools and machinery. This being so, if the ruling for which respondent contends is the correct one, it must result that, if A. leases to B. a derrick or hoist for use upon the buildings which B. is constructing, A. will have a lien upon each of those buildings for the value of the use of the derrick; or, in still simpler form, if a carpenter lets to a fellow carpenter his chest of tools for 50 cents a day, the former will have a lien upon every building upon which the latter works and uses the rented tools. The illustration, reduced to its simplicity, shows the untenableness, if not the absurdity, of the contention. Giving to the law its broadest and most beneficent construction, it can never be said that one who merely rents appliances to another who labors upon a structure has himself bestowed labor upon that structure within the meaning of our law.

In this, of course, there is no denial, but a distinct affirmance of the fact that, in proper cases, the value of labor may be enhanced by the use of tools and appliances, and in such cases a lien may be properly given for such value, as in West Coast Lumber Co. v. Newkirk, 80 Cal. 280, 22 Pac. 231, and in McClain v. Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622. Upon the other hand, reference may be made to Adams v. Burbank, 103 Cal. 646, 37 Pac. 390, where it was held that a teamster who had been employed by the brick men to haul brick for them, who had no contract with the contractor and owed him no liability, had not performed labor upon the building, and was not entitled to a lien. Unquestionably the brick men would have been allowed a lien in a proper case for this cartage as a part of the cost of the material. The case of Clark v. Brown, 141 Cal. 93, 74 Pac. 548, relied upon by appellant, has not been overlooked. Clark v. Brown was an action for a lien upon a threshing machine, brought under the act which provided for a lien for the wages of persons employed as laborers. It was there held by the trial court, and its ruling approved by this court, that the law limited the lien to the wages of the persons employed, and did not and could not include the value of the services of horses rented to the owner of the machine and used by him in its work. In principle the case is identical with the one at bar. The distinction which is sought to be drawn between the two rests upon the broader language of the mechanic's lien law. But even that language, as we have said, does not warrant the award of a lien in such a case.

For the foregoing reasons, the judgment and order denying a new trial are reversed, and the cause remanded.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.

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153 Cal. 215

CARPENTER v. SIBLEY et al. (Sac. 1,469.)

(Supreme Court of California. March 13, 1908.)

1. Pleading — Objection to Introduction of Evidence — Insufficiency of Complaint.

Objection that the complaint does not state sufficient facts, made in the form of objection to introduction of evidence, is timely.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1433–1436.]

2. Malicious Prosecution — Complaint — Want of Probable Cause.

The complaint for malicious prosecution, though showing that plaintiff was convicted, overcomes the presumption therefrom of probable cause by alleging that defendants conspired to falsely charge plaintiff with crime, and had him convicted by procuring false testimony and intimidating the jury; the fraud that may be the basis for an action for malicious prosecution not being required to be such extrinsic fraud as would be necessary for relief from the judgment of conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, §§ 94, 95.]

In Bank. Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by A. H. Carpenter against W. F. Sibley and others. Judgment for defendants. Plaintiff appeals. Reversed, and cause restored to calendar.

A. H. Carpenter, for appellant. Nicol & Orr, Louttit & Louttit, and C. L. Neumiller, for respondents.

HENSHAW, J. Plaintiff filed his complaint against the defendants, the district attorney and the sheriff of San Joaquin county, with others, seeking a recovery for malicious prosecution. Defendants interposed a general demurrer to the complaint, which was overruled. Subsequently they joined issue by answering, a jury was impaneled at the request of the plaintiff, and defendants again interposed their general demurrer in the form of objection to the introduction of any evidence because of insufficient facts alleged in the complaint. This objection was timely, since it may be interposed at any stage of the case. Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445; Bell v. Thompson, 147 Cal. 689, 82 Pac. 327; Hall v. Linn, 8 Colo. 264, 5 Pac. 643. The court sustained this objection, and, plaintiff declining to amend, a judgment of dismissal was entered and plaintiff appeals.

Plaintiff charged in his compliant that the district attorney and the assistant district attorney and the sheriff and other persons maliciously and feloniously conspired and agreed to falsely charge and accuse the plaintiff of the crime of subornation of perjury, and to convict and punish him therefor; that, in pursuance of this conspiracy, the conspirators unlawfully procured false evidence to be given before the grand jury of the county, by means of which false evidence they caused plaintiff to be wrongfully and unlawfully indicted for the crime of subornation of perjury; that the indictment was insufficient in form and substance, and did not state a public offense; that it was presented to the superior court. Plaintiff was arraigned thereon, and pleaded not guilty. Subsequently his trial was had before a jury, and "the said conspirators then and there, during the trial of said case, made use of the false and perjured evidence of thieves and perjurers, which they had corruptly and maliciously procured by means of promises of immunity from crimes and other inducements, and offered and introduced such testimony, which they then and there knew to be false, in evidence at said trial against plaintiff." There then follow allegations of intimidation against the jury whereby the jury was coerced into bringing in a false verdict; that judgment of guilty was entered upon the verdict, and plaintiff was sentenced to a term of imprisonment; that he appealed to the Supreme Court of the state, making application for bail and for a certificate of probable cause pending his appeal, and that the granting of the one and the issuance of the other were opposed by defendants; that he suffered 261 days of imprisonment; that the Supreme Court reversed the judgment and the cause was remanded for a new trial, and subsequently, upon the application and motion of the district attorney, made in open court, the superior court dismissed the action and ordered plaintiff released and his bondsmen discharged.

Respondents' argument in support of their contention as to the insufficiency of the complaint is that, in order to support an action for malicious prosecution, the plaintiff must allege malice and want of probable cause for instituting the action complained of, and this, of course, is well settled. Holliday v. Holliday, 123 Cal. 26, 55 Pac. 703; Dowdell v. Carpy, 129 Cal. 168, 61 Pac. 948. They urge, further, that probable cause is shown by a judgment of conviction, even though that judgment be afterwards reversed, and there is authority of much weight supporting this contention. Root v. Rose, 6 N. D. 575, 72 N. W. 1023; Nehr v. Dobbs, 47 Neb. 867, 66 N. W. 864.

Respondents next contend that the complaint itself shows plaintiff's conviction, and thereby conclusively establishes, against his pleading, the presence of probable cause for his prosecution. Respondents recognize that the general principle that the conviction establishes probable cause is subject to the modification that the judgment of conviction has not been procured by fraud at the instance or instigation of the defendants. Such, of course, is the estalished rule. Holliday v. Holliday, supra; Crescent Live Stock Co. v. Butchers' Union, 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614.

Respondents then argue that the only fraud which will avail the plaintiff to overcome the presumption of probable cause established by the conviction is extrinsic fraud which would justify an action to set aside the judgment. Here respondents fall into error. The rule that only extrinsic fraud may be made the basis of an action to set aside a judgment is a rule founded in necessity. It is to the interest of the state that there should be an end to litigation. If it were permitted that a litigant could maintain an action to overthrow a judgment upon the ground that perjured testimony had been employed against him, or upon any other ground than extrinsic fraud, litigation would have no end. Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159. But this is very far from saying that, because the law denies to a litigant this particular form of redress for such an injury, it denies him any redress whatsoever. Certainly, if a man has procured an unjust judgment by the knowing use of false and perjured testimony, he has perpetrated a great private wrong against his adversary. If that judgment is in the form of a judgment of criminal conviction, it would be obnoxious to every one's sense of right and justice to say that, because the infamy had been successful to the result of a conviction, the probable cause for the prosecution was thus conclusively established against a man who had thus been doubly wronged. Therefore, while it may be true that the fraud alleged in this complaint is not such a fraud as would support an action for the setting aside of a jdugment, it is still a fraud which will support an action for a remedy for the private wrong thus committed. So we find it laid down that the general rule now is "that if the declaration or complaint shows a conviction of the plaintiff, yet if it be averred that the conviction was procured by fraud, perjury, or subornation of perjury, or other unfair conduct on the part of the defendant, the presumption of probable cause is effectually rebutted." 13 Ency. Pl. & Prac. p. 449, and note; Spring v. Besore, 12 B. Mon. (Ky.) 555; Ross v. Hixon, 46 Kan. 550, 26 Pac. 955, 12 L. R. A. 760, 26 Am. St. Rep. 123; Crescent Live Stock Co. v. Butchers' Union, supra.

It follows from the foregoing that the court erred in sustaining defendants' objection to the introduction of evidence and in dismissing the action. Therefore it is ordered that the judgment be reversed and the cause restored to the calendar of the trial court.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; McFARLAND, J.; LORIGAN, J.

153 Cal. 204

NELSON v. NELSON. (S. F. 4,083.)

(Supreme Court of California. March 11, 1908.)

APPEAL—DISMISSAL—GROUNDS.

Where an appeal is taken, but before it is argued all matters in dispute are settled by the parties, the appeal must be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3122.]

In Bank. Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by Peter Olsen Nelson against Mary E. Nelson. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

J. R. Webb and C. D. Wright, for appellant. Wm. H. Johnson, for respondent.

PER CURIAM. This was an action to obtain a decree setting aside a conveyance of real property and a bill of sale of personal property executed by plaintiff to defendant. Plaintiff had judgment as to the conveyance of real property, and defendant appealed from such judgment and from an order denying her motion for a new trial.

Upon the calling of the case upon the calendar for oral argument it was made to appear to the court that since the judgment the parties have settled between themselves all the matters in dispute in said action. It follows that the appeal, being no longer a contest involving the determination of adversary rights, must be dismissed, unless, as suggested, we are required to retain and decide the questions presented upon the appeal solely for the purpose of incidentally determining who shall pay the costs on appeal. It is settled to the contrary in this state. In the Estate of Blythe, 108 Cal. 124, 41 Pac. 33, it was held that an appeal from a decree of distribution taken by Alice Edith Blythe pending a previous appeal by her from an order denying a new trial in a proceeding to determine heirship must be dismissed upon the affirmance of the order denying a new trial; such affirmance being a final determination that she had no right in the estate, and no interest in the matter of distribution. The court said: "Appellant contends that her right to costs following a successful appeal, even if her right is found to be no greater than this, gives her such a substantial interest in the controversy as must compel the retention and determination of the questions presented by her appeal. But to this we cannot accede. Were appellant, for example, to declare that she had surrendered her claim to respondent, and finally adjusted and disposed of the matter in controversy, saving that it had been agreed between them that the appeal should be pressed to a decision, solely to determine which of the two should bear the costs, it would present a case not different in principle from the present, and, the costs being incidental to the judgment, the appeal would be dismissed as no longer being a contest involving the determination of adversary rights."

The appeal is dismissed.

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153 Cal. 213

LEVY v. LYON. (S. F. 4,682.)

(Supreme Court of California. March 12, 1908.)

Specific Performance—Option for Purchase of Land—Enforcement by Purchaser—Tender—Necessity.

The holder of an option for purchase of land cannot enforce specific performance by the vendor in the absence of a showing of the tender of the purchase price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 286–298.]

Department 2. Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by J. H. Levy against M. J. Lyon. From a judgment for plaintiff, defendant appeals. Affirmed.

Milton L. Schmitt, for appellant. E. M. Rosenthal, for respondent.

McFARLAND, J. The plaintiff brought his action to quiet title to certain real property. The action was commenced November 1, 1905. Defendant appeared by answer and cross-complaint, and alleged: That on April 6, 1901, plaintiff had executed to him an option for the purchase of the lands in the complaint described, the material portions of which option are as follows: "I hereby agree to sell to M. J. Lyon or assigns certain property or land, 10 acres more or less, adjoining the property of M. J. Lyon on the south, described as follows: [Here follows the description]—including use of abstract of title to said lands, title to be satisfactory to purchaser. Deed to be delivered in shortest possible time without delay." That on the 30th day of the following May he "requested and demanded from said J. H. Levy the deed to the said premises." That at divers times since he has demanded the delivery of the deed from plaintiff, and has requested "at all of said times that the said Levy provide the said Lyon with an abstract of title of said property in order that the sale contemplated in said agreement herein referred to might be consummated." The prayer of the complaint, amongst other things, is that the court adjudge and decree "that the said J. H. Levy make, execute, and deliver the deed to said premises to the said M. J. Lyon upon the said M. J. Lyon complying with the terms of sale set forth in said agreement."

The option was a unilateral contract, binding the defendant to do nothing, and binding only upon the plaintiff; becoming mutual only in the event that the defendant should, within a reasonable time and before withdrawal of the offer, make tender of performance on his part. In such a contract performance upon the part of him to whom the option runs consists of a valid tender of the amount due under the contract, coupled with a demand for the deed. This defendant nowhere pleads that he made. He specifically pleads that he demanded a deed, but nowhere avers that he ever tendered the consideration for the deed. More than four years after the execution of the option he seeks to have a court of equity declare it to be a subsisting, valid, and binding obligation on the part of the owner of the land, without any tender of performance ever having been made.

The general demurrer to the cross-complaint and answer were properly sustained, and, as this option constitutes the sole claim of defendant to title in the property, the judgment quieting that title in favor of plaintiff was proper.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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153 Cal. 197

CONGREGATIONAL CHURCH BLDG. SOCIETY v. OSBORN et al.

(Sac. 1,581.)

(Supreme Court of California. March 11, 1908.)

1. Mortgages — Foreclosure by Action — Pleading—Answer.

In a foreclosure suit, an answer admitting the allegation that all the conditions of the mortgage have been broken does not establish the fact that they were broken more than four years before the action was begun.

2. Limitation of Actions—Computation of Period of Limitation.

The rule is universal, with the exceptions provided in the statute itself, and certain cases where the statute is suspended when it becomes impossible under the law for plaintiff to begin his action, that, when the period of limitation has once begun to run, it cannot be postponed, suspended, or interrupted by any subsequent condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 417.]

3. Same — Defenses in General — Limitations.

A church building society upon application provided one of its churches with a certain amount of money to build a house of worship. The church covenanted that it would use the money for that purpose, continue to maintain public worship, make an annual contribution to the society, preserve its corporate existence, that it would not alienate any portion of the premises, and would pay all taxes and liens thereon, and keep the building insured. As security the church granted to the building society the church premises, provided that, so long as the church should perform its obligations, it might remain in possession thereof, and that, upon repayment to the society and the performance of the covenants of the instrument, the estate granted should cease and be void. It was further provided that if the church should cease to be one of the society's creed, or should for one year suspend public worship or fail to perform any of its obligations, the whole amount would become immediately due and payable "without further notice or demand." The church has not made an annual contribution to the society for more than seven years, and has not paid its taxes or kept the building insured for about ten years, of which failures the society has had knowledge for more than six years. There is no showing, however, that public worship was not maintained, or that the general work of the church was not performed until a time within the period of limitation. *Held*, in an action by the society to foreclose its lien, that the maintenance of public worship in the society's creed constituting the principal inducement for the money provided, the covenants which the church failed to perform being of minor importance, the statute of limitations did not begin to run simultaneously with the first breach of such covenants; since, the provision for the money to become immediately due being for the benefit of the society, it had the right to indulge the church and prevent the forfeiture.

4. Same—Waiver and Forfeiture.

In such a case the mere passive acquiescence on the part of the society was sufficient to waive the forfeiture provided by the instrument for its benefit, and to allow the church to continue to perform such of the covenants as it was able to perform without setting in motion the statute of limitations in the latter's favor.

In Bank. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the Congregational Church Building Society against E. B. Osborn and others. From a judgment for plaintiff, defendants appeal. Affirmed.

P. H. Griffin, for appellants. L. L. Dennett and J. M. Watshall, for respondent.

SHAW, J. This is an action to foreclose certain liens created by two instruments in writing, executed by the First Congregational Church Society of Turlock, covering the land on which its house of worship is situated. Plaintiff had judgment, and the defendants appeal.

The first instrument was executed on October 18, 1889, to the American Congregational Union, a corporation, which has since merged into and become the Congregational Church Building Society. The second was executed to the plaintiff corporation by name on February 5, 1896. The two instruments are alike in form in other respects. The sole question presented is whether or not the action is barred by the four-year statute of limitation. For convenience we will consider only the instrument of February 5, 1896.

The instrument in question is very peculiar in character, and so far as we have been able to ascertain, such instruments have never been the subject of judicial construction. From its terms it may be inferred that the plaintiff is, as its name indicates, a society organized and carried on for the purpose of receiving and applying contributions to aid in the erection of houses of worship for use by Congregational churches. In order to present the case properly, it will be necessary to state somewhat fully the contents of the instrument. It recites that, upon the application of the Turlock Congregational Church Society, the building society had provided aid to the amount of $432.75 to enable the Turlock Society to erect and pay for a house of worship. The Turlock Society then covenants, in consideration of said sum of money, that it would use the money only for the purposes aforesaid; that it would continue to be an Evangelical Congregational church and to maintain public worship; that it would make an annual contribution to the building society, would preserve its corporate existence, would not alienate said house of worship, or any portion of the premises described, would pay all taxes and liens thereon, and keep the house insured. It then declares that, "for the better securing of said sum of money and the performance of its covenants and obligations herein contained and the repayment of the said amount" to the building society "as herein provided," the Turlock Society thereby granted to the building society a tract of land in Turlock 58 by 100 feet in extent and particularly described. Then follows a proviso to the effect that, so long as the Turlock Society should keep and perform the covenants and obligations in the instrument contained, "it may and shall remain in possession and enjoyment of said premises for the uses and purposes of the Evangelical Congregational church as fully and freely as if these presents had not been executed," and that "on payment of said sum" to the building society, and, on performance of all the covenants of the instrument, the estate thereby granted should cease, determine, and be void. Another clause contained the proviso that the Turlock Society "doth hereby covenant and agree to and with" the building society that if the Turlock Society "or the church in connection with which it is organized" should cease to be an Evangelical Congregational church, or should for one year suspend public worship, or should cease to exist in its corporate capacity, or alienate its house of worship, "or fail to keep or perform any of the covenants or agreements hereinbefore provided, then in that case the whole amount secured by these presents shall be and become immediately due and payable and shall be paid by" the Turlock Society to the building society "without further notice or demand," and that, in default of such payment, the building society should have the right to enter upon the granted premises "and to sell and dispose of the same" at public auction and convey the same in fee simple to the purchaser, and, after retaining out of the proceeds the costs of sale and the amount secured, render the surplus to the Turlock Society.

This is not an ordinary mortgage to secure the payment of a debt. It was not the intention or purpose of the parties that a debt should exist from the church to the building society, except in the contingency that the primary objects of the transaction should fail. The money was not advanced or delivered to the Turlock Society as a loan. It was "provided" as "aid" toward the erection of a church, to the end that a local church society of the Congregational faith should be maintained in Turlock, and, so long as such society was properly carried on, there was to be no disturbance of its possession and no obligation on its part to repay in money. It was, no doubt, the anticipation and desire of both parties that the local church society should perpetually continue to exist and conduct the church affairs in the manner specified in the covenants. It is to be presumed that this was the purpose for which the local church was organized, and that it was a part of its duty independent of the obligations contained in the covenants. If it did so, the purpose of the plaintiff's donation would be accomplished, and no debt would ever arise. The main purpose of the instrument was not to secure the repayment of the money, but to secure the application of that money to the purposes for which it was donated, to compel the continuous use of the property into which it was converted, as a Congregational house of worship, and to prevent its being devoted to different uses. The finding of the court is that the Turlock Society had not made an annual contribution to the building society for more than seven years before the action was begun, that it had not paid the taxes nor kept the building insured, since the year 1894, and that the plaintiff knew of these failures more than six years before the action was begun. The complaint was filed on July 16, 1904. It is not found that any other breaches of the covenants had occurred. There is a finding that a meeting of the society had not been held since February, 1896. There is no covenant requiring that any meetings of the society shall be held. The covenant is for the holding of public worship, which is a different thing from a meeting of the society. The complaint alleges in general terms that all the conditions of the mortgage have been broken, and this allegation is admitted in the answer. This, however, does not establish the fact that they were broken more than four years before the action was begun. Hence the breaches mentioned in the findings, as above stated, are the only ones which occurred more than four years before the action was begun, and those only are to be considered in determining whether or not the action is barred. It is to be presumed that public worship was maintained and the general functions and work of the church performed until a time within the period of limitation. These latter constitute the principal matters intended to be secured and the principal inducement for the donation in question. The covenant to make an annual contribution could have been fulfilled by the contribution of any sum, however trifling. This, with the covenant to pay taxes and insurance, was of comparatively minor importance.

The contention of the appellants is that the agreement of the Turlock Society to repay the money to the building society became a matured obligation for money due forthwith upon the occurrence of a breach of any of the covenants of the agreement; that a cause of action to foreclose the lien then at once accrued in favor of the building society, against which cause of action the statute of limitations began to run simultaneously with the breach of the covenant; and that this result would follow without the concurrence of any affirmative act of the building society, and even against its wish and will. We do not think this rule is applicable to the instrument in question. It is not to be viewed as an ordinary commercial transaction. The cases, of which there are many, holding that, where the time of payment of a debt is made to depend upon the happening of a given event, the debt becomes due immediately upon the occurrence of the event, are not fully applicable to transactions of this character. It is true that, upon the happening of the event, the plaintiff could at once proceed to sell the property under the power of sale contained in the instrument or to foreclose the lien, and that this could be done without notice or demand, other than the notice of sale in one case, and the beginning of the action in the other. But it does not follow that this would be the result of a breach independent of or against the will of the building society. We think the rule adopted after full consideration in the case of Belloc v. Davis, 38 Cal. 249, is applicable to the case at bar. That case involved an ordinary commercial transaction, a mortgage and note for the payment of a debt owing to the mortgagee. The note provided that, on failure to pay the monthly interest when due, the principal and interest should "become due and payable, immediately, upon such default." Nothing was said about notice or demand, and neither was required to make the interest due. By the terms of the note it became due at certain stated times. Discussing the question of the effect of the failure to pay the interest upon the running of the statute of limitations, the court said: "The provision in the note, to the effect that, in the case of a default in the payment of interest, the whole amount of principal and interest shall 'become due and payable immediately upon such default,' is evidently in the nature of a penalty, inserted for the benefit of the creditor, and as an incentive to the debtor to stimulate him to the prompt payment of the interest in order to avoid a forfeiture of the credit allowed by the note. Being in the nature of a penalty, inserted for the sole advantage of the creditor, it was competent for him to waive the benefits which it secured to him, as the plaintiff in this case has done, by accepting payment of the interest after default made." And, in illustration of the necessity for this rule and the results of a contrary doctrine, the court further said: "Suppose the case of a promissory note payable 10 years after date, with interest payable monthly, and with a clause that the principal is to become due on a failure to pay the interest, as in this case. The interest for the first month is not paid precisely on the day it became due, but is paid and accepted on the following day, and thereafter, for three years, is paid punctually at maturity every month, and whilst being so paid, and without any new default, the creditor brings his action to collect the principal sum, on the ground that the credit had been forfeited by a failure to pay the first month's interest for a single day, three years before. To hold that the action could be maintained, under these circumstances, would be repugnant to every principle of reason and justice, and shock the common sense of mankind. But, if the argument for the defendants be sound, the creditor could not only maintain the action in the case supposed, but would be obliged to institute it within four years from the time of the default, on pain of losing his entire debt by the bar of the statute of limitations. We deem this to be altogether a too narrow and technical construction of the statute, which, though designed to be a statute of repose, was never intended to work such hardship as this." The decision then proceeds to refer to the analogy of clauses in a lease declaring the lease forfeited upon failure to pay rent, in which case, as is well known, the landlord may waive or enforce the forfeiture at his option, and that, if he so elects, the lease will continue, notwithstanding the fact that by the strict terms of the covenants it would have ceased to exist by reason of the breach. Upon this point it said that the tenant would not "be allowed to say that he is discharged from his covenants by his own default in the payment of rent. In other words, he is estopped from alleging a forfeiture caused by his own default, on the familiar principle that a party shall not take advantage of his own wrong." This case has been approved in the subsequent decisions of this court. Cal. S. & L. Society v. Culver, 127 Cal. 107, 59 Pac. 292; Moore v. Russell, 133 Cal. 300, 65 Pac. 624, 85 Am. St. Rep. 166; Mason v. Luce, 116 Cal. 236, 48 Pac. 72. In the two cases first cited it is held that the holder of the note containing such a clause may, even after he has exercised his option, elect to waive the forfeiture, and thereby avoid the effect of his first election, and restore the instrument to its status as an unmatured obligation.

The only point in which Belloc v. Davis differs from the case at bar is that in that case the obligation would become due in any event after a fixed period; whereas, in this case it was not the intention that it should ever become due. This difference is not important to the application of the reasoning of that case to this case. Indeed, it may be said that it makes the reasoning more forcible in this case than in that. The rule is universal, with the exceptions provided in the statute itself, and certain cases where the statute is suspended when it becomes impossible under the law for a plaintiff to begin his action, that, when the period of limitation has once begun to run, it cannot be postponed, suspended, or interrupted by any subsequent condition. 19 Am. & Eng. Ency. of Law, 224, 212, 215; Wood on Lim. § 6. If the slightest breach of these covenants would set the statute irrevocably in motion, it would follow that if the tax became delinquent for a month, or a policy of insurance lapsed a few days before renewal, the plaintiff being aware thereof, the money given as a donation would at once be changed to a matured debt, and the building society would be compelled to enforce payment within the succeeding four years, on pain of losing its money and of being deprived of all power to enforce the main objects in furtherance of which the money was provided, although in the meantime the delinquent tax had been paid, the building kept fully insured, and the primary object of maintaining public worship in the Congregational faith had been continually and satisfactorily accomplished. As in the case of a note payable at a future period, but providing for the forfeiture of credit upon failure to pay an intermediate installment of principal or interest, so here, the plaintiff has the right to waive the forfeiture provided by the instrument for its benefit, and to allow the Turlock Society to continue to perform such of the covenants as it was able to perform, without setting in motion the statute of limitations in its favor. The provision for the money to become immediately due being for the benefit of the building society, it had the right to indulge the other party and prevent the forfeiture. The waiver mentioned in Belloc v. Davis was evidenced by the subsequent receipt of the defaulted interest. That, however, is not the only method by which a waiver can be made or evidenced. It could be accomplished by mere passive acquiescence, as in the present case. 29 Am. & Eng. Ency. of Law, 1105.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

153 Cal. 219

ANDERSON v. SCHLOESSER. (Sac. 1,580.)

(Supreme Court of California. March 13, 1908. Rehearing Denied April 10, 1908.)

1. Action—Nature and Form.

The nature of a cause of action is to be determined from the complaint, and not from the conclusion of witnesses expressed in affidavits, etc.

2. Parties—Substitution.

Code Civ. Proc. § 385, provides that an action does not abate by the death of a party or by the transfer of any interest therein, if the cause of action survive, and in case of death, etc., the court may allow an action to be continued against deceased's representatives or successors in interest, and in case of any other transfer in interest the court may allow the transferee to be substituted. Plaintiff secured judgment against defendant on her liability as a stockholder, and an attachment having been levied on her interest in a mine, it was sold under execution. Thereafter S. moved for an order substituting himself as defendant, alleging defendant's death, and that before the attachment defendant's interest in the mine was conveyed to him. *Held*, that plaintiff's action was against defendant personally, and he was entitled to a general judgment, the levy on the particular property being merely to satisfy the general judgment, and hence the order substituting S. as defendant, which also eliminated defendant as a party, was erroneous.

3. Same.

Even if the judgment against defendant was rendered on service by publication so as to subject only defendant's interest in the attached property to the payment of plaintiff's claim, it was possible to obtain jurisdiction of defendant, or of her estate on her death, so long as the action was pending, so as to render a general judgment for plaintiff to which the facts alleged in his complaint entitled him, and hence the order eliminating the original defendant from the action was erroneous.

4. Same.

The right of S. under Code Civ. Proc. § 385, to be made a party defendant, did not depend upon the death of the original defendant, but his right, if any, rested upon the transfer of the property to him.

5. Abatement and Revival — Transfer of Interest—Substitution of Successor.

Under Code Civ. Proc. § 1502, providing that on the death of a defendant pending an action plaintiff must present his claim against the estate, where at defendant's death an action was pending against her wherein service was had by publication, personal service could be had on defendant's estate in case of administration in this state, so as to support a general judgment against the estate.

6. Action—Commencement and Termination—"Pending."

Under the direct provisions of Code Civ. Proc. § 1049, an action is "pending" from the time of its commencement until its final termination upon appeal, or until the time for appeal has expired.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5276–5279; vol. 8, p. 7750.]

In Bank. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by H. P. Anderson against Amalia Schloesser. From an order substituting George F. Stone as defendant and eliminating defendant Schloesser from the action, plaintiff appeals. Reversed.

Garoutte & Goodman and Pardee & Pardee, for appellant. N. J. Barry, John Sands, and Solinsky & Wehe, for respondent.

SLOSS, J. On November 11, 1904, the plaintiff, H. P. Anderson, commenced in the superior court of Lassen county an action against Amalia Schloesser to recover from her certain sums claimed to be due on account of her liability as a stockholder in Hayden Hill Golden Eagle Mining Company, a corporation. A writ of attachment was issued, and was, on the 28th day of November, 1904, levied on the defendant's interest in the Evening Star mine. On August 28, 1905, the court gave judgment in favor of the plaintiff against the defendant, Amalia Schloesser, for $2,258.70, with costs and interest. It was in form an ordinary money judgment, and contained the following recitals: "In this action the defendant, Amalia Schloesser, having been regularly served with process, and having failed to appear and answer plaintiff's complaint herein, and the legal time for answering having expired, and no answer or demurrer having been filed; and by order of the court the default of said defendant having been entered in the premises according to law on the 26th day of August, 1905." This judgment was entered on August 28, 1905, and on the 28th day of October, 1905, all the right, title, and interest of Amalia Schloesser in said Evening Star mine was sold under writ of execution issued in this cause.

On February 16, 1906, respondent, George F. Stone, filed and served upon the plaintiff a notice that he would move the court for an order substituting him as defendant in the place and stead of said Amalia Schloesser. The grounds of the motion, as stated in the notice, were: "That said action is an action to subject real estate within the state of California to the payment of an indebtedness of the plaintiff, Amalia Schloesser; that said Amalia Schloesser was a nonresident of the state of California, and is now dead; and that subsequent to the commencement of said action all the right, title, and interest of the said Amalia Schloesser of, in, and to said real estate has been transferred to the said George F. Stone, and that he is now the legal owner thereof." Upon the hearing of the motion Stone offered in support of his motion the affidavit of one Barry alleging that the action "is an action commenced against a nonresident of the state to subject certain real estate situated in the county of Lassen, * * * and known as the 'Evening Star Mine,' * * * to the payment of an alleged indebtedness of said defendant; that subsequent to the commencement of said action defendant transferred all her right, title, and interest of, in, and to said Evening Star mine to George F. Stone, and that said George F. Stone is now the legal owner of said real estate; that affiant is informed and believes, and upon such information and belief alleges the fact to be, that the said Amalia Schloesser is now dead." In addition Stone offered in evidence plaintiff's complaint in the action. This was a complaint which alleged that the Hayden Hill Golden Eagle Mining Company was indebted on certain contracts to the plaintiff, and that the defendant was the holder and owner of one-half of the subscribed and issued capital stock of said corporation. It alleged further that the defendant, Schloesser, was a resident of the state of Illinois and the owner of an interest in the Evening Star mine, and "that this action was brought for the purpose of subjecting said defendant's interest in said mine or mining claim to the payment of such proportion of the indebtedness aforesaid as said defendant may be found legally liable for." The complaint prayed judgment against said defendant for one-half of the amount of the indebtedness of the corporation with interest. In opposition to the motion the plaintiff offered an affidavit stating that the action did not relate to or affect the title, the possession, or the right of possession of any real property, and setting forth the facts as to the issuance of the attachment, the recovery and entry of judgment, and the execution sale as hereinbefore stated. It further alleged that the conveyance to Stone was not made until the 21st day of January, 1905, after the levy of the writ of attachment. The court granted the motion for the substitution of Stone as defendant in place of Amalia Schloesser, and plaintiff appeals from the order so made.

Section 385 of the Code of Civil Procedure provides that: "An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

The respondent's right to be substituted rests, if it can be supported at all, upon the last sentence of this section. He claims by reason of a transfer made to him by Amalia Schloesser in her lifetime, not in the capacity of one who, as representative, or otherwise, succeeded to her interest by reason of her death or disability. The fact that after the transfer to Stone his grantor died is therefore a false quantity in the case. Whatever rights Stone had were derived from the conveyance to him, and were fixed at the time of such conveyance.

Was this such a transfer of interest in the "action" or in the "cause of action" as justified the substitution of Stone in place of the original defendant? The order appealed from not only made Stone a party to the suit, with the right to take such steps therein as might be necessary to protect his interest, but it eliminated Amalia Schloesser as a party, and prevented the plaintiff, in any future stage of the proceeding, from obtaining any relief against her. The nature of the cause of action is to be determined from the complaint, and the conclusions of witnesses, expressed in affidavits, can have no weight in this connection. The complaint was simply one to recover money claimed to be due to plaintiff from the defendant, Schloesser, on contracts made by a corporation of which she was a stockholder. As such stockholder she was directly and primarily liable on these contracts. Young v. Rosenbaum, 39 Cal. 646; Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047. The allegation that the action was brought to subject defendant's interest in the Evening Star mine to the payment of plaintiff's claim does not alter the fact that plaintiff set forth a case of a personal liability on the part of defendant, Schloesser, entitling him to the relief which he asked, i. e., a general judgment against her. On this complaint the plaintiff had no claim against Stone, and was not entitled to any judgment against him. The effect of levying an attachment against the property of the defendant was merely to create a lien on that property as security for any judgment that might be recovered against Schloesser. The attached property did not thereby become the subject of the action. The subject of the action consisted, as it had from the outset, of plaintiff's demand against Schloesser. The fact that Stone acquired an interest in the attached property, while it might justify his becoming a party to the action for the purpose of protecting that interest (Wilson v. Baker, 64 Cal. 475, 2 Pac. 253; Trumpler v. Trumpler, 123 Cal. 248, 55 Pac. 1008; Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 Pac. 797), would furnish no reason for ousting Schloesser as a party, and so depriving plaintiff of his right to a general judgment against her.

The theory upon which the substitution was asked appears, from the briefs, to have been that, while the action was one for the recovery of a simple money judgment, there was no personal service upon the defendant within the jurisdiction, and that, under the familiar rule declared in Pennoyer v. Neff, 95 U. S. 741, 24 L. Ed. 565, and similar cases (Brown v. Campbell, 100 Cal. 641, 35 Pac. 433, 38 Am. St. Rep. 314; Murray v. Murray, 115 Cal. 266, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97), the judgment obtained on substituted service could not be effectual except to the extent of subjecting to the satisfaction of plaintiff's claim property which had been attached or otherwise brought within the jurisdiction of the court at the inception of the proceedings. It is a sufficient answer to this proposition to say that nowhere in this record does it appear that the judgment was one rendered on substituted service. All that appears regarding service is the recital of the judgment hereinbefore quoted, which is that the defendant, Amalia Schloesser, had been regularly served with process, and had failed to appear and answer plaintiff's complaint herein. While it is shown that the defendant, Schloesser, was a nonresident of the state of California, there is nothing in the notice of motion for substitution or in the evidence to indicate that she was not at some time during the pendency of the action within this state, and that she was not while here served with summons. If she was so served, the court, of course obtained jurisdiction to render a general judgment against her.

But, even if we were to assume that the judgment was rendered on a service by publication, the transferee of the attached property did not thereby become entitled to the substitution. While the judgment, if based on such service, could not be effectual to any greater extent than to subject the interest of the defendant, Schloesser, in the attached property to the payment of plaintiff's claim, it is still true that the prayer of the complaint and the facts therein alleged authorized a general judgment against the original defendant. So long as the action was pending, it was possible for the court to obtain jurisdiction of that defendant by a personal service, or by voluntary appearance on her part. It cannot be urged on behalf of Stone that the plaintiff's right to treat the action as one purely "in personam" ended with the entry of judgment. An action is pending "from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed." Code Civ. Proc. § 1049. Indeed the very motion of defendant to be substituted as a party defendant recognizes the action as a pending one. The sole purpose which Stone can have in now coming into the action as a defendant is to attack a judgment already entered. If he should succeed in a motion to set the judgment aside, the plaintiff would be left in the position of having to look solely to the attached property for the satisfaction of his claim, although he had commenced an action to recover a general judgment against a party personally liable. In this respect the case differs materially from Fay v. Steubenrauch, 138 Cal. 656, 72 Pac. 156, relied on by respondent. In that case the grantee of mortgaged land was, in a foreclosure suit, substituted for an original defendant, who was not himself the mortgagor, and was not personally liable for the debt.

As we have said, the death of Schloesser can add nothing to the rights of Stone, who succeeds to no right by virtue of her death. It may be remarked, however, that the fact of her death does not destroy the possibility of the court securing jurisdiction to render, in this action, a general judgment against her representatives. If there should be administration of her estate in this state, a claim on the demand here sued upon could be presented to the executor or administrator, and be made the basis of a judgment (payable in due course of administration) in this action. Code Civ. Proc. § 1502.

The order is reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; McFARLAND, J.

153 Cal. 208

SCHMIERER v. MUTUAL RESERVE FUND LIFE ASS'N. (S. F. 4,561.)

(Supreme Court of California. March 12, 1908.)

INSURANCE—ASSESSMENTS—RATE.

A certificate of life insurance provided that at certain times there should be payable to the association a mortuary premium for such an amount as the executive committee of the association might deem requisite, at such rate according to the age of each member as may be established by the board of directors, and that the rate of the mortuary premiums might be changed to correspond with the actual mortality experience of the association. *Held*, that the association had the right to increase the premiums according to the exigencies of its business.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Gottlieb Schmierer against the Mutual Reserve Fund Life Association. From a judgment for defendant, plaintiff appeals. Affirmed.

Wal. J. Tuska, for appellant. Van Ness & Redman, for respondent.

PER CURIAM. Respondent, an assessment life insurance association, issued in 1884 to one James D. Marvin a certificate of life insurance in the sum of $5,000. Marvin for several years was the agent of respondent in San Francisco. The certificate required the payment of annual dues of $10 and also bimonthly assessments, the amount of which was dependent upon the mortality experience of the association. Marvin assigned his certificate to plaintiff, and on April 5, 1889, a new certificate was issued in which plaintiff was payee. By the terms of this certificate it was provided that "within thirty days from the first week day of the months of February, April, June, August, October and December of each and every year during the continuance of this certificate or policy of insurance as there shall be payable to the association a mortuary premium for such an amount as the executive committee of the association may deem requisite, which amount shall be at such rate, according to the age of each member, as may be established by the board of directors, and the net amount received, as provided in the constitution or by-laws of said association, less twenty-five per cent. to be set apart for the reserve fund, shall go into the death fund to meet the current mortality of the association." And it was further provided in said certificate that the "rate of the mortuary premiums may be changed to correspond with the actual mortality experience of the association." The assessments levied on the certificate were duly paid until June 30, 1903, when default was made in the payment of a bimonthly assessment. The assessment was levied on May 31, 1903, and called for the payment of $37.65 within 30 days thereafter. Plaintiff refused to pay this assessment, and tendered the defendant the sum of $11.86, which amount plaintiff refused to accept, and thereafter declared the contract forfeited. Plaintiff then brought this action to recover the amounts which had been paid under the contract. He contends that $11.86 is the maximum amount of the bimonthly assessment which can be levied against him under the terms of his contract of insurance. The trial court held to the contrary, and this appeal is taken. The determination of this question depends upon the construction to be given to the contract.

Appellant's position is that by the terms of this contract he was entitled to insurance for a fixed premium bimonthly of $11.86, notwithstanding the fact that at the time when the insurance was issued and when Marvin was 42 years of age the rate in an old-line, level premium insurance company would have been more than twice that amount, and that for the increase of the years no advance could be made in the premiums of an insurance company operating upon a mutual assessment plan notwithstanding the increased risk to the insurer. If this contention is upheld by the contract then it needs no argument to disclose that the insurance company itself was conducting its operations upon a most reckless basis and issuing contracts which could but end in its ruin. We think, however, by a reading of the clauses above quoted, and others, which, while pertinent to the question, are not necessary here to be set forth at length, since there are provisions designed to effectuate the payments of the rates to be fixed from time to time, that it is clear that the interpretation sought for by this appellant is not only in violation of every principle of assessment insurance, but is in direct conflict with the provisions of the certificate itself. The one declaration contained in the certificate that the "rate of the mortuary premiums may be changed to correspond with the actual mortality experience of the association" is itself an unequivocal declaration of the reserved right of the company to increase its premiums as the exigencies of its business may require. This construction of the contract is in accord with that given to a like contract in the case of Gaut v. Mutual Reserve Fund Life Ass'n (C. C.) 121 Fed. 403.

For these reasons, the judgment and order appealed from are affirmed.

153 Cal. 206

VISALIA SAVINGS BANK et al. v. CITY OF VISALIA et al. (Sac. 1,503.)

(Supreme Court of California. March 11, 1908.)

1. Schools and School Districts—Public Schools—Taxation—Party Liable.

Where land adjoining a city is included in the city school district, it will be liable to a city school tax levied by the city trustees under the express provisions of Pol. Code, §§ 1576, 1670.

2. Same — Taxation — Statutes—Constitutionality.

The power expressly given by Pol. Code, §§ 1576, 1670, to city trustees to levy a school tax on lands beyond the city limits, but within the school district, is constitutional.

3. Same—Collection and Enforcement.

In an action to have a city school tax levied on land adjoining the city declared void and to enjoin sale of the lands to pay the tax, where the answer set up that there was a school district composed of the territory inside the city and other territory adjoining on the outside including plaintiff's land, and that the tax was levied on said land as part of the district, the averment of the existence of the school district was sufficient as against a general demurrer.

In Bank. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Visalia Savings Bank, a corporation, and others, against the city of Visalia and another. From a judgment sustaining a demurrer to the answer, defendants appeal. Reversed and remanded, with directions.

H. B. McClure and H. T. Miller, for appellants. Chas. G. Lamberson and Frank Lamberson, for respondents.

McFARLAND, J. The defendant, the city of Visalia, is a municipal corporation of the fifth class, and the other defendant, T. W. Holder, is tax collector of said city. The plaintiffs are owners of lands and mortgage liens on lands which lie outside of, but adjoining, the corporate territory of said city. In 1905 the city trustees of the city of Visalia levied a school tax on these outside lands of plaintiffs, and, this tax becoming delinquent, the defendant T. W. Holder advertised the lands for sale, and was about to sell the same for said taxes, whereupon plaintiffs brought this action to obtain a judgment adjudicating said tax to be invalid and void and enjoining the said T. W. Holder from selling said lands under said tax. The defendants filed an answer setting up that during the times mentioned in the complaint there was a school district composed of the territory inside of said city, and other territory adjoining on the outside, which included the lands described in plaintiff's complaint, and that the tax has been rightfully levied on said lands as part of said school district. To this answer plaintiffs filed a general demurrer, which was sustained, and, defendants declining to amend, judgment was entered in favor of plaintiffs according to the prayer of the complaint. From this judgment defendants appeal.

There is no doubt that by the general law (Municipal Corporation Act [St. 1883, p. 24, c. 17], and amendments of 1891 and 1901; Pol. Code, §§ 1576, 1670) power was given to the trustees of the city to levy a school tax upon the lands of the school district lying outside of the city. The law provides for the creation of a school district composed partly of the lands in the city and partly of the lands on the outside adjoining it. In such cases the residents of the district outside of the city have a right to vote for the board of education or school trustees of the district. The board of education are to submit to the board of trustees of the city an estimate of the tax deemed necessary for school purposes. When the tax is collected, the board of education has full control over its expenditure; and in no instance shall the tax be greater than 20 cents on every $100 worth of property. It may be observed, whether this consideration be of importance or not, that there is no room left here for that oppression which may be exercised by the body having either unlimited or very extensive powers of taxation. The power of taxation given the city board of trustees is valid, unless there is some constitutional objection to the exercise of that power to any extent. The fact that the board of trustees of the city is given power, at the request of the board of education, to levy a tax on lands outside of the city, may afford a plausible excuse for indulgence in some general chatty talk about constitutional principles; but this power given the board of trustees does not violate any existing inhibition of the Constitution which has been pointed out to us. In our opinion, therefore, this contested power is not unconstitutional, but is valid and effective. We think that there is a sufficient averment in the answer of the existence of the Visalia school district, at least as against an attack by a general demurrer. Of course, upon a trial, the question whether the said school district has been regularly and legally adopted under the law will be open for examination and decision.

The judgment appealed from is reversed, and the case remanded, with directions to the superior court to overrule the demurrer to the answer.

We concur: ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; SLOSS, J.; LORIGAN, J.

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153 Cal. 234

BELL v. BANK OF CALIFORNIA. (S. F. 3,799.)

(Supreme Court of California. March 13, 1908.)

1. Pledges—Debts or Liabilities Secured.

Under Civ. Code, § 2891, providing that a lien on property does not of itself entitle the lienor to a lien on the same property for the performance of any other obligation than that originally secured, where property is pledged to secure specific indebtedness, the pledgee has no right to hold it as security for any other obligation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, § 58½.]

2. Same—Conversion of Property—Return of Property—Redemption—Remedies of Pledgor.

Where a pledgee wrongfully parts with the property, or, on tender of the secured debt, refuses to return it, the pledgor may maintain an action at law for damages, or, where such relief is appropriate, to regain the property itself by claim and delivery, or he may, if there are circumstances authorizing a demand for equitable relief and redemption is possible, bring suit to establish and enforce his right of redemption.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, §§ 92, 118, 122.]

3. Replevin—Property Subject to Replevin—Shares of Corporate Stock.

An action of claim and delivery does not lie to recover shares of corporate stock, being intangible property.

4. Pleading—Demurrer—Grounds.

The mere fact that plaintiff in framing his complaint proceeds on a certain theory of his rights affords no ground for sustaining a general demurrer, if the complaint alleges facts which entitle him to relief on some other theory.

5. Pledges—Actions to Redeem—Complaint—Sufficiency.

Since a court of equity will not decree the specific performance of a contract which defendant is unable to perform, a bill to redeem a pledge which affirmatively shows that the pledged property has passed out of the defendant's possession and control is defective.

6. Same—Conversion of Property by Pledgee—What Constitutes—Shares of Corporate Stock.

Where shares of corporate stock are pledged, a sale of the certificates by the pledgee does not constitute a conversion, if he at all times has in his possession, ready for delivery to the pledgor on redemption, similar certificates evidencing a right to the same number of shares; and hence, in an action to redeem, the fact that the particular certificates have been disposed of is not fatal to plaintiff's right to recover.

7. Same.

Where, in an action by a pledgor to redeem shares of corporate stock, plaintiff alleges that defendant is no longer able to restore the identical property pledged, he must, if he seeks the delivery of similar property, allege and prove that defendant is able to make such delivery.

8. Same.

Under Civ. Code, § 1439, providing that, before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed on himself, no right of redemption of pledged property arises until the pledgor has performed or offered to perform the obligation for the performance of which the property was pledged.

9. Same.

Civ. Code, § 1511, provides that the want of performance of an obligation or of an offer of performance, in whole or in part, or any delay therein, is excused when the debtor is induced not to make it by any act of the creditor intended or naturally tending to have that effect, done at or before the time when such performance or offer may be made, and not rescinded. Section 1515 provides that a refusal by a creditor to accept performance, made before an offer thereof, is equivalent to an offer and refusal, unless before performance is actually due he gives notice to the debtor of his willingness to accept it. *Held* that, where there was a dispute between plaintiff as administratrix of an estate and defendant as to which of certain notes given by decedent to defendant were secured by a pledge, the mere act of defendant in designating, in its claim against the estate, all of the notes as secured, did not excuse plaintiff from tendering to defendant the amount claimed by her to be secured by the pledge as a condition precedent to her right to redeem therefrom.

10. Trover and Conversion—Limitations—Pledges.

Under Code Civ. Proc. § 338, subd. 3, providing that an action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property, must be commenced within three years, an action for damages for the unauthorized transfer by defendant pledgee nearly four years before the commencement of the action of certain corporate stock, alleged to have exceeded in value the amount of the indebtedness, was barred, though plaintiff also sought an accounting to determine the value of the stock transferred, since the gist of the action was the wrongful conversion.

11. Limitation of Actions—Operation as to Rights or Remedies in General.

The nature of the right sued on, and not the form of the action, nor the relief demanded, determines the applicability of the statute of limitations under the Code; it being immaterial whether legal or equitable relief is sought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 66–69.]

12. Action—Tort or Contract—Waiver of Tort—Nature of Action.

While a pledgor whose property has been unlawfully disposed of by the pledgee may waive the tort and sue in assumpsit, demanding the application of the proceeds so far as necessary on account of his debt and judgment for the excess of the proceeds remaining, such relief cannot be granted under a complaint treating the transfer as invalid and repudiating it, and seeking to recover the property.

13. Equity—Incidental Jurisdiction.

Where there can be no relief on the main ground, a bill will not be retained for the mere purpose of having an accounting which is only incidental to the main relief.

14. Pleadings—Demurrer—Amendment After Demurrer Sustained.

While it may be an abuse of discretion to sustain a demurrer without leave to amend, where a cause of action is stated and the demurrer is directed to matters of form only, no such abuse is shown where the facts alleged fail to disclose any right in plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 575–582.]

15. Same—Scope and Extent of Demurrer in General—Statute of Limitations.

The bar of the statute of limitations is not specified in the Code as a ground of demurrer, and that objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 432; vol. 33, Limitation of Actions, §§ 670–675.]

16. Judgment—Dismissal of Action.

Where a demurrer was properly sustained on the general ground, it was, at least in the absence of a showing that leave to amend was requested, not error to enter judgment of dismissal without granting such leave.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Teresa Bell, as administratrix of the estate of Thomas Bell, deceased, against the Bank of California. From a judgment of dismissal entered on an order sustaining a demurrer to her complaint, plaintiff appeals. Affirmed.

T. Z. Blakeman, for appellant. James M. Allen, for respondent.

SLOSS, J. This is an appeal by the plaintiff from a judgment of dismissal entered upon an order sustaining a demurrer to her complaint. The complaint alleges the following facts: Thomas Bell died on October 16, 1892. His will was admitted to probate and letters testamentary were issued to the executors named in the will. Two of the three executors having resigned, the third was removed on March 23, 1900, and on February 19, 1902, the plaintiff was appointed administratrix with the will annexed. At the time of his death Thomas Bell was indebted to the defendant, the Bank of California, in the sum of $50,000. Of this amount $30,000 was evidenced by the note of Thomas Bell, $5,000 by the note of G. Staacke, $10,000 by the note of John S. Bell, and the remaining $5,000 by the note of J. B. Shaw. Each of the three last-mentioned notes was payable to Thomas Bell, and was by him indorsed and delivered to the defendant. As collateral security for the payment of said indebtedness Bell had delivered to the bank 675 shares of the capital stock of the Bellingham Bay & British Columbia Railroad Company, 3,401 shares of the Black Diamond Coal Mining Company, 3,435 shares of the Bellingham Bay Improvement Company, 130 shares of the capital stock of the Bank of California, and the promissory note of one L. L. Robinson for $29,262.18, payable to the order of Thomas Bell. On July 20, 1893, within 10 months after the first publication of notice to creditors of the estate of Bell, the defendant presented to the executors its claim, in which it set out its demand upon the foregoing notes, alleged that all of said notes were secured by a pledge of the shares of stock above mentioned and of the Robinson note, and claimed, in addition, two items of unsecured indebtedness, amounting to $3,976.69 and $3,859.10, respectively. This claim was allowed by the executors, approved by the judge of the superior court, and filed. During the year 1893 the 130 shares of the capital stock of the Bank of California were sold, pursuant to an order of court, for the sum of $28,757.50, $14,000 of which was applied by the defendant on the payment of its claim and the balance turned over to the estate.

The plaintiff alleges upon information and belief that the whole of said sum of $50,000 was not at the date of Thomas Bell's death secured by the pledge of the personal property described, but that $5,000 of it, to wit, that portion evidenced by the note of G. Staacke, was not secured by the pledge of any part of said property. It is alleged that "on or about the 1st day of April, 1898, the said defendant, without any order of court, or authority therefor whatever, assigned, transferred, and delivered to one D. O. Mills" all of the pledged shares of stock (except the stock of the Bank of California already disposed of), together with the certificates representing the same, and "received from the said Mills upon the said assignment the total sum of $40,053.70 after deducting some expenses of said assignment and transfer, * * * which sum of $40,053.70 was by said defendant placed to the credit of said estate upon its claim." These shares of stock were of great value, and largely in excess of the total indebtedness of the estate to said bank, but none of the shares were of known or recognized market value. They were not listed upon any stock exchange, nor were they dealt in by the public, and it was impossible to ascertain their value without taking an account of the assets and liabilities of said corporations. On the 7th day of November, 1900, the defendant collected upon the note of L. L. Robinson, held as collateral, the sum of $30,847.18, and took and applied to its own use therefrom the sum of $22,384.47.

The plaintiff alleges that as administratrix, she has demanded of the defendant that it account to her for said shares of capital stock pledged to it (except the stock of the Bank of California), and for a statement showing the amount, if any, due from the estate of Bell to said defendant for account of which the said personal property was pledged, "and that this plaintiff be permitted to redeem the said personal property, to wit, the said shares of the capital stock of the said corporations last above mentioned, and that this plaintiff be permitted, if there remains any portion of the debt for which said personal property was pledged, to redeem such personal property by paying to said defendant the amount that may be ascertained to be due to it upon that portion of the indebtedness secured by the pledge of the said personal property." The defendant refused "to make such accounting, or to permit plaintiff to redeem the said shares of the capital stock." Said defendant unjustly and without right claims the right to apply out of the proceeds of the sale of said personal property, pledged as aforesaid, and out of the collection of the Robinson note "in payment of the other portion of its claim approved against the estate of said Bell, to wit, the last two items of said claim, amounting, respectively, to the sum of $3,976.66 and $3,859.10." The prayer of the complaint is that the defendant be required to account in accordance with the demand alleged to have been made and that the plaintiff be permitted to redeem the shares of stock pledged, except those sold under order of court, upon the payment to defendant of any balance found to be due, and the plaintiff offers to pay whatever sum may be due on account of any portion of the secured indebtedness remaining unpaid, upon delivery of said shares of stock. There is also a prayer for general relief. The grounds of the demurrer which, as we have stated, was sustained, are the want of facts sufficient to constitute a cause of action, the barring of the cause of action by the statute of limitations, certain points of alleged ambiguity and uncertainty, and misjoinder of causes of action.

Where property is pledged to secure specific indebtedness, the pledgee has no right to hold it as security for any other obligation. Civ. Code, § 2891; Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934. If the pledgee wrongfully parts with the property, or, upon tender of the secured debt, refuses to return it, the pledgor may maintain an action at law for damages, or, where such relief is appropriate, to regain the property itself by claim and delivery. Or he may, if there are circumstances authorizing a demand for equitable relief, and redemption is possible, bring a suit to establish and enforce his right of redemption. The complaint in this case was evidently framed with a view to enforcing the plaintiff's right to redeem the shares of stock pledged by her testator, rather than to obtain damages for the conversion. It cannot be an action in claim and delivery, since it is not aimed at specific certificates alleged to be in the possession of defendant. For shares of stock as intangible property, this form of action will not lie. Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624. But, inasmuch as under our system the court may grant any relief, legal or equitable, to which a party may be entitled, the mere fact that plaintiff, in framing her complaint, proceeded upon a certain theory of her rights, affords no ground for sustaining a general demurrer if the complaint alleges facts which entitle her to relief upon some other theory. Viewed as a bill to redeem a pledge, the complaint is defective in that it shows affirmatively that the pledged property has passed out of the possession and control of the defendant. It is alleged that the defendant "assigned, transferred, and delivered" to D. O. Mills the shares of stock here sought to be redeemed, and received on such assignment the sum of $40,053.70. "A bill in equity to redeem personal property is essentially a bill for specific performance." Angus v. Robinson's Adm'r, 62 Vt. 60, 19 Atl. 993. By such bill the pledgor asks the court to compel the pledgee to carry out his agreement to return the pledged property upon payment of the debt secured by it. A court of equity will not decree the specific performance of a contract which the defendant has not the ability to perform. 26 Am. & Eng. Ency. of Law (2d Ed.) 39; Shields v. Trammell, 19 Ark. 51; Saur v. Ferris, 145 Ill. 115, 34 N. E. 52; Ferrier v. Buzick, 2 Iowa, 136; Davenport v. Latimer, 53 S. C. 563, 31 S. E. 630; Coleman v. Dunton, 99 Me. 121, 58 Atl. 430. Accordingly a bill for specific performance must at the least be free from averment that the defendant has not the ability to comply with the decree sought. In Joseph v. Holt, 37 Cal. 250, an action by a vendor for specific performance of an agreement for the purchase of real estate, this court said: "It must be that in an action of this kind the complaint must make a case in which the defendant is at least prima facie able to perform. * * * Where a party calls upon a court to compel another to do a particular thing, he ought to allege that he can do it, and not leave his capacity to do it in doubt or resting on presumption." It has been held that inability to perform is matter of defense to be presented by answer. Greenfield v. Carlton, 30 Ark. 547; Borden v. Curtis, 46 N. J. Eq. 468, 19 Atl. 127. But where, as here, the complaint affirmatively shows that the property involved has passed from the possession and control of the defendant, the right to the relief sought is negatived by the bill itself. Columbine v. Chichester, 2 Phila. 27; Roanoke St. Ry. Co. v. Hicks, 96 Va. 510, 32 S. E. 295. See, also, Angus v. Robinson's Adm'r, supra, where this rule was applied to a case of a bill to redeem personal property.

It is true that, in the case of a pledge of shares of stock in a corporation, the identity of the particular certificates delivered and pledged is not important. Atkins v. Gamble, 42 Cal. 86, 10 Am. Rep. 282. A sale of these certificates will not constitute a conversion, if the pledgee has at all times had in his possession, ready for delivery to the pledgor, upon redemption, similar certificates evidencing a right to the same number of shares. Thompson v. Toland, 48 Cal. 99; Hayward v. Rogers, 62 Cal. 348. It follows that, in an action by the pledgor to redeem, the fact that the particular certificates have been disposed of is not fatal to plaintiff's right. If the pledgee has other certificates for an equal number of shares, he may, by the decree, be compelled to transfer them to the pledgor. Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1084. But there is no presumption that the pledgee has such certificates, and the plaintiff, who has alleged that the pledgee has no longer the ability to restore the identical property pledged, must, if he seeks the delivery of similar property, allege and show that the defendant is in a position to make such delivery. In Krouse v. Woodward, supra, the complaint did so allege, and the finding was in accordance with the allegation.

A further objection to the sufficiency of the complaint as a bill for redemption is that there is no allegation of a tender of the amount secured by the pledge. Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58. The undertaking of the pledgee is to return the property pledged upon performance of the obligation for which it is pledged as security (Palmtag v. Doutrick, 59 Cal. 155, 43 Am. Rep. 245), and no right of redemption arises until the pledgor has performed or offered to perform such obligation. Civ. Code, § 1439; 22 Am. & Eng. Ency. of Law (2d Ed.) p. 58. No such tender is here alleged. Does the complaint aver facts excusing the want of a tender? It is argued that a tender was not necessary because the bank had already realized from the pledged property enough money to pay all of the secured debt. But this result is reached only by including the money received on the transfer of the stock to Mills. Such transfer is assailed by plaintiff as unauthorized; and it is sought by this action to redeem the stock as if it still remained in possession of the bank, subject to the terms of the pledge. The plaintiff cannot in one breath repudiate this transfer and claim the benefits of it. If the transfer to Mills was void as against the Bell estate, the proceeds realized on that sale cannot be treated by the plaintiff as a payment on account of the debt. The debtor might, of course, ratify the transfer and the application of the proceeds to the payment of the debt, but such ratification would necessarily destroy the right to claim that the property still remained subject to redemption.

Again, appellant maintains that a tender was unnecessary because the debtor did not know the amount of the debt, and was seeking, as a part of her relief, an accounting to determine that amount. Jones on Pledges, § 567; Castoriano v. Dupe, 145 N. Y. 250, 39 N. E. 1065. The complaint, however, shows no such uncertainty as to the amount of the debt as would obviate the necessity of a tender. The claim of the defendant, allowed by the executors and approved by the court, is annexed to the complaint, and shows the precise amount due from the estate to the defendant. The sums received by defendant on account of the claim are specified in the complaint. Nor does it appear that the plaintiff is unable to determine what proportion of the debt was secured by the pledge. All that is shown is that there is a dispute between the parties upon this point; the defendant claiming that all of the notes executed and indorsed by Thomas Bell to the defendant were secured by the pledge, and the plaintiff that the note of G. Staacke for $5,000 was not so secured. This dispute furnishes no reason why the plaintiff should not have made a tender. She knew the amount due on the notes which according to her contention were alone secured, and could readily have tendered this amount and demanded the return of the pledged property. Section 1511 of the Civil Code provides that "the want of performance of an obligation or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: * * * (3) When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect done at or before the time at which such performance or offer may be made, and not rescinded before that time." Section 1515 reads: "A refusal by a creditor to accept performance made before an offer thereof, is equivalent to an offer and refusal unless before performance is actually due he gives notice to the debtor of his willingness to accept it." The mere act of the creditor in designating in its claim all of the notes as secured was not such an act as is described in either of these sections. The statement in the claim was not made with a view to indicating the terms upon which the pledgee would consent to return the pledged property, but was merely incidental to making the formal demand necessary, under the statute, to establish the amount of the liability of the estate. It was not an act "intended or naturally tending" to induce the debtor to omit an offer of performance; and there is nothing to show that it did, in fact, induce such omission. Both conditions must concur in order to excuse the want of a tender under subdivision 3 of section 1511. Sanford v. S. & L. Socy. (C. C.) 80 Fed. 54. Nor was it a "refusal to accept performance made before an offer thereof." In Hanson v. Slaven, 98 Cal. 377, 33 Pac. 266, it is said that "the authorities all agree that, in order to constitute an implied waiver of an offer or tender, the refusal must be explicit and positive." See, also, Herzog v. Purdy, 119 Cal. 99, 51 Pac. 27. The mere assertion, unaccompanied by any other act, of a lien greater in amount than that to which the lienor is entitled, will not dispense with the necessity of a tender. Scarfe v. Morgan, 4 M. & W. 270; Searight v. Calbraith, Fed. Cas. No. 12,585; Hoyt v. Sprague, 61 Barb. 497; Lamar v. Sheppard, 84 Ga. 561, 10 S. E. 1084; Loewenberg v. A. & L. Ry. Co., 56 Ark. 439, 19 S. W. 1051. The same considerations apply with equal force to the allegation that the defendant claims the right to apply the proceeds of the sale of the personal property and of the collection of the Robinson note to the payment of the unsecured portion of its demand. It is not alleged that this claim was ever made to plaintiff, or any one representing the estate, or that it tended to induce failure to make offer of performance.

If the complaint can be regarded as setting forth a cause of action for damages by reason of the conversion of the shares of stock sold by the defendant to Mills, it is plain that said cause of action is barred by section 338, subd. 3, Code Civ. Proc. This is one of the points made by the demurrer. The complaint alleges that the unauthorized transfer and delivery to Mills took place on or about the 1st day of April, 1898. It further alleges that the value of the shares so transferred was in excess of the amount of the secured debt. Immediately upon the transfer there arose a cause of action for such excess. The complaint in question was not filed until March 31, 1902, almost four years after the transfer of the stock. Subdivision 3 of section 338, above referred to, is applicable to all cases "of unlawful taking or detaining of personal property," whatever the form of action. Lowe v. Ozmun, 137 Cal. 257, 70 Pac. 87. It makes no difference that the plaintiff seeks an accounting to determine the value of the stock so transferred. In so far as this may be regarded as an action to recover the value of such property, the gist of the action is the wrongful conversion. The accounting, if it be a proper case for an accounting at all, is merely incidental to the main purpose of the action. The nature of the right sued upon, and not the form of the action nor the relief demanded, determines the applicability of the statute of limitations under our Code. Lord v. Morris, 18 Cal. 482; Miller & Lux v. Batz, 131 Cal. 402, 63 Pac. 680; Banks v. Stockton, 149 Cal. 599, 87 Pac. 83. And it is immaterial whether equitable or legal relief is sought. Williams v. Southern Pac. Co., 150 Cal. 624, 89 Pac. 599. We are satisfied that this is not an action to recover money or other property deposited with a bank, within the meaning of section 348 of the Code of Civil Procedure. See Civ. Code, § 1318 et seq.

It is argued by the appellant that, even if there be no right of redemption and no cause of action for damages for the conversion of the stock, the complaint shows facts entitling the plaintiff to a money judgment for the amount received by the defendant as the proceeds of the pledged property and retained by it in excess of the amount of the secured claim. No doubt, as above suggested, the pledgor whose property has been unlawfully disposed of by the pledgee may ratify the transfer and demand the application of the proceeds on account of his debt. He may waive the tort and sue in assumpsit. So here the plaintiff is not bound to treat the sale to Mills as invalid, but may recognize and adopt such sale and the application of the proceeds made thereon. If she does so recognize it, the amount realized on such sale, together with the other sums received by the bank, would be more than sufficient to pay the entire secured debt, even if that debt included the Staacke note. We need not here decide whether plaintiff's right to receive the surplus over the amount of the secured claim, and the defendant's claim for amounts not secured, are cross-demands, which, under the provisions of section 440 of the Code of Civil Procedure, are to be "deemed compensated, so far as they equal each other." See Ainsworth v. Bank of California, 119 Cal. 470, 51 Pac. 952, 39 L. R. A. 686, 63 Am. St. Rep. 135. If they are, the total amount received by the defendant was not sufficient to pay its entire claim, and no balance is shown to be due the estate. But, assuming that section 440 does not apply, the action to recover the amount realized by the bank in excess of its secured claim must rest upon the ratification by the estate of the act of the bank in selling the property. The allegations of the complaint in this case are entirely inconsistent with the view that the plaintiff seeks, in any event, to recognize the validity of the transfer to Mills and accept its fruits. Throughout she treats the transfer as an invasion of her rights, and puts herself in the attitude of repudiating it. We cannot read into this pleading an election to accept the benefits and burdens of this transfer, when the plaintiff, who alone has the right of such election, has chosen to take the opposite stand. While an action for money had and received, based upon the theory just indicated, might lie, an assertion of the right upon which such action would be based is not within the purview of this complaint, or of the relief demanded. The prayer for general relief is to be read in the light of the facts alleged, and those facts negative any intent to count upon the transfer to Mills as a valid disposition of the property. The plaintiff, having the right to "waive the tort," has not waived it. See Whilden v. M. & P. Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; Chambers v. Lewis, 10 Abb. Prac. 206; Id., 11 Abb. Prac. 210. We do not hold that the plaintiff has by bringing this action made such an election of remedies as will bar her from proceeding against the bank for the surplus proceeds of the security. For the purposes of this case it is enough to say that she is not here so proceeding.

It is argued that the complaint should be sustained as a bill in equity for an accounting of all of the transactions of the bank with reference to the security, but the accounting sought, if a case for an accounting is made, would be only incidental to the main relief sought, which is either a redemption of the property sold, or a recovery of its value. Where there can be no relief upon the main ground, the bill will not be retained for the mere purpose of having an accounting which can lead to no useful purpose. Jewett v. Bowman, 29 N. J. Eq. 175.

For these reasons, we think the demurrer was properly sustained. The order sustaining the demurrer directed a dismissal of the action. The appeal is on the judgment roll without a bill of exceptions. While it may be an abuse of discretion to sustain a demurrer without leave to amend, where a cause of action is stated, and the demurrer is directed to matters of form only (Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759), no such abuse can on a record like the one before us, be said to be shown where the facts alleged fail to disclose any right in the plaintiff. The bar of the statute of limitations is not specified in the Code as a ground of demurrer (Code Civ. Proc. § 430), and that objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action. The demurrer in this case having been properly sustained on the general ground, it was, at least in the absence of a showing that leave to amend was requested, not error to enter judgment of dismissal without granting such leave.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.

153 Cal. 211

GLENN COUNTY v. KLEMMER, County Treasurer, et al. (Sac. 1,589.)

(Supreme Court of California. March 12, 1908.)

COUNTIES — PUBLIC FUNDS—LIMITATIONS ON USE.

County Government Act 1903 (St. 1903, p. 462, c. 277) § 36, provides that up to and including January 1st of each fiscal year the board shall have no power to contract debts in any manner or for any purposes, nor to make any allowance against any funds which, with all the debts and liabilities fixed by law payable therefrom, shall exceed 70 per cent. of the auditor's estimate of the revenue for the year, except to build or repair roads and bridges which have been destroyed and made impassable, and that debts contracted contrary to this section shall be null and void. *Held*, that when for any and all purposes 70 per cent. of the fund has been expended, or liabilities to the amount of 70 per cent. have been incurred, no more of the fund may be expended prior to January 1st, except only for the emergency purposes enumerated, and the statute does not merely limit the ordinary expenditures before January 1st to 70 per cent.

In Bank. Appeal from Superior Court, Glenn County; John F. Ellison, Judge.

Action by the county of Glenn against L. J. Klemmer, as treasurer of the county of Glenn, and another, to restrain payment of money. From a judgment for plaintiff, defendants appeal. Affirmed.

R. L. Clifton, Dist. Atty., and Clifton & Zumwalt, for appellants. Charles L. Donohoe and Frank Freeman, for respondent.

HENSHAW, J. Section 36 of the county government act of 1903 (St. 1903, p. 462, c. 277) provides as follows: "Up to and including the first day of January in each fiscal year the board shall have no power for any purpose to contract debts or liabilities in any manner or for any purpose nor to make any allowances against any funds which, with all the debts and liabilities fixed by law payable therefrom, shall exceed seventy per cent. of the auditor's estimate of the revenue for the year, except to build or repair roads and bridges which have been destroyed or made impassable by flood or fire. And debts and liabilities contracted in any manner or for any purpose and any allowances made contrary to the provisions of this section shall be null and void and the auditor shall not draw his warrant therefor nor the treasurer pay the same." The plaintiff in this action alleged that liabilities amounting to 70 per cent. of the auditor's estimate of the funds of a certain road district had been incurred prior to January 1st of the fiscal year commencing July 1, 1904; but, notwithstanding this, that the supervisors had allowed claims against this fund accruing before January 1st in excess of the 70 per cent., and that these excess claims were not for expenses incurred in the emergency work of building or repairing roads or bridges destroyed or made impassable by flood or fire. Plaintiff further pleaded that the defendant Klemmer, as treasurer of the county, would, unless restrained, pay these claims, and the action was brought to restrain him from so doing. Defendant Hochheimer & Co., assignee of the claims which had been allowed in excess of the 70 per cent., pleaded as an affirmative defense that 40 per cent. of the 70 per cent. of claims which had been allowed were for emergency expenditures expressed in the law, and that therefore, within the contemplation of section 36, there was still 30 per cent. of the auditor's estimate available for the payment of the ordinary expenses of the repair of the roads. Defendant also demurred to the complaint; its demurrer going to the same question of law. The court overruled its demurrer, and ordered the special defense stricken from the answer, and gave judgment for plaintiff as prayed for.

Thus, upon defendant's appeal, the single question presented for interpretation is the construction of section 36. Plaintiff contends that the obvious import and meaning of the section is that when, for any and all purposes, 70 per cent. of the fund has been expended, or liabilities to the amount of 70 per cent. have been incurred, no more of the fund's money may be expended prior to January 1st, excepting only for the emergency purposes enumerated in the section. Defendant, on the other hand, contends that the section excepts from the 70 per cent. limitation any moneys which may have been expended for emergency purposes, or, phrasing it differently, that the section limits only the ordinary expenditures before January 1st to 70 per cent. of the auditor's estimate. It seems apparent that respondent's construction is the one which the language most obviously bears. If an emergency has arisen, all of the moneys may, for such emergency purposes, be expended or liabilities incurred for their expenditure, before the 1st of January; but if, for any purpose, liabilities amounting to 70 per cent. have been incurred before the 1st of January, thereafter and until the 1st of January no more moneys may be expended, saving for emergency purposes alone. If the statute had intended, as appellant insists, that all expenditures for emergency purposes should be deducted from the 70 per cent. limitation, we should look for some clearer expression of that purpose than can be found from a reading of the statute. In the absence of such expression, the more obvious interpretation must prevail—the interpretation contended for by respondent and given to the statute by the trial court.

For which reasons, the rulings of the trial court are approved, and the judgment appealed from is affirmed.

We concur: LORIGAN, J.; SHAW, J.; SLOSS, J.; ANGELLOTTI, J.

153 Cal. 261

PEOPLE v. HART. (Cr. 1,426.)

(Supreme Court of California. March 16, 1908.)

1. Criminal Law—Trial—Objections to Evidence—Sufficiency—General Objections.

In a criminal prosecution, it appeared that a witness for the state had been sworn at the preliminary hearing, and on cross-examination he was asked as to whether his testimony at the trial agreed with that on the preliminary examination, etc. The questions were objected to as immaterial, irrelevant, and incompetent. *Held*, that the objections were insufficient to raise the specific point that the witness had not testified on the preliminary examination, since the fact that he was sworn raised the implication that he testified, and required a specific objection so as to enable the defendant to obviate it, and obtain answers to the questions which were pertinent and otherwise proper.

2. Witnesses—Impeachment—Laying Foundation—Former Testimony—Necessity of Showing Transcript.

It was unnecessary to show the witness a transcript of his testimony on the preliminary examination, since the questions were not by way of direct impeachment, but merely preliminary in their nature to determine whether there was any occasion for impeachment questions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1228–1232, 1233–1242.]

3. Criminal Law—Appeal—Harmless Error—Rejection of Testimony.

Error in sustaining objections to questions on cross-examination, asking a witness for the state as to whether he had testified the same on the preliminary examination, as to why he did not so testify before, and whether he told all he knew of the case on the preliminary examination, was prejudicial, since the questions were pertinent, proper, and valuable as testing the witness' credibility, memory, and fairness.

In Bank. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Thomas J. Hart was convicted of grand larceny, and appeals. Heard in Supreme Court on disagreement of District Court of Appeal. Reversed and remanded.

J. C. Thomas, for appellant. Attorney General U. S. Webb, for respondent.

LORIGAN, J. The justices of the District Court of Appeal for the Third Appellate District having given their respective opinions in this cause and being unable to agree in a judgment therein, the matter is brought to this court for disposition. The appellant, T. J. Hart, was jointly informed against with Evan Davis and James Flood for the crime of grand larceny. Davis, on his arraignment, pleaded guilty to the charge. What became of Flood the record does not disclose. The appellant was tried, convicted, and sentenced to four years' imprisonment in San Quentin and from the judgment of conviction, and the order denying his motion for a new trial, he appeals.

The evidence adduced at the trial of defendant Hart established that on October 7, 1906, the prosecuting witness Fred Dowane went from Wheatland to Marysville, reaching the latter city about dusk. He had with him about $55, consisting of two $20 pieces, some smaller gold and some silver coin. Immediately on reaching Marysville he went to Dempsey's saloon, which he had been accustomed to visit, and there met the defendant and Flood, and proceeded to treat them and other persons in the barroom. After several drinks taken there, Dowane, together with the defendant and Flood, went to the Workingman's saloon, where they were subsequently joined by Davis, and more drinks were indulged in. Dowane had no prior acquaintance with either the defendant or Flood or Davis. It would seem, however, from the testimony of Davis that he knew defendant before he joined the party in the Workingman's saloon that night; but to what extent they were acquainted is not disclosed. When Davis went into the saloon, as he testified, "there was no introduction; went into the saloon by myself. Hart was there, and said: 'There is a live one. Come up and have a drink.'" Dowane did the treating at the Workingman's saloon, and while there exhibited his money. Leaving the Workingman's saloon, the party, consisting of Dowane, the defendant, and Davis and Flood, took in other saloons, and together reached Gabriel's saloon, the last one visited by them on their round. It was after they left this saloon that Dowane was robbed, and as to the occurrence he testified: "Was alone; they all came out of the saloon at the same time. Witness was alone with these three parties. Left the saloon in company with the men witness went there with. One of the men was then in the courtroom, the defendant. Went out the front door of the saloon, or the corner; did not know which. Defendant was one of the men witness went out with. Turned to go up town. There were three with the witness. Defendant was one. Was grabbed from behind when maybe a couple of hundred yards from the saloon. The one who grabbed witness had his hand tied up. Hart, the defendant, was on the left side of witness at the time the man with his hand tied grabbed him. Was right up to witness; that is, the defendant, Hart. * * * Q. Do you know whether or not right at that time he touched your person? A. Well, all he could have done perhaps was kind of to take hold of my pocket like this [showing]. I remember that very well. At that time the little fellow, Davis, was on the right side of witness. Right up close to witness. The man who had his hand wrapped was the one who grabbed witness from behind. From the time left Dempsey's saloon and Debau's saloon, the saloon on the corner, and the one near the levee, during all of that time did not know of it, if he was in company with any one but Hart, Flood and Davis. Had made associates with no one else. Q. Were you traveling with any one excepting the three named? A. I was not." It appeared from Dowane's testimony that Davis took the money from his pocket. He testified on cross-examination: "Q. The defendant never made any effort to take any money from you, did he? A. Never made any effort; no. Q. As a matter of fact, he did not take any money from you, did he? A. No. Q. You do not know whether or not he was in counsel with or advised or connived with anybody to take any money from you, do you? A. Only from observation. Q. What did you observe that would make you believe that? A. Well, it looked to me like that, when they were keeping company together and when I was robbed, this party went away with the others."

After being robbed Dowane went to a saloon known as "Wall's" where the party had previously been in making their round that night. Hart and Davis were in the saloon drinking when Dowane came in. As to what occurred after Dowane came in, the barkeeper—Hall—who had been on duty all that evening, testified: "While they, Hart and Davis, were there, he [Dowane] said he had been robbed, and looked in the crowd at the bar, and pointed to Hart and said he was one of the men. He said: 'That is one of the men, and, I want a policeman, if there is any around, and I want one now.' * * * Hart and Davis were about 10 feet off when Dowane made the remark that Hart was one of the men who robbed him. * * * Hart said he had not seen Dowane, had not been with him." On the cross-examination of Hall by counsel for the defendant the witness was asked these questions, after stating that he had been sworn at the preliminary examination of the defendant: "Q. You did not make this statement on the preliminary examination, did you? Q. Why did you not make this statement on the preliminary examination? Q. In your testimony on the preliminary examination did you then and there tell all you knew about the case?" To each of the foregoing questions the court sustained an objection by the district attorney upon the ground that it was "immaterial, irrelevant, and incompetent." The bartender further testified that a few minutes after Dowane made the above statement indicating Hart as one of the parties who had robbed him, and that he wanted a policeman, and Hart denied that he had been with or seen Dowane that night, Hart and Davis went away together, and after they had gone the witness telephoned for the police. An officer came in not long afterwards, and Hart and Davis were arrested together somewhere on the streets of the city. The officer found on Hart $1.60 and on Davis two $20 gold pieces, two $5 gold pieces and some silver.

On behalf of the defense the only testimony offered was that of Davis and one witness who testified favorably to the reputation of the defendant for honesty. Davis testified that he took the money from Dowane; that there was no previous understanding with Hart or Flood, or either of them, of any character, that Dowane should be robbed; that at the time the money was taken by him from Dowane the latter had it in his hand and was apparently about to put it in his pocket; that he (Davis) was standing by his side and grabbed him by the arm, wrenched the money out of his hand, and went across the street; that he took it on the impulse of the moment, and could have done so without the other two knowing anything about it; that Hart was four or five feet away when he took it, and he could easily have taken it away without either knowing whether he had taken it or not; that Hart followed him after he went across the street, and together they went into a saloon; that after he took the money nothing was ever said about it, nothing as to any division of it being made.

We have stated all the material evidence in the case, so that the main point upon which the claim for a reversal is based may the better be understood. This is that the court erred in sustaining the objections of the prosecution to the questions asked by the defense of the barkeeper, Hall, as to whether he had at the preliminary examination, as he then did on the trial, made the statement concerning what took place in the saloon after the robbery while Dowane, Davis, and Hart were there.

It is insisted by the people that the rulings were proper because it did not appear, first, that the witness had testified upon any preliminary examination; secondly, that the attorney for defendant had not offered to exhibit to the witness any transcript of his testimony taken at the preliminary examination; and, thirdly, that in any event the ruling was not prejudicial to the defendant. The only claim of the people is that the defense had not laid the proper predicate or adopted the proper form to authorize the questions. But there is clearly no merit in this claim, particularly under the general objections which were interposed. While it is insisted by the prosecution that it was not shown that the witness had testified at the preliminary examination, this claim is not strictly true. The witness answered to a previous inquiry on that subject that he had "been sworn on the preliminary examination." While it is true that this was not proving with legal exactness that he then testified, still it was a statement from which it was to be implied that he had done so, and was sufficient proof of it to require upon the part of the prosecution more specific objection to the inquiries which were being made on the theory that there was such proof than that the questions that were asked were "immaterial, irrelevant and incompetent." Proof of the fact that he had been sworn was sufficient to raise the implication that he had testified, and, if it was really intended under the general objection interposed by the people to the subsequent inquiries of counsel for defendant to make the special point that no sufficient predicate had been laid because it was directly proven that the witness had testified on the preliminary examination, or that there should have been exhibited to the witness his testimony given at the preliminary examination, it was the duty of the district attorney to have made these specific objections in order to afford the attorney for the defendant an opportunity to obviate them and have the witness answer the questions which were pertinent and otherwise unobjectionable.

As to the further argument of the prosecution that the questions were impeaching questions and therefore that a transcript of the witness' testimony should have first been shown him, it is sufficient to say that these questions were not by way of direct impeachment. In the first place, they were but preliminary in their nature, and, had answers been allowed, the explanations of the witness might have been full, complete, and satisfactory. He might, for example, have said that he did so testify on preliminary examination, or he might have answered that he was not interrogated upon the subject at all. Only as he answered, and depending upon the character of his answers, would questions by way of direct impeachment have followed. As it was, in sustaining the objection to these questions, the court cut off the right of defendant's counsel to proceed along a legitimate line of cross-examination, while, in addition to this, the questions in and of themselves were pertinent, proper and valuable cross-examination as testing the credibility, memory and fairness of the witness. People v. Manasse, 94 Pac. 92.

No other point urged as error seems to call for specific consideration; but for the reasons above given the judgment and order are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; HENSHAW, J.; McFARLAND, J.

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153 Cal. 254

HINER v. HINER. (Sac. 1,576.)

(Supreme Court of California. March 16, 1908.)

1. Husband and Wife—Separate Maintenance—Statutes — Construction — Remedial Statutes.

Civ. Code, § 137, which provides that, when a wife has any cause of action as provided in section 92, declaring the several causes for divorce, she may maintain an action for separate maintenance without applying for a divorce, is remedial in its character, and hence must be liberally construed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 1074, 1075.]

2. Same—Technical Terms.

There is no rule that requires that the term "cause of action," as used in Civ. Code, § 137, shall be given a strict technical construction.

3. Same.

It was undoubtedly a question for the Legislature to declare under what conditions it should accord the right to a married woman to maintain an action for separate maintenance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 1074, 1075.]

4. Same — Jurisdiction of Action for Separate Maintenance—Residence.

Civ. Code, § 92, provides that a divorce may be had for several causes, among them "willful desertion." Section 128 provides that a divorce must not be granted unless plaintiff has been a resident of the state for a year. Section 137 provides that, when a wife has any cause of action as provided in section 92, she may maintain an action for separate maintenance of herself and children without applying for a divorce. *Held*, that a nonresident wife may maintain an action against a resident husband for separate maintenance under section 137, when he has willfully deserted her; section 128 being intended to prevent the state from being made a resort in which to obtain a divorce under a fraudulent claim of residence, and not to apply under section 137 as a basis for preventing a nonresident deserted wife, having a cause of action under section 92, from obtaining the benefit of its provisions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1078.]

In Bank. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Alice E. Hiner against J. E. Hiner. From an order granting plaintiff alimony pendente lite and costs and counsel's fees, defendant appeals. Affirmed.

See 90 Pac. 957.

J. M. Thompson, for appellant. J. W. Oates, for respondent.

LORIGAN, J. The plaintiff, who is the wife of defendant, brought this action against him in the county of Sonoma to obtain a judgment for permanent support of herself and minor children under section 137 of the Civil Code without asking for a divorce. The complaint filed on February 9, 1906, alleged the marriage of the parties in 1902; set forth facts constituting desertion of plaintiff by defendant under the laws of this state; alleged that such desertion of plaintiff took place in the state of Washington in October, 1902, that plaintiff is a resident of said state of Washington, and that defendant, since shortly after October, 1902, has been and now is a bona fide resident of Sonoma county, this state; and by further apt allegations set forth the poverty of plaintiff and the failure of defendant to support her and their minor children since the date of his desertion. The defendant demurred to the complaint, challenging the sufficiency of the facts stated to constitute a cause of action, and questioning the jurisdiction of the court over the subject-matter of the controversy. Before the demurrer was disposed of plaintiff moved the court for alimony pendente lite and for costs and counsel's fees, which, though resisted by defendant, the court granted.

This appeal is taken by defendant from such order of allowance, and the only question presented for consideration is, can a nonresident wife maintain an action in this state against a resident husband for permanent support and maintenance when she has cause for a divorce against him under the law of this state? This is the first time this particular question has arisen in this court, and it is to be solved from an examination of the various provisions of the Code bearing upon the inquiry, and these consist of sections 92, 128, and 137 of our Civil Code. Section 92 declares the several causes for which a divorce may be granted in this state, and enumerates "willful desertion" as one of them. Section 128 provides that "a divorce must not be granted unless the plaintiff has been a resident of this state for one year and of the county in which the action is brought three months next preceding the commencement of the action." That portion of section 137 pertinent to the question here declares that, "when the wife has any cause of action as provided in section 92 of this Code, she may, without applying for a divorce, maintain in the superior court an action against him for permanent support and maintenance of herself or of herself and children."

The principal point to be considered upon this appeal is as to the meaning of the language used in this latter section. To simplify matters it may be stated that no question is made upon this appeal, but that the complaint states one of the causes for divorce—willful desertion—mentioned in section 92.

The claim of counsel for appellant is that plaintiff could only maintain an action for permanent support under the provisions of section 137 if she had a "cause of action for divorce" against defendant, and that to constitute a cause of action for divorce in this state there must, not only exist in her favor one of the "causes for divorce" mentioned in section 92, but she must also have been a resident of the state for the period required by section 128; that sections 92 and 128 must be considered together for the purpose of determining whether plaintiff has a cause of action for divorce or not. We make no question of the accuracy of appellant's claim that residence is an essential element to a cause of action where a divorce itself is sought, because the law so declares; but we cannot agree with his claim that residence was intended by the Legislature as an essential element in the "cause of action" mentioned in section 137. We perceive no impelling reason which calls upon us, in determining what is meant by the cause of action referred to in section 137, to consider in connection with section 92, which is referred to in it, also section 128, which is not. There is certainly no rule of construction that requires us to do so.

Section 128 deals exclusively with divorce, and the object of the Legislature in requiring a residence of one year in this state before a divorce can be obtained is quite apparent. It was intended by requiring a residence of a permanent character to prevent persons who could not obtain divorce in the state or country of their real residence from establishing temporary residence here for the purpose of doing so. The policy of the law is against allowing divorces, and they are only allowed in this state in the enumerated cases in section 92. The spirit of section 128 is to prohibit them entirely from being granted in this state except to bona fide residents thereof. That is its only purpose. The section was never intended by the Legislature to be invoked in the construction of section 137 so as to defeat the right of the wife to enforce against the husband resident here the marital obligation of supporting her and their minor children which that section conferred. The policy of the law, as illustrated by the enactment of section 137, is to afford the wife, when cause for a divorce exists under section 92, the right to enforce support from her husband, which springs from the marital status, without praying for or requiring a total dissolution of such status. Public policy defends the wisdom of a provision of law requiring that the plaintiff shall be a bona fide resident of the state, the jurisdiction of whose courts is invoked to obtain a divorce. Its purpose is to prevent a fraud upon the law of the state by nonresidents, and is in aid of restricting the dissolution of the marriage status except at the suit of a resident of this state. There is, however, no possible consideration of public policy which could be suggested in support of precluding a nonresident wife, or a wife resident here for less than a year, from invoking the aid of our courts to compel support from her husband, who is a bona fide resident of the state. The policy of the present age, following an instinct of humanity and justice, and crystallizing it into legislative enactment, has been to afford facilities to the wife to compel the delinquent husband to discharge his marital duty of support without seeking a divorce, and no one has ever deprecated the justice or wisdom of the provision except the delinquent husband himself. Particularly in this country has the doctrine of our courts and the legislation of the states furthered that right. Under the rule prevailing in the English system a court of equity could not decree a specific performance of the marital obligation on the part of the delinquent husband by requiring him to furnish his wife separate maintenance; that the only remedy was in a court of law by action against the husband in favor of any one who was considerate enough to supply her with the necessaries of life; that the jurisdiction of awarding alimony to the wife rested with the spiritual courts, could only be granted in those courts, and then only as an incident to a decree of divorce.

A more reasonable doctrine early obtained in most of the American courts, and it was held that under its general powers a court of equity was authorized in the case of abandonment of the wife by the husband to award her, at her own suit, a decree for separate maintenance against her husband without any application for a divorce. It was so held in this state before there was any legislation upon the subject. Galland v. Galland, 38 Cal. 265. Subsequently it was provided by section 137, and so stood before the amendment of 1895, which is now under consideration, that the wife might maintain an action for separate maintenance without applying for a divorce "when the husband willfully deserts the wife." This original section extended such right only in cases of willful desertion. In 1895 the present section was passed, which extended the right, not only where there had been willful desertion, but to all cases where the wife has any cause of action for divorce as provided in section 92 of this Code. The purpose of the amendment was to enlarge the right of action in favor of the wife. It is remedial in its character, and the rule is that remedial statutes are to be liberally construed. Now, considering the remedy which the Legislature by the section intended to afford to the wife, which was the right of separate maintenance without the necessity of suing for divorce, we perceive no reason why the language of the section conferring it should be construed to mean that before she could invoke this particular remedy she should through residence for the statutory period, be able to invoke the remedy for divorce, which she did not desire, and which the section declares she need not apply for. What the Legislature intended was to accord the wife the right to compel the husband to discharge his marital obligation of support, and, while it provided that this could be enforced without asking for a divorce when the "wife has any cause of action for divorce as provided in section 92 of this Code," the cause of action referred to consisted solely of the existence of one of the "causes for divorce" mentioned in section 92 as affording a basis for divorce. There is no rule that requires that the term "cause of action" shall be given a strict technical construction. As is said in 1 Cyc. p. 643: "As with most legal terms it often becomes necessary, acting upon the well-settled rules of construction, to depart from the technical meaning and use of the words 'cause of action' when contained in statutes * * * in order to carry out the intention of the Legislature. * * *" Now, applying this rule to the further consideration of this question, section 92 declares what shall constitute "causes for divorce," and when the Legislature in section 137 authorized an action by the wife for separate maintenance where she had "a cause of action for divorce, as provided in section 92," the cause of action referred to was intended to mean the existence of any of the causes for divorce which were specified in the latter section; that while, for the purpose of constituting a cause of action where dissolution of the marriage relation was sought, residence according to section 128 was essential, still, for the purpose of sustaining an action for maintenance without divorce, the existence of "cause for divorce" as provided in section 92 constitutes the cause of action, and was all that was necessary or required. We think this is a reasonable and just construction to be given to section 137, and is in accord with the language used in it. It was undoubtedly a question for the Legislature to declare under what conditions it should accord the right to a married woman to maintain an action for separate maintenance. If it had intended that she should not have that right unless a resident of the state for a year, it would have said so plainly. It could have declared it by referring to section 128, as well as section 92 in enacting section 137; or, if it was intended that residence should have any application to the right of action referred to in section 137, it could have amended section 128 so as to declare that a divorce or judgment for permanent support shall not be granted unless plaintiff has resided in the state a year. The fact that it neither referred to that section nor amended it, but referred solely and specifically to section 92, is persuasive evidence that the right of a wife to sue for support was to be measured alone by the existence of a cause for divorce, as provided in section 92 referred to, and is the cause of action meant, and that section 128 was not intended to have any application.

Aside from this, effect must be given to all the language used in section 137. It may not be assumed that any words employed in it were used idly. And, if it was not intended by referring to section 92 to declare that the existence of the "cause for divorce" provided therein should constitute the cause of action for separate maintenance, then the reference to that section was idle. If it had been intended by the Legislature that residence for the required period should enter as an element in the cause of action for separate support which it was conferring under section 137, it would have been entirely unnecessary to refer to section 92 at all. If that was the intention, it would have been effectually disclosed by simply providing that, "when the wife has any cause of action for divorce, * * * she may maintain" such action for support. No reference to section 92 would then have any place or purpose, because there are no other causes for divorce except as stated in that section, and to have referred to causes for divorce generally would have accomplished every purpose, and have left no room for doubt but that residence for the statutory period would have been essential as an element to the cause of action mentioned in section 137.

On the other hand, by referring to section 92, and authorizing suit by the wife for permanent support without divorce when she has a cause of action for divorce as therein provided, the only effect and purpose of the reference to such section must have been to declare that a cause of action for maintenance is complete when any cause or ground for divorce exists in her favor, and that her right to sue is to be measured alone by the existence of any such cause for divorce, and that residence under section 128 was not intended to enter as an essential element to its maintenance. And there is every just reason why this should have been the intention of the Legislature and that such a construction should be put on the language of the section.

Section 128 has reference solely to the dissolution of the marriage; section 137 solely to conferring a right to secure support without applying for a dissolution. The one was intended to prevent a fraudulent use of the courts of this state by temporary residents to obtain the divorces here which they could not obtain in the states where they properly resided; the other in aid of the right of a wife to compel the husband to fulfill his marital obligation to support her and his minor children. While restricting divorces is a matter of public policy, enforcing the obligations of the husband to support his family is a matter of justice and duty to be exercised as well in favor of a nonresident as a resident wife against a husband who is bona fide a resident of this state. It was undoubtedly in this spirit that the Legislature declared that this obligation might be enforced, and that the right to do so should exist when the wife had a cause of action as declared in section 92. It is not consonant with justice, nor is it warranted by the terms of section 137, to say that the Legislature meant, in addition to the existence of a cause for divorce under section 92, that the plaintiff should also be a resident for a year before she would be entitled to maintain an action for her support. Happily it is not the law, for, while section 128 is intended to apply solely to actions where a divorce itself is sought, and to prevent this state from being made a resort in which to obtain a divorce by imposition upon our courts under a fraudulent claim of residence, it was not intended to apply under section 137 as a basis for preventing a nonresident deserted wife having a cause of action under section 92 of the Code from obtaining the benefit of its provisions.

We are cited by counsel for appellant to certain decisions from Florida, which he contends sustains the views he urges here. They do to some extent, but the statutes of Florida are so different from our Code provision (section 137) that these cases do not aid us in the construction of our section of the Code.

The order appealed from is affirmed.

We concur: HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.; SHAW, J.

153 Cal. 245

NOBLE v. LEARNED et al. (Sac. 1,457.)

(Supreme Court of California. March 16, 1908.)

1. Trusts—Parol Trusts—Validity.

Under Civ. Code, § 1052, providing that a transfer may be made without writing, when not expressly required by statute, a valid trust in personal property may be created by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 15–24.]

2. Same—Creation of Trusts—Sufficiency of Language Used.

A trust, whether of realty or personalty, is created as to the trustor and beneficiary by any words or acts of the trustor indicating with reasonable certainty an intention on his part to create a trust, and the subject, purpose, and beneficiary of the trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 34–38.]

3. Same.

Under Civ. Code, §§ 863, 2250, providing that every valid express trust in real property vests the whole estate in the trustee subject to the execution of the trust, etc., the title of the property, which is the subject of a trust, is vested in the trustee so far as may be necessary to carry out the purposes of the trust. This is implied in the very nature of the term "trust."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 177–182.]

4. SAME.

Evidence *held* not to show the creation of a trust by the transfer of property to a trustee for the benefit of a designated person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 66–68.]

5. SAME.

One owning property may so deal with it, while retaining the legal title, as to make himself a trustee for the benefit of another, and, in the absence of statutory requirements, any words or acts are sufficient which clearly denote the intention to relinquish the beneficial interest in the property, and to hold it for the benefit of another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 45, 46.]

6. SAME.

The reservation of a partial or total power of revocation of a trust by the trustor is not inconsistent with the establishment of a trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 78–81.]

7. SAME.

It is not an objection to the creation of a trust that the beneficiary's right of enjoyment is postponed, provided an immediate interest subject to such postponement is given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 12.]

8. SAME.

Whether words and acts of an alleged trustor indicate with reasonable certainty an intention to create a trust, and the subject, purpose, and beneficiary of the trust, is a question of fact.

9. SAME.

An ineffectual attempt to make a gift does not create a trust, and equity will not perfect an imperfect gift by establishing a trust where none was in contemplation.

10. SAME.

Evidence *held* not to show the creation of a trust by an owner agreeing to hold the legal title for the benefit of another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 66–68.]

11. APPEAL—FINDINGS—CONCLUSIVENESS.

A finding that no trust was created cannot be disturbed on appeal, where there is any evidence from which the court might conclude that the intent to create a trust did not exist, or was not shown with reasonable certainty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979–3982.]

12. JURY—RIGHT TO JURY TRIAL—NATURE OF ACTION—LEGAL OR EQUITABLE.

An action for the cancellation of a certificate of stock and for the issuance of a new certificate is equitable, and defendant is not entitled to a jury trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 35–65.]

Beatty, C. J., dissenting.

In Bank. Appeal from Superoir Court, San Joaquin County; F. H. Smith, Judge.

Action by Arthur M. Noble, administrator of Deborah H. Lee, deceased, against D. A. Learned, executor of Gennis H. Learned, deceased, and another. From a judgment for plaintiff, defendant D. A. Learned as executor appeals. Affirmed.

For opinion in Court of Appeals, see 87 Pac. 402.

A. H. Carpenter (J. J. Burt, of counsel), for appellant. Plummer & Dunlap (Woods & Levinsky and Sheldon G. Kellogg, of counsel), for respondent.

SLOSS, J. In October, 1902, Deborah H. Lee was the owner of 40 shares of the stock of the San Joaquin Valley Building & Loan Association. She died in March, 1903, and the certificate representing said shares came into the possession of Gennis H. Learned, who surrendered it to the association, receiving in exchange therefor a certificate for 39 shares of stock and $100 in cash, the value of the remaining share. This action was brought to establish the ownership of Deborah H. Lee in said stock. The specific relief asked was the cancellation of the certificate for 39 shares, the issuance by the association of a new certificate for 39 shares of stock, or the recovery of judgment for the value of the shares, if such certificate could not be obtained, and the recovery of $100. The plaintiff, administrator of the estate of Deborah H. Lee, had judgment, and the defendant D. A. Learned, sued as executor of the will of Gennis H. Learned, appeals.

The main question involved is whether certain transactions had between Deborah H. Lee and A. M. Noble vested in Gennis H. Learned any legal or beneficial interest in said 40 shares of stock. The facts upon which the controversy arose are substantially similar to those before this court in Noble v. Garden, 146 Cal. 225, 79 Pac. 883. The subject-matter of that action consisted of 29 shares of the stock of the San Joaquin Valley Building & Loan Association. The certificate evidencing those shares and the certificate evidencing the 40 here in controversy were delivered by Mrs. Lee to Noble under circumstances detailed in the opinion in Noble v. Garden. The defendant in that action, Clara L. T. Garden, claimed title to the shares by virtue of an alleged gift causa mortis. Upon appeal from a judgment in her favor this court held that the evidence was insufficient to establish such gift. The case of the appellant here, so far as this point is concerned, is no stronger, and for the reasons stated in Noble v. Garden it must be held that there was no valid gift of the shares to Gennis H. Learned.

But, conceding this, the appellant contends that the transaction may be upheld as a valid trust of the shares for the benefit of Mrs. Learned, and that the decision in Noble v. Garden is not authority against the position that such trust was here created. The answer of the appellant Learned set up as a separate defense the creation of a trust in the shares and an execution of the trust by a delivery of the certificate to Mrs. Learned.

The finding of the court was that Mrs. Lee did not declare or create any trust in said stock or said certificate. Assuming that the existence of a trust was not involved or determined in Noble v. Garden, we must consider whether upon the facts in evidence the finding of the court against the creation of a trust was sustained by the evidence.

The principal testimony regarding the transaction was that of Noble, the plaintiff himself. He testified that about October, 1902, Mrs. Lee had a consultation with him relative to the investment of some $16,000 owned by her. She asked his opinion as to the best method of investing this money or putting it in such a way that she could derive some income from it, and "if she could dispose of it so as while she lived have the income from it, and if she should get well—she was sick at the time—she might want to use it all. If anything would happen to her she wanted the money placed in such a way it would go to those she wanted to designate." Noble told her that she could buy some building and loan stock which would pay her a definite rate of interest, payable semiannually, and if she wanted to use the principal at any time that would be available also. She said "she wanted the money put where she could have the income from it and use any part of the principal in case she needed it at any time; that she was sick; and that was the only money she had, and she did not want to put it out of her control, and she might want to use it, might want to use it all or part. She could not tell. * * * She was very particular about her control over the property. She did not want to lose control. She wanted me to tell —to assure her that she could have the use and control of the whole or any part of this money as long as she lived." In pursuance of that conversation 19 certificates of the stock of that corporation were issued to Mrs. Deborah H. Lee for different numbers of shares. Upon the same day Mrs. Lee signed upon the back of each of these certificates an indorsement purporting to transfer and assign the shares evidenced by the respective certificates to different persons. Certificate No. 465 for 40 shares was so indorsed with an assignment running to Gennis H. Learned. Two or three days later Mrs. Lee sent for Noble and delivered the pass books and certificates to him. She then said that "if she did not get well, and anything happened to her, to notify the people to whom these certificates have been assigned, and send for them, and deliver them to them. She said she would use more or less of it, and what was left at the time of her death was to be given to the people mentioned by her." Subsequently the certificates were handed to Mrs. Lee, and two of them, one for 1 share and one for 10 shares, were canceled at her request and their value paid to her. After the cancellation of the last certificate the remainder of the certificates were returned to Noble, Mrs. Lee telling him "to take and keep them the same as I had done before—to keep them for her." "She said keep them in your safe. * * * I never had any other conversation with Mrs. Lee in relation to the keeping of the stock, and no other directions were given."

Mrs. Lee died on the 12th day of March, 1903, whereupon Noble sent for Mrs. Learned and delivered to her the certificate which had been indorsed with an assignment to her. Mrs. Learned surrendered the certificate, and, as has been stated, took in exchange a new certificate for 39 shares and $100 in cash.

On behalf of the defendant testimony was offered to the effect that prior to the transaction between Mrs. Lee and Noble Mrs. Lee had stated that she was under great obligations to her sister Mrs. Learned, and intended to give her more than any one else, and that she wanted Mrs. Learned to be able to stop working so hard. There was other testimony regarding declarations by Mrs. Lee made before the delivery of the certificates to Noble. It is not necessary to state particularly what these declarations were. It is sufficient to say that, while they tend to show that it was Mrs. Lee's desire that the shares of stock remaining at her death should be delivered to the parties named in the respective indorsements, and particularly to Mrs. Learned, there is nothing in them that conflicts with Noble's statement that Mrs. Lee reserved the power to recall and use all the certificates.

That a valid trust in personal property may be created by parol is not questioned. Civ. Code, § 1052; Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659. A trust, whether of real or personal property, is created "as to the trustor and beneficiary by any words or acts of the trustor indicating with reasonable certainty: (1) An intention on the part of the trustor to create a trust; and (2) the subject, purpose, and beneficiary of the trust." Did the evidence in this case show the concurrence of these elements so clearly as to require the court to find that a trust had been created by the plaintiff's intestate? In this connection it may be remarked that the appellant himself does not point out with "reasonable certainty" the precise trust relied upon. Was the subject of the alleged trust the shares or merely the certificate representing those shares? Who was the trustee, Mrs. Lee herself, or Noble? The contention appears to be that Noble was constituted a trustee of the shares or the certificates for the benefit of Mrs. Lee during her life, and of the parties named in the various indorsements after her death. By the creation of an express voluntary trust for the benefit of third persons the title or estate in the property, which is the subject of the trust, so far as may be necessary for carrying out the purposes of the trust, is vested in the trustee. This is implied in the very nature of the term "trust." 28 Am. & Eng. Ency. of Law (2d Ed.) 858; Civ. Code, §§ 863, 2250. It is plain, however, that the transactions above recited did not operate to convey to Noble any title whatever to the 40 shares or to the certificate. The written assignment of the shares, if operative at all, could be effective only to transfer title to the assignee, Mrs. Learned; nor did any ownership in the certificate ever become vested in Noble. He was given only the custody of the paper, and the title to it, if it passed from Mrs. Lee at all, passed, not to Noble, but to Mrs. Learned. It follows that the transaction cannot be given the effect claimed, i. e., of making Noble a trustee.

It is possible, however, for one who owns property, to so deal with it, while retaining the legal title, as to make himself a trustee for the benefit of another. Estate of Webb, 49 Cal. 541. "It is not necessary that this be done in express terms, but in the absence of statutory requirements any words or acts are sufficient which clearly denote the intention to relinquish his beneficial interest in the property in præsenti, and to hold it for the benefit of another." 26 Am. & Eng. Ency. of Law (2d Ed.) 898; Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565. If there is any trust here, it must have been created in this manner, that is, by means of a declaration by Mrs. Lee that she held the shares for the benefit of Mrs. Learned, and constituted herself a trustee for the latter. It may, for the purposes of this case, be conceded that the evidence was sufficient to have justified a finding that Mrs. Lee so dealt with the shares as to show an intent to immediately vest in the parties to whom Noble was to deliver the shares the beneficial interest in such of the shares as might remain at her death. The reservation of a partial or total power of revocation is not inconsistent with the establishment of a trust. Hellman v. McWilliams, supra; Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370; Civ. Code, § 2280. Nor is it an objection that the beneficiary's right of enjoyment is postponed, provided that an immediate interest, subject to such postponement, is given. Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089, 58 Am. St. Rep. 43.

But in every such case it is for the trial court to determine, as a question of fact, whether the words and acts of the alleged trustor indicated with reasonable certainty an intention to create a trust, and the subject, purpose, and beneficiary of the trust. An ineffectual attempt to make a gift does not create a trust, and equity will not perfect an imperfect gift by establishing a trust where none was in contemplation. Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Stevenson v. Earl, 65 N. J. Eq. 721, 55 Atl. 1091, 103 Am. St. Rep. 790; Clay v. Layton, 134 Mich. 317, 96 N. W. 458. The evidence here is certainly consistent with the view that Mrs. Lee did not intend to vest a present interest in the parties named in the assignments. In the testimony of Noble we find the declarations by Mrs. Lee that she did not want to put the property out of her control; that she wanted to be assured that she could have the use or control of the whole or any part of this money as long as she lived. Furthermore Noble testified that Mrs. Lee told him to keep the certificates "for her." The trial court had the right to accept Noble's testimony. Taking it altogether, it justified the inference that, while Mrs. Lee undoubtedly intended and desired that any of the certificates not parted with in her lifetime should go to the parties designated, she was not transferring any present interest in the shares, but was merely endeavoring to arrange a disposition of them which should take effect upon her death. Such disposition, being in effect testamentary, could not be made effective, except by a will executed in accordance with the statutory requirements governing the making of wills. Noble v. Garden, supra. The intent to create a trust is a requisite to its creation, and the finding that no trust was created cannot be disturbed on appeal, if there is any evidence from which the court might conclude that this intent did not exist, or was not shown "with reasonable certainty."

The appellant places great reliance upon Hellman v. McWilliams, and Booth v. Oakland Bank, supra. In Hellman v. McWilliams the finding of the trial court was in favor of the trust, and this finding was held to be sustained by the evidence. There, as here, every presumption was in support of the finding, and it could not be disturbed if it was based upon any substantial evidence. In the Booth Case the action was brought by the parties relying upon the alleged trust, and the appeal was from a judgment entered upon an order of nonsuit and from an order denying a new trial. Upon a motion for a nonsuit the testimony offered is to be given the strongest possible interpretation in favor of the plaintiff's case. If the facts there in evidence, under any possible view, were consistent with the existence of a trust, the nonsuit should not have been granted. Here, however, as has been stated, the situation is just the opposite. If there is any evidence consistent with the conclusion that a trust was not created, the finding of the lower court must stand. It cannot be doubted that there is such evidence here.

There is no force in the point that the court below erred in denying the appellant a jury trial. The action was for the cancellation of a certificate issued to Mrs. Learned and for the issuance of a new one to plaintiff. The relief sought was equitable, and the defendant was not entitled to a jury trial. Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624; Ashton v. Heggerty, 130 Cal. 516, 62 Pac. 934.

No other points are made by the appellant. The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.

BEATTY, C. J. (dissenting). I dissent from the judgment of the court in this case upon the ground that the contention of appellant that a valid trust in favor of his intestate was created by Mrs. Lee is fully sustained by the decisions of this court in Booth v. Oakland Bank, 122 Cal. 19, 54 Pac. 370, and Hellman v. McWilliams, 70 Cal. 450, 11 Pac. 659. Those cases cannot be distinguished from this upon the ground stated in the opinion of the court. It makes no difference that in one the court merely affirmed a finding of the superior court, and in the other reversed a judgment of nonsuit. In each case it became necessary to decide what evidence would, if true, establish an oral trust of personal property. In this case the evidence of the only witness as to Mrs. Lee's declarations was in substance the same as that which, assuming its truth, was held sufficient in the cases cited, and that witness was the plaintiff in the action whose testimony could not be deemed untrue in order to find the fact in his favor. A finding in favor of the plaintiff in conflict with his own testimony, and in the absence of any other testimony, cannot, in my opinion, be upheld.

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153 Cal. 267

BRETT v. S. H. FRANK & CO. et al.

(S. F. 4,348.)

(Supreme Court of California. March 19, 1908. Rehearing Denied April 16, 1908.)

1. APPEAL—ORDER GRANTING NEW TRIAL—REVIEW.

The court on appeal from an order ordering a new trial, "on the ground that the motion for nonsuit should have been granted and order denied on all other grounds," is not limited to a consideration of the question whether the motion for nonsuit should have been granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3477.]

2. MASTER AND SERVANT—INJURY TO SERVANT—DUTIES OF EMPLOYER.

The law requiring an employer to furnish reasonably safe appliances and a reasonably safe place for his employés does not make him an insurer of his employés, and an employer having furnished a reasonably safe place is not responsible, where an accident has happened which could have been avoided had the employer used extraordinary precautions to prevent it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 139, 173, 174.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

The rule that preoccupation or forgetfulness on the part of an employé does not bar a recovery for injuries received has to do with abnormal risks and with the performance of duties under high tension of emergency only, and in the doing of one necessary thing under the stress of immediate action an employé is not guilty of contributory negligence because he has omitted or forgotten another, but the exceptional cases are not subversive of the rule that the law demands that one who is working in a place where he is exposed to danger shall himself exercise his faculties for his own protection, and does not permit a recovery for damages resulting from a neglect of the rule.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 668–673, 681, 789–794.]

4. SAME.

An adult employé was familiar with his work, and with the conditions in which he was performing it. Through the act of a co-employé a light truck which they were wheeling was wheeled against an obstruction so that it was necessary to back it off. In doing this the employé took three or four steps backward, and without looking for or thinking of a hole in the floor, with the existence, place, and purpose of which he was familiar, stepped into it and was injured. *Held*, that he was guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 701–723.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Richard Brett against S. H. Frank & Co. and others. From an order granting a new trial after verdict for plaintiff, plaintiff appeals. Affirmed.

Stafford & Stafford, for appellant. Chickering & Gregory, for respondents.

McFARLAND, J. This is an action for damages. After trial and verdict for plaintiff the court granted defendants' motion for a new trial, and plaintiff appeals.

The court ordered a new trial "on the ground that the motion for nonsuit should have been granted, and order denied on all other grounds." It is contended by appellant that this limits the consideration of this court to the one proposition. The question is not of consequence in this case, for, upon the ground indicated, the court was correct in its ruling. However, the position of appellant in this matter is contrary to the well-settled rule. Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; Thompson v. Cal. Construction Co., 148 Cal. 35, 82 Pac. 367; Weisser v. Southern Pacific Co., 148 Cal. 426, 83 Pac. 439.

The action was for personal injuries alleged to have been occasioned to plaintiff, an employé of defendant, through the negligence of the latter. The negligence charged consisted in maintaining, in an unguarded condition, upon the second floor of its tannery building, a hole in the floor through which passed a leather belt. The accident to plaintiff occurred by his stepping with his right leg into the unguarded hole, whereby his leg was mangled and injured by the moving belt. The undisputed facts disclosed by the evidence at the time when plaintiff rested his case and a motion for a nonsuit was interposed are the following: Plaintiff was an adult laborer in the employ of the defendant. For seven weeks prior to the accident he was engaged in hauling sides of sole leather upon a truck from the rolling room to the drying room. The truck was loaded upon one floor, wheeled into the elevator, thus carried to the second floor—the drying room—where the truck was wheeled out of the elevator to some convenient place in the room for the purpose of drying the hides. About 9 inches to the right of the entrance to the elevator, and slightly in front of that entrance, was the hole, 26 by 14 inches, through which the belt from the ceiling of the second floor ran to the first floor. This belt operated the elevator. Plaintiff was perfectly familiar with the condition, knew of the existence of the hole, which was unguarded, and at the time of the accident the room was so light that every object therein could be distinguished clearly and without difficulty. Plaintiff could have seen the hole had he looked for it. On the afternoon of the accident plaintiff, with an assistant, Price, was pushing a truck loaded with leather off the elevator at the second floor. Plaintiff was guiding the truck, and accidentally twisted the tongue, as he says, by reason of the fact that Price leaned against it. Because of this the direction of the truck was swerved, and its rear wheels struck an elevation or "rise" in the floor. To guide the truck along its proper course it became necessary to back it off this elevation, and in doing so plaintiff stepped into the open hole. Plaintiff was perfectly familiar with the conditions at the time of the accident, and they had not been changed. He had passed the spot of the accident at least four or five times a day for seven weeks. He knew of the hole, and that it was unguarded, and had made no complaint of its condition. The truck which he was handling at the time of the accident was a light one, was easily turned, and there was a light load upon it. The hole did not interfere with his route of travel to and from the elevator, but was to one side of it. He backed into it. In pulling the truck off from the "rise" he stepped back three or four steps before putting his leg into the hole. He could have stepped back into the elevator, but did not want to do so lest somebody should lower it while he was there.

To summarize, an adult employé, perfectly familiar with his work, and with the conditions and environment in which he is performing it, through the act of a fellow employé, pushes the light truck which they are wheeling against an obstruction so that it is necessary to back it off. In doing this the employé takes three or four steps backward, and without looking for or thinking of a hole, with the existence, place, and purpose of which he is perfectly familiar, steps into it and is injured.

The law, in justly requiring that an employer shall furnish reasonably safe appliances and a reasonably safe place for the performance of his work, does not make him an insurer of his employés against all accidents. It does not require the employer to provide safeguards against every possible chance of accident; nor, having furnished a reasonably safe place, does it hold him responsible if an accident has happened which could have been avoided had the employer used extraordinary precautions to prevent it. The requirement that the place of employment shall be reasonably safe is itself always to be considered in connection with the rule of law as to the assumption by the employé of known and understood risks. But, aside from the consideration as to whether under these circumstances negligence in failing to provide a safe place for work may be imputed to the employer in this case, it is indisputable that the accident was occasioned through the negligent failure of the plaintiff himself to use ordinary prudence for his own protection. Plaintiff, perfectly familiar with the condition of the premises, inadvertently walking backward, steps into a hole which he knew was there, and which, had he looked, he could readily have seen. This inadvertence and forgetfulness is sought to be excused by appellant upon the proposition that plaintiff was so engrossed in the performance of his duties at the time of the accident that his forgetfulness was not negligence, or at least that it was for the jury to say whether it was or not.

It is a recognized doctrine that there are cases where preoccupation or forgetfulness on the part of the employé does not bar a recovery. These cases, from the nature of things, are exceptional. They have to do with abnormal risks, and with the performance of duties under the high tension of emergency, and where, in the doing of one necessary thing under the stress of immediate action, an employé shall not be held guilty of contributory negligence because he has omitted or forgotten another. Thus it is said in Labatt on Master and Servant: "This doctrine may be referred to the general principle that the failure of an employé to perform a duty will not constitute contributory negligence where such failure results from the necessary observance of a duty of equal importance and equally binding upon him, the neglected duty in this instance being that of keeping a vigilant lookout." But these exceptional cases are in no way subversive of the long-established rule that "the law demands that one who is working in a place where he is exposed to danger shall himself exercise his faculties for his own protection, and does not permit a recovery for damages resulting from a neglect of this rule." Kenna v. Central Pacific R. R., 101 Cal. 26, 35 Pac. 332.

In Davis v. California Street Cable Co., 105 Cal. 113, 38 Pac. 647, defendant had placed an iron rail to be used in the construction of its street railway track in front of the house in which plaintiff lived. It had remained there about four weeks. An alarm of fire having been sounded in the nighttime, plaintiff came out of her house, and started across the sidewalk to discover the whereabouts of the fire. She forgot the presence of the rail, tripped, fell, and was injured. This court said: "We quite agree with counsel for appellant that previous knowledge or familiarity with the dangerous place or obstruction on the highway was not per se conclusive evidence of contributory negligence in failing to avoid it. In this case, if plaintiff's house had been falling, rendering great haste in escaping from imminent danger necessary, the haste, excitement, and fear might reasonably be held sufficient to obliterate all memory or thought of the presence of the obstruction on the sidewalk. But that is not this case. No danger could have been apprehended by Mrs. Davis from the fire after she reached the sidewalk, but mere curiosity induced her to start to go down the street to see where the fire was. That she forgot the presence of the rail is not disputed in the evidence, but that the circumstances justified her forgetfulness and consequent want of care cannot be conceded."

In Van Praag v. Gale, 107 Cal. 438, 40 Pac. 555, plaintiff had recovered judgment for injuries occasioned by falling through an open and unguarded trapdoor in the sidewalk. This trapdoor was sometimes open and sometimes closed, and plaintiff was familiar with these facts. It was held merely that his knowledge that it was sometimes open did not bar his right of recovery because he inadvertently stepped into it, and Davis v. California Street Cable Co. is distinguished, this court saying: "There was a known and fixed object, namely, an iron or steel rail adjacent to a street lamp, over which plaintiff fell. In the present case the object of danger was only occasionally presented, and was not usually existent as a menace, and it was proper in such case to submit the question of plaintiff's negligence to a jury."

So, also, in Martin v. Cal. Central Ry. Co., 94 Cal. 326, 29 Pac. 645, it is said, discussing an instruction given to the jury: "In effect the instruction told the jury that, notwithstanding the deceased was engaged in a dangerous business requiring constant and watchful care upon his part to save himself from injury, still, if he did not always bear these things in mind, and act upon them, and by reason thereof was injured, he could recover. An injury received under such circumstances would be the direct result of contributory negligence upon the part of the party injured, and would defeat a recovery."

Giraudi v. Electric Improvement Co., 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114, is not in conflict with these views. It is there declared that the general rule is that, if one is aware of a fact which should have put him on his guard, he cannot rebut the presumption of contributory negligence by showing that he momentarily forgot. The court then proceeds to note the exceptions to the application of this general rule, the exceptions being those cases where temporary forgetfulness is not negligence as matter of law, unless it shows a want of ordinary care, and the question then becomes a question for the jury.

In the case at bar there was no sudden emergency, no stress of peril, no haste in the performance of the work. The case does not belong to the exceptional class which we have been considering. It is the ordinary one of an employé heedlessly failing to take ordinary care and use ordinary precautions for his own safety. These facts were, as has been said, clearly established by the testimony introduced on behalf of plaintiff himself.

It follows, therefore, that the court erred in denying the motion for a nonsuit, and its order granting a new trial is therefore affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

153 Cal. 225

In re MARTIN'S ESTATE. (S. F. 4,596.)

(Supreme Court of California. March 13, 1908.)

1. Taxation — Succession Tax — Constitutional Provision.

Under Const. art. 4, § 31, providing that the Legislature shall have no power to make any gift, or authorize the making of any gift of any public money or thing of value to any individual, where the right to a succession tax became vested in the state, the Legislature could not, either by repeal of the law under which the right vested or by any other means, grant or donote it to the successor in estate or to any other person.

2. Taxation — Succession Tax — Repeal — Statutory Construction.

The act of 1893, providing for a succession tax and its amendments (St. 1893, p. 195, c. 168, § 8; St. 1895, p. 35, c. 28, § 6), provided that the executor should deduct from all money legacies or money of the intestate in his hands the amount of the succession tax due thereon, and pay the tax to the county treasurer. Act March 20, 1905, which took effect July 1, 1905, and which purports in section 27 (Acts 1905, p. 350, c. 314) to repeal the act of 1893 and all amendments thereto, is practically a revision and re-enactment of the latter act and its amendments; certain changes being made regarding the persons on whom the tax is imposed, the exemptions therefrom, and the rate of the tax. Pol. Code, § 325, provides that, when a part of a statute is amended, it is not to be considered as having been repealed and re-enacted as amended, but the unaltered portions are to be considered as having continuously been the law. *Held* that, since it would be presumed that the Legislature of 1905 was aware of its want of power under decisions of the Supreme Court to release taxes accrued and uncollected, the re-enactment of the provisions of the former law respecting the payment and collection of succession taxes was to be considered as having been done with knowledge of the existence of such uncollected taxes and with the intent to continue in force the mode and means for the collection thereof, and that under the provisions of the act as re-enacted, in connection with St. 1905, p. 83, c. 85, § 1, amending Code Civ. Proc. § 1669, so as to provide that, before any decree of distribution of an estate is made, the court must be satisfied that any inheritance tax due and payable has been fully paid, the court was authorized to direct the executor of an estate to deduct from the legacies due thereunder the amount of the succession tax.

In Bank. Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

In the matter of the estate of Elizabeth Hewlett Martin, deceased. From an order directing the executor of the estate to pay a succession tax on certain legacies, John Q. Hewlings and others appeal. Affirmed.

S. F. Lieb and James H. Campbell, Dist. Atty., for appellants. U. S. Webb, Atty. Gen., and Cassius Carter, Dist. Atty., for respondent.

SHAW, J. Elizabeth Hewlett Martin, a resident of this state, died in the county of Santa Clara on January 2, 1905, leaving a valuable estate. By the terms of her will, which was duly probated, she bequeathed to each of the appellants, a sum of money greater than $500, amounting in the aggregate to $38,415.21. None of the appellants was related to the deceased in a degree nearer than that of brother, and hence the legacy came within the terms of the act of 1903 (St. 1903, p. 268, c. 228), amending section 1 of the act imposing a tax on inheritance devises and legacies. Section 27 of an act approved March 20, 1905 (St. 1905, p. 350, c. 314), which took effect July 1, 1905, purports to repeal unconditionally the act of 1893 providing for a succession tax and all the subsequent amendments thereto, including that of 1903 above mentioned. In due course of administration of the estate, a decree of distribution thereof was rendered by the superior court of Santa Clara county on February 2, 1906, declaring that the appellants, respectively, were the owners of and entitled to receive the legacies bequeathed to them as aforesaid, subject to whatever inheritance tax might be due thereon. Subsequently, on March 2, 1906, upon due notice, the court made an order directing the executor of the estate to deduct from each of said legacies a sum equal to 5 per cent. thereof, as and for a succession tax thereon, and to pay said sums so deducted to the county treasurer. This appeal is taken from that order.

The appellants ask us to overrule the decisions of this court in Estate of Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788, and Trippet v. State, 149 Cal. 521, 86 Pac. 1084, 8 L. R. A. (N. S.) 1210, and declare that the repeal of the collateral inheritance tax law of 1893, and its amendments, by the act of 1905, operated to deprive the state of the right to collect or receive all succession taxes accrued under the former law which had not been paid, or ordered to be paid, to the state, at the time the repeal took effect on July 1, 1905. The briefs filed for the appellants in Trippet v. State, supra, are referred to by counsel and made to constitute the argument on behalf of the appellants in this case. No additional points are presented. Even if we were disposed to doubt the soundness of those decisions, and were to concede that vested rights would not be affected by overruling them, we would hesitate to overrule decisions so well and thoroughly considered as those mentioned. But, after again considering the arguments presented, we are satisfied that the conclusion reached in those cases is correct.

The argument of the appellants is that the decision in Trippet v. State is based wholly on the authority and reasoning of the opinion in Estate of Stanford, and that the conclusion in the Stanford Case was founded solely upon the proposition that the effect of the law of 1893 and its amendments was to provide for the succession to property upon the death of the owner, and not to establish a tax. And this proposition, it is claimed, is false for two reasons: First, because the language of the statutes does not permit that construction, and, secondly, because, if it did, the title of the act would not include the subject and the act would be void. It is further argued that the law does not in fact provide for a tax, that the right of the state thereto does not vest until payment, or until a judicial order has been made for the payment, and that a repeal of the law before either event, as in the present case, extinguishes the inchoate right of the state to the unpaid tax. The opinion in Estate of Stanford does not have the effect claimed. It does not hold that the law in question provides that the state shall succeed as an heir in certain classes of cases to 5 per cent. of the property of the decedent. Some of its phraseology may perhaps be consistent with such an idea, if taken separately from the context, but the real meaning and effect of the decision is that the law establishes a succession tax, in certain cases, and that the right of the state to such tax vests immediately upon the death of the ancestor or testator, and hence, that the repeal of the law does not affect the right of the state to the tax. The law, in effect, created a lien in favor of the state on the property for the amount of the tax thereon. This right to the tax in question here, and the lien therefor, vested in and became the property of the state upon the death of Elizabeth Hewlett Martin in January, 1905. Under the limitations prescribed by section 31, art. 4, Const., it is not within the power of the Legislature, either by the repeal of the law in virtue of which the right vested, or by any other means, to grant or donate it to the successor in estate or to any other person. The law of 1893 and its amendments provided that the executor or administrator of the particular estate should deduct from all money legacies, or money of the intestate, in his hands for distribution, the amount of the succession tax due thereon, and that he should in other cases collect from the distributee the amount of the tax due on the share distributed, before delivery thereof to the party entitled, and should pay the said tax to the county treasurer for use of the state. Section 6, p. 35, c. 28, St. 1895; section 8, p. 195, c. 168, St. 1893. If this law is still in force, no order of court was required to give the executor authority to deduct from the money legacies distributed to the appellants the succession tax thereon and to pay the same to the county treasurer. In that event the order would be harmless, even if unnecessary. It is claimed that the express repeal, by the act of 1905, of the previous law for succession taxes, if not effective to deprive the state of the right to the tax here involved, is at least valid so far as it repeals the provisions of sections 6 and 8 aforesaid, providing for its retention and payment by the executor, and hence that the executor had no authority to pay the tax for the legatees, and that the court had no power to make the order giving him such authority.

We do not think that these provisions were repealed. The act of 1905, containing the repealing clause above mentioned, is practically a revision of the act of 1893 and its amendments, providing for succession taxes. Certain changes are made in the new law in regard to the persons on whom such tax is imposed, the exemptions therefrom, and in the rate of tax to be imposed upon the different persons. These changes are found, for the most part, in sections 1, 2, 3, and 4 of the new law, which cover the subjects embraced in section 1 of the old law. The other portions of the old law are substantially re-enacted in the act of 1905, with a few alterations and additions which do not affect the question. The aforesaid section 6 of the former law is, word for word, the same as section 9 of the new act, and section 8 of the former law is identical with section 11 of the new act, with the exception of a few words of trifling import. We must presume that the Legislature of 1905 was aware of its want of power, under the decision of this court in Estate of Stanford, supra, to release, surrender, or discharge the taxes previously accrued and remaining uncollected. The re-enactment of the provisions of the former law respecting the payment and collection of succession taxes is to be considered as having been done with knowledge of the existence of these uncollected taxes and with the intent to continue in force the mode and means for the collection thereof. These re-enactments come within the scope and effect of section 325 of the Political Code, declaring that, when a part of a statute is amended, it is "not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time when they were enacted." The rule particularly applicable to this case is thus stated in Sutherland on Statutory Construction (2d Ed.) § 238: "Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time." Speaking of a similar case, the Supreme Court of the United States in Bear Lake I. Co. v. Garland, 164 U. S. 11, 17 Sup. Ct. 7, 41 L. Ed. 327, say: "Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act." The following authorities are of similar effect: Endlich on Interpretation, § 490; Pratt v. Swan, 16 Utah, 483, 52 Pac. 1094; Howlett v. Cheetham, 17 Wash. 626, 50 Pac. 522; Pacific M. S. Co. v. Joliffe, 2 Wall. (U. S.) 456, 17 L. Ed. 805; Wright v. Oakley, 5 Metc. (Mass.) 406; Sabin v. Connor, 21 Fed. Cas. 125; United Hebrew Ass'n v. Benshimol, 130 Mass. 327; Anding v. Levy, 57 Miss. 59, 34 Am. Rep. 435; Middleton v. New Jersey, etc., Co., 26 N. J. Eq. 274; State v. Bemis, 45 Neb. 733, 64 N. W. 350. The effect of the act of 1905 was to establish a different rate of taxation and make it applicable to different persons with respect to all succession taxes accruing thereafter, but otherwise the provisions of the previous act incorporated into the new act, relating to the payment and collection of succession taxes, remained in force and applied to taxes previously assessed, the same as if there had been no express repealing clause in the new act. The same session of the Legislature amended section 1669, Code Civ. Proc., so as to provide that, before any decree of distribution of an estate is made, the court must be satisfied that "any inheritance tax which is due and payable has been fully paid." St. 1905, p. 83, c. 85. This amendment took effect May 6, 1905, and remained in force, notwithstanding the repeal of the inheritance tax law of 1893. Under its provisions, in connection with the provisions of the former act re-enacted in the revisory act, there can be no doubt that the court had authority to make the order appealed from.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

In re BOWEN'S ESTATE. (S. F. 4,669.)

(Supreme Court of California. March 13, 1908. Rehearing Denied April 10, 1908.)

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of E. J. Bowen, deceased. From an order imposing and directing the payment of certain collateral inheritance taxes by the administrator with the will annexed, the residuary legatees appeal. Affirmed.

Matt Clarken, for appellants. C. L. Dam, U. S. Webb, Atty. Gen., and Sidney M. Van Wyck, Jr., for respondents.

PER CURIAM. This is an appeal by the residuary legatees from an order made on partial distribution in the above estate imposing and directing the payment of certain collateral inheritance taxes by the administrator with the will annexed of the estate of said deceased.

The same points are made by appellants here for a reversal as were urged by the appellants in the matter of the estate of Elizabeth Hewlett Martin, Deceased, San Francisco, No. 4,596 (this day decided) 94 Pac. 1053. In this latter case it was held that the points urged were untenable, and on the authority of that decision the order appealed from here is affirmed.

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7 Cal. App. 553

RANDALL v. FREED. (Civ. 397.)

(Court of Appeal, Third District, California. Feb. 15, 1908.)

COURTS—APPELLATE COURTS OF CALIFORNIA—SUPREME COURT—JURISDICTION—APPEALS IN PARTICULAR CASES.

Under Const. art. 6, § 4, providing that the Supreme Court shall have appellate jurisdiction in all cases at law in which the demand, exclusive of interest, amounts to $300, and in actions to prevent a nuisance, where an action was brought for damages in the amount of $2,070 for personal injuries, and defendant in his answer and cross-complaint sought an injunction to restrain plaintiff from committing a nuisance, after judgment for defendant, plaintiff's appeal should be taken in the first instance to the Supreme Court.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Anna Randall against Clark V. Freed. From a judgment for defendant and an order refusing a new trial, plaintiff appeals. Appeal transferred to the Supreme Court.

Taber & Taber, for appellant. L. L. Chamberlain, for respondent.

BURNETT, J. The action was brought for damages in the amount of $2,070 for personal injuries. The defendant filed an answer and cross-complaint, in which he sought an injunction to restrain plaintiff from the commission of a nuisance. The judgment was in favor of defendant, from which, and the order denying her motion for a new trial, plaintiff appealed directly to this court.

It is conceded by appellant, and it must be so held under article 6, section 4, of the Constitution, that the appeal should have been taken in the first instance to the Supreme Court.

The cause is transferred to the Supreme Court.

We concur: HART, J., CHIPMAN, P. J.

WEST KEY NUMBER SYSTEM